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# A TREATISE

ON

## CRIMES AND MISDEMEANORS.

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### BOOK THE THIRD.

#### OF OFFENCES AGAINST PROPERTY, PUBLIC OR PRIVATE.

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#### CHAPTER THE FIRST.

##### OF BURGLARY.<sup>1</sup>

##### SEC. I.

##### *Definition of Offence.*

It is laid down in the more ancient authorities, that the offence of burglary may be committed by the felonious breaking and entering of a church, and the walls and gates of a town, in time of peace, as well as by the felonious breaking and entering of a private house. (a) But the more material inquiry at the present day relates to the breaking and entering of private houses, or, in the language of the books, the mansion-houses of individuals: and this species of the offence appears to be well described, as—*A breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not.* (b)

(a) Staundf. P. C. 30. 22 Ass. pl. 95. Britt. c. 10. Dalt. c. 99. Crom. 31. Spelm. *in verbo burglaría*. In 3 Inst. 64, Lord Coke gives us a reason for considering the breaking and entering the church as a burglary, that the church is *domus mansionalis omnipotentis Dei*; but Hawkins says that he does not find this nicety countenanced by the more ancient authors; and that the general tenor of the old books seems to be that burglary may be committed in breaking houses,

or churches, or the walls, or gates of a town. 1 Hawk. P. C. c. 38, s. 17. And in 4 Black. Com. 224, it is stated that breaking open a church is undoubtedly burglary. And see *R. v. Nicholas*, 1 Cox, C. C. 218, *R. v. Baker*, 3 Cox, C. C. 581.

(b) 3 Inst. 63. 1 Hale, 549. Sum. 79. 1 Hawk. P. C. c. 38, s. 1. 4 Black. Com. 224. 2 East, P. C. c. 15, s. 1, p. 484. Burn, Just. tit. *Burglary*, s. 1. The word *burglar* is supposed to have been introduced from

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##### AMERICAN NOTE.

<sup>1</sup> See *P. v. Marks*, 4 Parker, C. R. 153; *Allen v. S.*, 40 Ala. 384.

## SEC. II.

*The Breaking and Entering.*<sup>1</sup>

Notwithstanding some loose opinions to the contrary, which may have been formerly entertained, it is now well settled that both a *breaking and entering* are necessary to complete the offence of burglary. (c)

With respect to the breaking, it is agreed that it is not every entrance into a house, in the nature of a mere trespass, which will be sufficient, or satisfy the language of the indictment, *felonice et burglariter fregit*. (d) Thus, if a man enter into a house by a door or window, which he finds open, or through a hole which was made there before, and steal goods; or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary. (e) There must either be an actual breaking of some part of the house, in effecting which more or less of actual force is employed; or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

Where, therefore, a cellar window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and, by the assistance of the other prisoner, he thus entered the house, but the prisoners did not enlarge the aperture at all; it was held that this was not a sufficient breaking. (f) So where a

Germany by the Saxons; and to be derived from the German, *burg*, a house, and *larron*, a thief; the latter word being from the Latin, *latro*. Burn, Just. tit. *Burgl.* s. 1. 2 East, P. C. c. 15, s. 1, p. 484. But Sir H. Spelman thinks that the word *burglaria* was brought here by the Normans, as he does not find it amongst the Saxons: and he says that *burglatores*, or *burgalores*, were so called *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effringunt, et deprædantur*. The crime, however, appears to have been noticed in our earliest laws, in the common genus of offences denominated *Hamsecken*; and by the ancient laws of Canutus and of Hen. 1; to have been punishable with death. Ll. Canuti, c. 61. Hen. 1, c. 13. 1 Hale, 547, citing Spelm. Gloss. tit. *Hamsecken*, and *ibid.* tit. *Burglaria*. Originally, the circumstance of *time*, which is now of the very essence of the offence, does not seem to have been material; and the malignity of the crime was supposed to consist merely in the invasion on the right of habitation, to which the laws of England have always shown an especial regard, herein agreeing with the sentiments of ancient

Rome, as expressed in the words of Cicero: *Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium? Hic aræ sunt, hic foci — hoc perfugium est ita sanctum omnibus, ut inde abripi neminem fas sit*. The learned editor of Bacon's Abridgment says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence; but that it must have been so settled before the reign of Ed. 6, as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary, *nisi ou le infreinder del meason est per noctem*, (Bro. tit. *Corone*, pl. 185), and that, two years before, *per noctem* is introduced (Id. pl. 180), as of course in the mention of the offence. 1 Bac. Abr. tit. *Burglary*, 539 (ed. 1807). And see 3 Inst. 65.

(c) 1 Hawk. P. C. c. 38, s. 3. 1 Hale, 551. 4 Black. Com. 226.

(d) 3 Inst. 64. 1 Hawk. P. C. c. 38, s. 4. 1 Hale, 551, 552.

(e) Id. *ibid.* 4 Black. Com. 226.

(f) R. v. Lewis, 2 C. & P. 628, Vaughan, B.

## AMERICAN NOTE.

<sup>1</sup> See *S. v. Boon*, 13 Ired. 244; *Fisher v. S.*, 43 Ala. 17; *S. v. Reed*, 20 Iowa, 413. *S. v. O'Brien*, 81 Iowa, 98. As to tearing down

network, *C. v. Stephenson*, 8 Pick. 354. As to getting down chimney, *S. v. Willis*, 7 Jones (Law), 190; *Vonaken v. S.*, 36 Ala. 281.

hole had been left in the roof of a brewhouse, part of a dwelling-house, for the purpose of light, and it was contended that an entry through this hole was like an entry by a chimney: it was held that this was not a sufficient breaking. *Bosanquet, J.*, 'The entry by the chimney stands upon a very different footing; it is a necessary opening in every house, which needs protection; but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking.' (*g*)

An actual breaking of the house may be by making a hole in the wall; by forcing open the door; by putting back, picking, or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window, either by taking out the nails or other fastenings, or by drawing or bending them back, or by putting back the leaf of a window with an instrument. And even the drawing or lifting up the latch, (*h*) where the door is not otherwise fastened; the turning the key where the door is locked on the inside: or the unloosing any other fastening which the owner has provided, will amount to a breaking. (*i*)

Where a pane of glass had been cut for a month, but there was no opening whatever, as every portion of the glass remained exactly in its place, and the prisoner was both seen and heard to put his hand through the glass, this was held a sufficient breaking. (*j*)

The prisoner got into the prosecutor's cellar, by lifting up a heavy grating, and into his house by forcing open a window which opened on hinges, and was fastened by two nails, which acted as wedges, but would open by pushing: upon a case reserved, the judges held the forcing open the window to be a sufficient breaking. (*k*)

The prisoner entered a house by pushing down the upper sash of a window, which had no fastening, and was kept in its place by the pulley weight only. There was an outer shutter, but it was not put to. A case was reserved upon the question, whether the pushing down the sash was a breaking, and all the judges were unanimous that it was. (*l*)

So raising a window, which is shut down close, but not fastened, is a breaking, although there be a hasp, which could have been fastened to keep the window down. (*m*)

But if a window be partly open, but not sufficiently to admit a person, the raising it higher, so as to admit a person, is not a breaking. (*n*) But where a square of glass in a kitchen window, through which the prisoners entered, had been previously broken by accident, and half of it was out at the time when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo

(*g*) *R. v. Spriggs*, 1 M. & Rob. 357.

(*h*) *Owen's case*, 1 Lewin, 35, per Bayley, J., whether it be an outer or inner door, and see *R. v. Lawrence*, 4 C. & P. 231, and *R. v. Jordan*, 7 C. & P. 432.

(*i*) 1 Hale, 552. 3 Inst. 64. Sum. 80. 1 Hawk. P. C. c. 38, s. 6. 2 East, P. C. c. 15, s. 3, p. 487.

(*j*) *R. v. Bird*, 9 C. & P. 44, *Bosanquet, J.*

(*k*) *R. v. Hall*, R. & R. 355.

(*l*) *R. v. Haines*, R. & R. 451.

(*m*) *R. v. Hyams*, 7 C. & P. 441, *J. A. Park*, and *Coleridge, JJ.*

(*n*) *R. v. Smith*, R. & M. C. C. R. 178.

the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done he removed the fastening of the casement; Alderson, J., and Patteson, J., entertaining a doubt, from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing, from the enlarging an aperture, by lifting up further the sash of a window, in the preceding case, submitted the case to the judges, who were unanimously of opinion that this was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window: (o) and it has since been laid down as clear law that a person, who, on finding a hole in a door or pane of glass, puts his hand in through the hole to remove the fastening of the door or window, and so gains admittance into the premises, is guilty of a breaking into the house. (p)

It was once doubted whether a thief, getting into a house by creeping down the chimney, could be found guilty of burglary, as the house, being open in that part, could not be said to have been actually broken; (q) but it was afterwards agreed, that such an entry into a house will amount to a breaking, on the ground, that the house is as much closed as the nature of things will permit. (r) The prisoner got in at the top of a chimney, and got down to just above the mantel-piece of a room on the ground floor. A case was reserved upon the question, whether this was a breaking and entering of the dwelling-house; and two of the judges thought it was not, because the party could not be considered as being in the dwelling-house, not having got below the chimney-piece; but the ten other judges held otherwise, on the ground that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself by the party was an entry within the dwelling-house. (s)

The place which the prisoner entered was a mill, under the same roof, and within the same curtilage, as the dwelling-house: through the mill there was an open entrance, or gateway, capable of admitting waggons, and intended for the purpose of loading them more easily with flour by means of a large aperture or hatch, over the gateway, communicating with the floor above; and this aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. The prisoner entered the mill in the night, by so pushing open the folding doors, with the intention of stealing flour; and Buller, J., held this to be a sufficient breaking. (t)

The prisoner entered into a cellar, by raising up a flap-door, which let down, and had from time to time been fastened with nails, when the cellar was not wanted to keep coals in: and the jury found upon the evidence that it was not nailed down on the night the prisoner

(o) *R. v. Robinson*, R. & M. C. C. R. 327.

(p) *Ryan v. Shilcock*, 7 Exc. 72, per Curiam.

(q) 1 Hale, 552.

(r) *Crompt.* 32 (b), *Dalt.* 253. 1 Hawk.

*P. C. c.* 38, s. 6. 2 East, *P. C. c.* 15, s. 2, p. 485.

(s) *R. v. Brice*, R. & R. 450.

(t) *Brown's case*. 2 East, *P. C. c.* 15, s. 3, p. 487.

entered; it was held, on a case reserved, that there was a sufficient breaking. (*u*)

The book, 22 Assiz. 95, in which burglary is defined as the breaking of houses, churches, *walls*, courts, or gates, in time of peace, is referred to by Lord Hale, as seeming to lead to the conclusion, that where a man has a wall about his house for its safeguard, if a thief should in the night-time break such wall, or the gate thereof, and finding the doors of the house open, should enter the house, it would be burglary; though it would be otherwise if the thief should get over the wall of the court, and so enter through the open doors of the house. (*v*) But upon this it has been remarked, that the doctrine referred to by Lord Hale was anciently understood only as relating to the walls or gates of a city; and did not, therefore, support his conclusion, when he applied it to the wall of a private house. (*w*) And the distinction between breaking and coming in over the gate or wall is spoken of by an able writer, as being over-refined; for if, as he observes, the gate or wall be part of the mansion, for the purpose of burglary, and be enclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or over-leaped, and more properly to fall under the same consideration as the case of a chimney; and that if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial, as in neither case will it amount to burglary. (*x*)

The prosecutor had a dwelling-house, warehouses, and other buildings, and a yard; the entrance into the yard was through a pair of gates, which opened into a covered way; over this way were some of the warehouses, and there was a loop-hole and crane over the gates, to admit of goods being craned up; and there was also a trap-door in the roof of the covered way; there was free communication from the warehouses to the dwelling-house: the prisoners broke open the gates in the night, with intent to steal, and entered the yard, but did not enter any of the buildings; and upon a case reserved, the judges were unanimous, that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. (*y*) So an area gate, opening into the area only, is not such part of the dwelling-house, that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such door or other fastening many not be secured at the time. The prisoners opened an area gate in a street in London, and entered the house through a door in the area, which happened to be open, but which was always fastened when the family went to bed, and was one of the ordinary barriers against thieves. Having stolen in the house to the value only of 39s., a question was made, whether the breaking the area gate was breaking the dwelling-house so as to constitute burglary; and as there was no free passage in time of sleep from the area into the house, the judges held unani-

(*u*) *R. v. Russell*, R. & M. C. C. R. 377. This case seems to overrule *R. v. Lawrence*, 4 C. & P. 231, where the breaking was out of the house. See *Callan's case*. MS. Bayley, J., and R. & R. 157.

(*v*) 1 Hale, 559.

(*w*) Note (*n*), 1 Hale, 559, ed. 1800.

(*x*) 2 East, P. C. c. 15, s. 3, p. 488.

(*y*) *R. v. Bennett*, MS. Bayley, J., and R. & R. 289.

mously that the breaking was not a breaking of the dwelling-house. (z) <sup>1</sup>

Where the prisoner broke open a box, used as a shutter-box, which partly projected from the wall of the house, and adjoined one side of the window of the shop, which side of the window was protected by wooden panelling, lined with plates of iron; it was held that the shutter-box was no part of the dwelling-house. (a)

The breaking requisite to constitute a burglary is not confined to the external parts of the house, but may be of an inner door, after the offender has entered by means of a part of the house which he has found open. Thus, if A. enter the house of B. in the night-time, the outward door being open, or by an open window, and, when within the house, turn the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. (b) So where the prisoners went into the house of the cook at Serjeant's Inn, in Fleet-street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was agreed that the picking open the lock of a chamber door ousted them of their clergy, though the breaking open the chest would not have done so. (c) And it will also amount to burglary if a servant in the night-time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's door, with such evil intent. (d) But it has been questioned whether, if a lodger in an inn should, in the night-time, open his chamber door, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the innkeeper's house. (e) <sup>2</sup>

It is clear that the breaking open of a chest, or box, by a thief who has entered by means of an open door or window, is not a kind of breaking which will constitute burglary, because such articles are no part of the house. (f) But the question with respect to the breaking

(z) *R. v. Davis*, MS. Bayley, J., R. & R. 322.

(a) *R. v. Paine*, 7 C. & B. 135, Lord Denman, C. J., J. A. Park, J., Bolland, B., Sir J. Cross. The whole facts in the report are inserted. It is not stated whether the box had any communication with the inside of the house, or whether the breaking was such as to make an opening into the inside of the house. C. S. G.

(b) 1 Hale, 553. 1 Hawk. P. C. c. 38, s. 6. Johnson's case. 2 East, P. C. c. 15, s. 4, p. 488.

(c) Anon. 1 Hale, 524.

(d) 1 Hale, 553, 554. 4 Black. Com. 227. Bingle's case, 2 W. & M. MS. Denton,

cited 2 East, P. C. c. 15, s. 4, p. 488. Gray's case, 1 Str. 481. Sum. 82, 84. Bac. Abr. tit. *Burglary* (A). *R. v. Wenmouth* 8 Cox, C. C. 348; Keating, J., where a servant burst open the door of a shop in the night in order to steal money from the till.

(e) 1 Hale, 554. But upon this it is observed, that if another person should open such lodger's door burglariously, it must be laid to be the mansion of the innkeeper, and that a guest may commit larceny of the things delivered to his charge. 2 East, P. C. c. 15, s. 4, p. 488, and see *R. v. Wheelodon*, *post*, note (i).

(f) 1 Hale, 523, 524, 555. 1 East, P. C. c. 15, s. 5, p. 488, 489.

#### AMERICAN NOTES.

<sup>1</sup> In America it has been held that the breaking of an outside shutter is not sufficient. *S. v. McCall*, 4 Ala. 643; 39 Am. D. 314. See *C. v. Strupney*, 105 Mass. 588.

<sup>2</sup> In America it has been held burglary for a guest at an inn to break into another room in the inn and steal goods. *S. v. Clark*, 42 Verm. 629. See *S. v. Mordecai*, 68 N. C. 207.



of cupboards, and other things of a like kind, when affixed to the freehold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house were burglary or not, it appears that they were divided upon the question. (g) But Lord Hale says, that such breaking is not burglary at common law. (h) And Foster, J., thinks that, with regard to cupboards, presses, lockers, and other fixtures of the like kind, a distinction should be taken, in favour of life, between cases relative to mere property, and such wherein life is concerned. He says, 'In questions between the heir or devisee, and the executor, those fixtures may, with propriety enough, be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, under whose bounty the executor claims, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest, should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced. But in capital cases, I am of opinion that such fixtures which merely supply the place of chests, and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use.' (i)

**Breaking out of the house.**—Though it was said to be the law, that the entering into the house of a person, without breaking it, with an intent to commit some felony, and afterwards breaking the house in the night-time to get out, was burglary; yet, the doctrine was questioned by great authority: (j) and it was thought expedient to remove the doubt by legislative enactment. This was done by the 12 Anne, stat. 1, c. 7, s. 3,<sup>1</sup> and the 7 & 8 Geo. 4, c. 29, s. 11, now repealed, and the 24 & 25 Vict. c. 96, s. 51, declares, that 'whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary.' (k)

**Lodgers.**—If a person commits a felony in a house, and breaks out of it in the night-time, this is a burglary, although he might have been lawfully in the house; if, therefore, a lodger has committed

(g) Fost. 108, citing MS. Denton.

(h) 1 Hale, 527.

(i) Fost. 109. And see 2 East, P. C. c. 15, s. 5, p. 489.

(j) By Lord Holt and Trevor, C. J., in Clarke's case. 2 East, P. C. c. 15, s. 6, p. 490. And the question is also stated in 1 Hale, 554, where he says, 'If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby

he opens another door to make his escape: this, I think, is not burglary, against the opinion of Dalt. p. 253 (new edit. p. 487), out of Sir Francis Bacon; for *fregit et exivit, non fregit et intravit*.' Lord Bacon thought it was burglary. Elem. 65.

(k) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 11, and 9 Geo. 4, c. 55, s. 11 (l).

#### AMERICAN NOTE.

<sup>1</sup> The Statute of Anne is too recent (1713) to be Common Law in all the States of America, yet it would appear to be of weight as declaring the Common Law and therefore generally a breaking out would be held to be burglary in America; but it may not be the

same in all the States, e. g. in Georgia where the words of the statute are "breaking and entering into," and there is no mention of breaking out. See Bishop, ii. s. 100; S. v. M'Pherson, 70 N. C. 239. White v. S., 51 Ga. 285. Rolland v. C., 85 Pa. 66.

a larceny in the house, and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglariously breaking out of the house. (*l*)

**Breaking by construction of law.** — Having mentioned these points relating to an actual breaking, we may now inquire concerning a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

**By threats.** — Where in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to a breaking in law: (*m*) for which some have given as a reason that the opening of the door by the owner, being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands. (*n*) Where the evidence was, that the family within the house were forced by threats and intimidation, to let in the offenders, Thomson, B., told the jury, that although the door was, literally, opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force that had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns, if under these circumstances the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations to prevail upon them so to open it, as if they had actually burst the door open. (*o*) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be burglary; (*p*) though if the money were taken up in the owner's presence, it is admitted that it would be robbery. (*q*) And though the assault were so considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him by the owner, the offence could not, it should seem, be burglary, though certainly robbery. (*r*)

**By fraud.** — Where an act is done, *in fraudem legis*, the law gives no benefit thereof to the party. Thus if thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable, and rob the owner, it is burglary. (*s*) And, upon the same principle, the getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any

(*l*) R. v. Wheeldon, 8 C. & P. 747, Erskine, J.

(*m*) Crompt. 32 (*a*), 1 Hale, 553. 2 East, P. C. c. 15, s. 2, p. 486.

(*n*) 1 Hawk. P. C. c. 38, s. 7.

(*o*) R. v. Swallow, Thomson, B. York, January, 1813. MS. Bayley, J. The prisoners were convicted, and executed.

(*p*) 1 Hawk. P. C. c. 38, s. 3.

(*q*) Sum. 81. 2 East, P. C. c. 15, s. 2, p. 486.

(*r*) 1 Hale, 555, but he says, that some have held it burglary, though the thief never entered the house; and that it is reported to have been so adjudged by Saunders, Chief

Baron, Crompt. 31 *b*. Lord Hale subjoins to this doctrine *tamen quære*, and certainly, as a part of the statement of the case is, that there was *no entry* into the house, and as an entry is, as will presently be shown, as essential a part of the offence as the breaking, it seems difficult to discover the ground on which it could have been ruled to be burglary. The editor of Lord Hale (ed. 1800), states in a note, that it was adjudged by Montague, Chief Justice of the C. B., and that Saunders only related it.

(*s*) 3 Inst. 64. 1 Hale, 552, 553. Sum. 81. Crompt. 32 *b*. Kel. 44, 82. 1 Hawk. P. C. c. 38, s. 10. 4 Blac. Com. 226.

colour of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein. (t) So if a man go to a house under pretence of having a search warrant, or of being authorised to make a distress, and by these means obtain admittance, it is, if done in the night-time, a sufficient breaking and entering to constitute burglary, or if done in the day-time, house-breaking. (u)

It was adjudged, that where thieves came to a house in the night-time, with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were guilty of burglary. (v) And so where some persons took lodgings in a house, and afterwards, at night, while the people were at prayers, robbed them; it was considered, that the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary. (w) For the law will not endure to have its justice defrauded by such evasions. (x)

A case is also reported, where the entrance to the house was gained by deluding a boy who had the care of it. It appeared upon the evidence, that the prisoner was acquainted with the house, and knew that the family were in the country; and that upon meeting with the boy who kept the key, she desired him to go with her to the house; and, by way of inducement, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in; upon which she sent him for the pot of ale, and, when he was gone, robbed the house, and went away. And this being in the *night-time*, it was adjudged that the prisoner was clearly guilty of burglary. (y)

**By conspiracy.** — The breaking may also be by conspiracy. Thus where a servant conspired with a thief to let him into his master's house to commit a robbery, and in consequence of such agreement, opened the door or window in the night-time, and let him in; this, according to the better opinion, was considered to be burglary in both the thief and the servant. (z) And this doctrine is confirmed by a subsequent decision. Two men were indicted for burglary; and, upon the evidence, it appeared, that one of them was a servant in the house where the offence was committed; that in the night-time he opened the street door, let in the other prisoner, and shewed him the side-board, from whence the other prisoner took the plate; that he then opened the door, and let the other prisoner out; did not go out with him, but went to bed. And upon these facts being found specially, all the judges were of opinion, that both the prisoners were guilty of burglary; and they were accordingly executed. (a)

(t) *Farre's case*, Kel. 43.

(u) *Per Cur. in Gascoigne's case*, 1 Leach, 284.

(v) *Le Mott's case*, Kel. 42. 1 Hawk. P. C. c. 38, s. 8.

(w) *Cassy's case*, Kel. 62, 63. 1 Hawk. P. C. c. 38, s. 9, referred to by the Court, in giving judgment in *Semple's case*, 1 Leach, 424.

(x) 1 Hawk. P. C. c. 38, s. 9. 4 Blac. Com. 227. 2 East, P. C. c. 15, s. 2, p. 485.

(y) *R. v. Hawkins*. 1 East, P. C. c. 15, s. 2, p. 485, cited from MS. Tracy, 80, and MS. Sum.

(z) 1 Hale, 553. 1 Hawk. P. C. c. 38, s. 14. 4 Blac. Com. 227. In *Dalt. c. 99*, p. 253 (later ed. p. 487), it is supposed only to be larceny in the servant; but, Lord Hale says, it seems to be burglary in both, for if it be burglary in the thief, it must needs be so in the servant, because he is present and aiding the thief to commit a burglary.

(a) *Cornwall's case*, 2 Str. 881. 1 Hawk.

On an indictment for burglary and stealing plate against Johnson and Jones, it appeared that the groom of the prosecutor met Jones, who proposed to him to rob his master of his plate, and they agreed to meet again on a future day. The groom, in the mean time, told a policeman, and, his master being out of town, agreed to act under the direction of the police in order to detect Jones: he accordingly met Jones, and also Johnson, and it was arranged that the groom should get the other servants out of the way, and admit the prisoners on a future evening. On that evening several policemen were secreted in the house, and the groom then went and fetched Johnson to the house; the groom lifted the latch of the kitchen door, and let Johnson in. Johnson went up stairs, and, as he was about to open the door of the room where the prosecutor's iron chest was deposited, he was secured by the police, and locked up in a room. A few minutes afterwards the groom brought Jones to the house, and let him in by opening the door for him. Jones went into the back kitchen, and took from it the plate basket containing the plate in question. It was held that there was no such breaking as to constitute a burglary; for, though the groom appeared to concur with the prisoners, he really did not so concur, and, in acting under the directions of the police, he must be taken to be acting under the directions of the prosecutor, and therefore the prisoners went in at a door which was lawfully open. Neither of the prisoners therefore was guilty of burglary, and, as Johnson was in custody at the time the plate was taken by Jones, he was not guilty of the larceny; but Jones was convicted of stealing the plate. (b)

**By servants.** — It is said, that if a servant unlatch a door, or turn a key in a door of his master's house, and steal property out of the room; such opening of the door, being within his trust, is not a breaking: but that if a servant break open a door, whether outward or inward, (as a closet, study, or counting house,) and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling-houses in the day-time, or within the law of burglary. (c)

**Entering necessary to constitute a burglary.** — With respect to the entering necessary to constitute burglary: it is agreed, that any, the least, entry either with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient. (d) Thus, where the prisoner, in the night-time, cut a hole in the window-shutters of the

P. C. c. 38, s. 14. 19 St. Tri. (Howel) 782 in the note.

(b) *R. v. Johnson, C. & M.* 218. Maule, J., and Rolfe, B. Johnson was afterwards convicted as an accessory before the fact.<sup>1</sup>

(c) 2 Hale, 354, 355. *Sed quære*, and see Edmond's case, Hutt. 20, Kel. 67, 1

Hale, 554, where a servant, who unlatched the stair-foot door and went with a hatchet to kill his master, was held guilty of burglary. And see *ante*, p. 6, C. S. G.

(d) 3 Inst. 64. 1 Hale, 555. Sum. 80. 1 Hawk. P. C. c. 38, s. 11, 12. 1 And. 115. Lamb. c. 7, p. 263. Fost. 108. 4 Blac. Com. 227. Bacon, Ab. tit. *Burglary* (B).

#### AMERICAN NOTE.

<sup>1</sup> In America it seems Johnson would have been held guilty of the breaking. *Alex-*

*ander v. S.*, 12 Tex. 540. *Rolland v. C.*, 82 Pa. 306; 22 Am. R. 758.

prosecutor's shop, which was part of the dwelling-house, and putting his hand through the hole, took out watches and other things, which hung in the shop, within his reach, it was holden to be burglary. (e) So, if a thief breaks the window of a house in the night-time, with an intent to steal, and puts in a hook or other engine, to reach out goods; or puts a pistol in at the window with intent to kill; this is burglary, though his hand be not within the window. (f) And, where thieves came in the night to rob A., who perceiving it opened his door, issued out, and struck one of the thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged burglary by great advice. (g)

Though it is admitted that a person putting a pistol in at a window with intent to kill, thereby makes a sufficient entry, to constitute a burglary, yet it has been questioned whether if he should shoot *without* the window, and the bullet come in, the entry would be sufficient. (h) It is, however, elsewhere laid down, that to discharge a loaded gun into a house is a sufficient entry. (i) And a learned writer has observed, that it seems difficult to make a distinction between this kind of implied entry, and that which is effected by means of an instrument introduced within the window or threshold, for the purpose of committing a felony; unless it be that the one instrument by which the entry is effected is holden in the hand, and the other discharged from it: but that no such distinction is anywhere laid down in terms. (j)

It appears, however, that the mere introduction of an instrument, in the act of breaking the house, will not make a sufficient entry; but that the instrument by which the entry is effected must be introduced for the purpose of committing a felony. So that where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered, when the owner for fear threw out his money to him, and he went off with it; the better opinion appears to have been, that it was not burglary. (k) In another case, where the prisoners had bored a hole with an instrument called a *centre-bit* through the panel of a house door, near to one of the bolts by which it was fastened; and some pieces of the broken panel were found withinside the threshold of the door; but it did not appear, that any instrument, except the point of the *centre-bit*, or that any part of the bodies of the prisoners had been withinside the house, or that the aperture made was large enough to admit a man's hand: the court held this not to be a sufficient entry. (l)

(e) Gibbon's case, *Fost.* 107, 108.

(f) 3 *Inst.* 64. 1 *Hale*, 555. *Sum.* 80.

(g) 1 *Hale*, 553. *Crompt.* 32 (a). 2 *East*, P. C. c. 15, s. 7, p. 490.

(h) 1 *Hale*, 555, where it is said that this seems to be no entry, to make a burglary: but a *qu.* is added. And see 1 *Anders.* 115.

(i) 1 *Hawk.* P. C. c. 38, s. 11; and it appears to have been ruled by Lord Ellenborough, C. J., that a person discharging a gun from the outside of a field, into it, so as that the shot must have struck the soil, was

guilty of breaking and entering the field.

See *Pickering v. Rudd*, 4 *Campb.* 220. 1 *Stark.* R. 58.

(j) 1 *East*, P. C. c. 15, s. 7, p. 490.

(k) 1 *Hale*, 555, *ante*, p. 8, note (r).

(l) *R. v. Hughes*. 1 *Leach*, 406. 1 *Hawk.* P. C. c. 38, s. 12. 2 *East*, P. C. c. 15, s. 7, p. 491. *R. v. Tucker*, 1 *Cox*, C. C. 73, seems the other way; but the report is not satisfactory, and no authority was referred to in the case.

Where a glass window was broken, and the window opened with the hand, but the shutters in the *inside* were not broken, it was ruled to be burglary, but considered as going to the extremity of the law. (m) It was afterwards decided that introducing the hand between the glass of an outer window, and an inner shutter, is a sufficient entry to constitute burglary, on the ground that as the glass of the window is the outer fence, whatever is within the glass is within the house. (n) And in a later case, where in breaking a window in order to steal something in the house, the prisoner's finger went within the house, the judges held that there was a sufficient entry to constitute burglary. The prisoner was instantly apprehended before he could put in his hand to steal anything. (o)

A glass sash window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, which were about an inch thick; after the sash was thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the shutters; and upon a case reserved, the judges held that this was not an entry, as it did not appear that any part of the prisoner's hand was within the window. (p)

On an indictment for burglary it was proved that the prisoner had lifted up the sash of a window, and, that for the purpose of doing so, his hand was within the room of the house; there was no further proof of entry; it was contended that if the hand was there for the mere purpose of opening the sash, there was no sufficient entry. Talfourd, J.: 'We have been looking into the authorities, and it seems sufficient if the hand, or any part of the person, is within the house for any purpose.' Patteson, J.: 'Where an instrument is used, the law appears to be different; there the instrument must be within the premises, not only for the purpose of making an entry, but also for the purpose of effecting the contemplated felony; as where a hook is introduced for the purpose of taking away goods, or a pistol put in for the purpose of killing the inmates of the house; but if the instrument is merely used for the purpose of making an entry; then the proof of the entry fails. We think there is sufficient evidence here.' (q)

On an indictment for burglary it appeared that a lodger in the house was disturbed by the sound of broken glass, and looking out of her window she saw the legs of a man dangling in the air, and hanging as if out of the shop window below, which she could not quite see; on being called to, the man sprang to the ground and ran away. When the shop window was examined, two panes of glass were found broken, the pieces lying inside the frame, and a quantity of lead

(m) Roberts's *alias* Chambers's case. 1 East, P. C. c. 15, s. 3, p. 487. It was so ruled by Ward, C. B., Powis and Tracy, JJ., and the Recorder; and they thought this the extremity of the law: and, on a subsequent conference with the other Judges, Holt, C. J., and Powell, J., doubting, and

inclining to another opinion, no judgment was given.

(n) R. v. Bailey, MS. Bayley, J., and R. & R. 341. R. v. Perkes, 1 C. & P. 300, S. P.

(o) R. v. Davis, R. & R. 499.

(p) R. v. Rust, R. & M. C. C. R. 183.

(q) R. v. O'Brien, 4 Cox, C. C. 398.

work was cut away, causing an opening through which a man's head and shoulders might easily be thrust. Nothing had been taken out of the shop, and there was no other evidence to show that any part of the man's person had been within the shop window. Coltman, J., directed an acquittal on the ground that there was not sufficient evidence of an entry. (r)

The prisoners were convicted before Best, J., on an indictment charging them with burglariously breaking and entering the dwelling-house of the prosecutor, with intent to steal, and stealing a flitch of bacon. The prisoner Loosely lodged in the prosecutor's house; the window-shutter was in the night-time opened from the inside of the house, the casement of the window was taken out and the bacon was most probably put through the window to Burr, by whom it was carried away from the prosecutor's premises to Burr's house. It did not appear that Loosely went out of the house, or that Burr ever entered the house. His Lordship inclined, at the trial, to think that the charge of burglary in the indictment was not supported by the evidence; but told the jury, that if they believed the facts, he advised them to convict, and that he would save the point for the twelve judges; afterwards, on conferring with the judges of the court of King's Bench, he thought that there was no evidence of entering the house, and he therefore did not present the case to the twelve judges, but recommended a pardon on condition of transportation for seven years, as the prisoners were properly convicted of a larceny. (s)

On an indictment for burglary it appeared that the loft of the house had two doors, one in the roof, the other communicating with the room below: there was no evidence to show that the door in the roof had been broken open, but the other had been wrenched off its hinges; there was no proof, however, of any entry having been made through that door; and it was held that the charge of burglary was not proved; for the entry must be consequent upon the breaking. (t)

The entry need not be made on the same night as the breaking, though both must be done in the night-time: (u) but this point will be more properly mentioned in the treating of the time at which the offence may be committed.

The doctrine which has been laid down, respecting principals in the second degree, and aiders and abettors, in a former part of this work, will apply to the case of burglary; and make the breaking and entering by one the act of all the party engaged in the transaction, and legally present while the fact is committed. (v) So that if A., B., and C., go upon a common purpose and design to commit a burglary in the house of D., and A. only actually break and enter the house, B. stand near the door but do not enter, and C. stand at the lane's end, orchard gate, &c., to watch, this will be burglary in them all; and they are all in law principals. (w)

Neither will the offence be the less the act of the party from his

(r) *R. v. Meal*, 3 Cox, C. C. 70. The prisoner was then indicted for attempting to commit the burglary, and Coltman, J., left it to the jury whether he had actually entered the house, and they found that he had.

(s) *R. v. Burr*, MS. 3 Burn, J., D. & W.

(t) *R. v. Davis*, 6 Cox, C. C. 369, Gurney, Com., after consulting Cresswell, J.

(u) 1 Hale, 551. 4 Blac. Com. 226.

(v) *Ante*, vol. 1, p. 161, *et seq.*

(w) 1 Hale, 555.

having effected the entry and the stealing by means of an infant under the age of discretion. Thus, if A., a man of full age, take a child of seven or eight years old, well instructed by him in the villanous art, as some such there are; and the child goes in at the window, takes goods out, and delivers them to A., who carries them away, this is burglary in A., though the child who made the entry, be not guilty, by reason of his infancy. (x)

It should be observed, that if the entry be not proved, the prisoner may be found guilty of an attempt to commit burglary. (y)

### SEC. III.

#### *The Mansion-House.*<sup>1</sup>

The breaking and entering, which have been thus described, must take place in a *mansion* or *dwelling-house*; which latter term is now generally adopted in indictments for burglary. And in treating of such mansion, or dwelling-house, it will be proper to inquire, first, as to what shall be so considered; secondly, how far it must be inhabited; and, thirdly, as to the person to be deemed the owner of it; for the ownership should be correctly stated in the indictment.

Every house for the dwelling and habitation of man is taken to be a mansion-house in which burglary may be committed. (z) And a portion only of a building may come under this description. Thus where, upon an indictment for burglary, it appeared that the prosecutor rented only certain rooms of a house, namely, a shop and parlour, in which the burglary was committed, but that the owner did not inhabit any part of the house, and only occupied the cellar, it was holden that the shop and parlour were to be considered as the mansion-house of the prosecutor. (a) And sets of chambers in a college, or an inn of court, are to all purposes considered as distinct dwelling-houses; being often held under distinct titles, and, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs. (b) A loft, situated over a coach-house and stables, in a public mews, and converted into lodging-rooms, has also been holden to be a dwelling-house. The prosecutor, who was coachman to a lady, rented the rooms at a yearly rent; but he had never paid any rent; and the rooms were not rated in the parish books as dwelling-houses, but as appurtenant to the coach-house and stables: the way to the coach-house and stables was down a passage

(x) 1 Hale, 555, 556.

(y) R. v. Spanner, 12 Cox, C. C. 155. Bramwell, B., after consulting with Martin, B.

(z) 3 Inst. 64.

(a) Rogers's case, 1 Leach, 89, 428. 2 East, P. C. c. 15, s. 19, p. 506. The points

respecting different mansions in the same house, will be considered presently, in treating of the *ownership* of the mansion-house.

(b) 1 Hale, 522, 526. 1 Hawk. P. C. c. 38, s. 18. Evans' case. Cro. Car. 473. 4 Blac. Com. 225. 2 East, P. C. c. 15, s. 17, p. 505.

#### AMERICAN NOTE.

<sup>1</sup> See S. v. Ginns, 1 N. & McC. 583; 29 Conn. 342. Pitcher v. P. 16 Mich. 142. Armour v. S. 3 Humph. 379. S. v. Toole, C. v. Brown, 3 Rawle, 207.



out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but there was a door at the top of the staircase to the rooms, which was locked at night and was broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form such mansions or dwelling-houses, as to become the subject of burglary; but the objection was overruled by the Court, who thought that the circumstance of these rooms being situated over the coach-house and stables, would not alter the nature of the case; and that they were, to all intents and purposes, the habitation and domicile of the prosecutor and his family. (c) Burglary, however, cannot be committed by breaking into any inclosed ground, or any booth, or tent, erected in a market, or fair, though the owner may lodge therein; for the law regards thus highly, nothing but permanent edifices; and the lodging of the owner in so frail a tenement no more makes it burglary, to break it open, than it would be to uncover a tilted waggon in the same circumstances. (d)

Where, however, a permanent building of mud and brick on the Down at Weyhill, which was only used as a booth, for the purposes of the fair, for a few days in the year, had wooden doors, and windows bolted inside, and the prosecutor rented it for the week of the fair, and he and his wife slept there every night of the fair, during one night of which the offence was committed; it was held that this was a sufficient dwelling-house for the purpose of burglary. (e)

**Buildings within the curtilage.**—The mansion or dwelling-house, in which burglary might be committed, was held formerly to include the outhouses, such as warehouses, barns, stables, cow-houses, or dairy-houses, though not under the same roof, or joining contiguous to the dwelling-house, provided they were *parcel* thereof. (f) And any outhouse within the *curtilage*, or same common fence, as the mansion itself, was considered to be parcel of the mansion, upon the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or homestall. (g) But the 24 & 25 Vict. c. 96, s. 53, enacts, that 'no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.' (h) But the breaking and entering any building within the curtilage of a dwelling-house, and stealing therein, is subjected to a higher

(c) *Turner's case*, *cor.* Gould and Buller, JJ.; and *Perryn, B.*, 1 Leach, 305. 2 East, P. C. c. 15, s. 9, p. 492, and the judges afterwards were of opinion that this was a dwelling-house.

(d) 1 Hale, 557. 1 Hawk. P. C. c. 18, s. 35. 4 Blac. Com. 226.

(e) *R. v. Smith*, 1 M. & Rob. 256, J. A. Park, and Littledale, JJ.

(f) 3 Inst. 64. 1 Hale, 558. Sum. 82.

1 Hawk. P. C. c. 38, s. 21. 4 Blac. Com. 225.

(g) 1 Hale, 558, 9. 1 Hawk. P. C. c. 38, s. 25. 4 Blac. Com. 225. 2 East, P. C. c. 15, s. 10, p. 493.

(h) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 13, and 9 Geo. 4, c. 55, s. 13 (1). See my note to the *Crim. L. Acts*, p. 144, 2nd Ed. C. S. G.

punishment than simple felony by another section of the same statute, which will be more particularly mentioned in a subsequent chapter. (i)

Though a shop may be, and usually is, a parcel of the dwelling-house to which it is attached; yet if the owner of the dwelling-house let the shop to a tenant who occupies it by means of a different entrance from that belonging to the dwelling-house, and carries on his business in it, but never sleeps there, it is not a place in which burglary can be committed, if there be no internal communication with the other part of the house; for it is not parcel of the dwelling-house of the owner, who occupies the other part, being so severed by lease; nor is it the dwelling-house of the lessee, when neither he nor any of his family ever sleep there. (j) But if there be an internal communication, burglary it seems may be committed. Thus, where a man let part of his house, including a shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, it was held, upon a case reserved, after a conviction for burglary in the shop, laid to be the dwelling-house of the father, that the conviction was right, upon the ground that the part of the house let to the son continued to be part of the dwelling-house of the father, by reason of the internal communication. (k) Where a pauper hired a house and garden for a year, and held the same from 1812 to 1821, but during the last four years let to a lodger one of the rooms on the ground floor, which communicated with the yard appurtenant to the house by an outer door, and with the adjoining rooms of the house by an inner door, of which doors the lodgers kept the keys, and he occupied nothing but the room; Lord Tenterden, C. J., said, 'It is said that the lodger held a part distinct from the rest, so that a burglary committed in that part might, in an indictment, be laid to have been in the dwelling-house of the lodger; I think, however, that that proposition is not established by the facts stated. It is said, that putting the key of the inner door into the hands of the lodger was the same thing as if there was a brick wall between his and the adjoining room. If, indeed, it had been stated that the key was delivered to the lodger for the express purpose of preventing the communication between the different apartments, there would be more weight in the argument. But the key may have been delivered to him for the purpose of enabling him to enter either way; and if that was the object, then he had not any distinct dwelling-house. I rather infer from the facts stated, that that was the object for which the key was delivered; and if so, then the pauper held the whole house, and it is to be considered as one entire tenement; and in that case a burglary committed in the part occupied by the lodger must

(i) *Post*, chap. V.

(k) *R. v. Sefton*, MS. Bayley, J., and R.

(j) 1 Hale, 557, 558. Kel. 83, 84. 4 & R. 202.  
Blac. Com. 225, 226. 2 East, P. C. c. 15,  
s. 20, p. 507.

have been laid to have been in the dwelling-house of the pauper.' (l)

If the lessee, or his servant, should usually, or often, lodge at night in a shop or other premises severed from the house, it would then be the mansion or dwelling-house of such lessee, in which burglary might be committed. (m)

A case was put under the old law of burglary, whether, if the owner and occupier of a dwelling-house should let a part of it, namely, a chamber and a cellar, to a tenant, the only passage to the cellar being out of the street, and the cellar should be broken open in the night, it would be burglary; and it was supposed that it would not, on the ground that the cellar must be considered as severed by the lease, and had no communication with the rest of the house. (n) Upon this, however, it was observed, that the cellar would be no more severed from the house by the lease than the chamber, in which a burglary might be committed, and laid to be in the mansion of the owner and occupier of the dwelling-house, there being but one common entrance to him and the lodger. But it was admitted, that if the cellar alone were let, clearly no burglary could be committed in it. (o) And this distinction seems fully to have been adopted in a case where the prisoners were convicted of a burglary in the house of T. Smith. Smith was the owner of a house, in which he resided, and to which house there was a shop adjoining, built close to the house; but there was no internal communication between the house and the shop, and no person slept in the shop, and the only door to the shop was in the court-yard before the house and the shop, which yard was inclosed by a brick wall, three feet high, including both the house and shop. Smith let the shop, together with some apartments in the house to Hill, from year to year, at a rent. There was only one common door to the house, which communicated as well to Smith's as to Hill's apartments. A gate, or wicket, fastened by a latch in the wall of the court-yard, next the road, served as a communication both to the house and shop. The burglary was committed in the shop. And upon objection that that could not be said to be the dwelling-house of Smith, the point was referred to the judges, who were all of opinion that the indictment was well laid, in describing it to be the dwelling-house of Smith, who inhabited in one part, it being within the same building, and under the same roof; and there being but one outer door, especially as it was within one curtilage or fence; and that the shop being let with a part of the house inhabited by Hill, still continued to be part of the dwelling-house of Smith, although there was no internal communication between them. But it was admitted, that if the shop had been let by itself, Hill not dwelling therein, burglary could not have been committed in it; for then it would have been severed from the house. (p)

(l) *R. v. North Collingham*, 1 B. & C. 578, and see *R. v. Great Bolton*, 8 B. & C. 71. *R. v. Ditchat*, 9 B. & C. 176. *R. v. Macclesfield*, 2 B. & Ad. 870.

(m) 1 Hale, 558.

(n) Kel. 83, 84.

(o) 2 East, P. C. c. 15, s. 20, p. 507. And see *R. v. Gibson*, 1 Leach, 357. 2 East, 508.

(p) *R. v. Gibson*, 2 East, P. C. c. 15,

It was observed in a former edition, that it should seem that no burglary could now be committed in such cellar as that above mentioned, (q) whether it were let alone or together with the chamber, as the late Act requires that there should be a *communication* between any building broken into and the dwelling-house, in order to constitute burglary; but this position seems to be at variance with the following case, in which it was held that a room in a dwelling-house, occupied therewith, and under the same roof, is to be deemed part of the dwelling-house, though it has a separate outer door, and there is no internal communication with the rest of the house. The prisoner was indicted for a burglary in the house of Swinton: the house consisted of two long rooms, another room used as a cellar and wash-house, on the ground floor, and of three bed-rooms up stairs, one of them over the wash-house; the bed-room over the house place communicated with the bed-room over the wash-house, but there was no internal communication between the wash-house and any of the other rooms in the house: the whole building was under the same roof; the door of the wash-house opened into a back yard. The prisoner broke into this wash-house, and was breaking through the wall between the wash-house and the house place, when he was detected. The provision in 7 & 8 Geo. 4, c. 29, s. 13, appearing to apply to buildings within the curtilage, other than the dwelling-house, the question whether the wash-house was, for the purpose of burglary, part of the dwelling-house, was submitted to the judges, who differed in opinion upon it, and seven of them thought that it was part of the dwelling-house, but the other five that it was not, and the conviction was affirmed. (r)

Upon an indictment for burglary, it was proved that behind the dwelling-house there was a pantry; to get to the pantry from the dwelling-house it was necessary to pass through the kitchen, into a passage; at the end of the passage there was a door, and outside the door, on the left hand, was the door of the pantry; when the passage door was shut, the pantry door was excluded and open to the yard. But the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was 'tea-fall,' and leant against the wall of an inner pantry, in which there was a latchet window, common to both, and which opened betwixt them, but there was no door of communication between them. The inside pantry was under the same roof as the dwelling-house. The prisoners entered the outer pantry by a window, which looked towards the yard, having first cut away the hair-cloth which was nailed to the window frame. For the prisoners it

s. 20, p. 508. 1 Leach, 357. Where the prisoner entered a loft, beneath which were four apartments, inhabited as a dwelling-house, but which did not communicate with the loft in any manner whatever; and on the side of the dwelling-house was a shop, which was not used as a dwelling, and which did not communicate with the four chambers; between this shop and the loft there

was a communication by a ladder; the dwelling and shop both opened into the same fold; Holroyd, J., on the authority of *R. v. Gibson*, held the loft to be a dwelling-house. *Thompson's case*, 1 Lew. 32.

(q) *Ante*, p. 16.

(r) *R. v. Burrowes*, R. & M. C. C. R. 274. See *R. v. Mayor of Eye*, 9 A. & E. 670.

was submitted, that the pantry was not a part of the dwelling-house within the description contained in the 7 & 8 Geo. 4, c. 29, s. 13. For the prosecution it was contended, that as there was a direct communication between the outer pantry and the inner, by means of the latchet window, and the inner pantry was under the same roof as the dwelling-house, the outer pantry must be considered a part of the dwelling-house, as much as the inner; and further, that as the roof, or covering of the passage, extended beyond the door of the passage, and actually formed a continuous covered way, from the dwelling-house to the outer pantry, the outer pantry must be considered as communicating with the dwelling-house, by means of a covered and inclosed passage. Taunton, J., after looking carefully into the Act of Parliament, was of opinion, that the pantry was not a part of the dwelling-house, it not being under the same roof, nor included within the passage by which it was approached; and, consequently, that no burglary was committed by breaking and entering therein. (*s*)

Upon an indictment for burglary, it appeared that the prisoner broke into the dairy of the prosecutor; this dairy adjoined a kiln; one of the walls of the kiln supporting one end of the dairy, and the kiln adjoining the dwelling-house, one end of the kiln being supported by one of the walls of the dwelling-house: there was no internal communication from the dwelling-house to the dairy; and to get from the dwelling-house to the dairy a person must go by a door from the dwelling-house into the yard, and from the yard by another door into the dairy. The kiln and the dairy were not under the same roof with the dwelling-house, and the roofs of the kiln and dairy were lower than the roof of the dwelling-house. It was objected that the dairy was not part of the dwelling-house so as to be the subject of burglary by reason of the 7 & 8 Geo. 4, c. 29, s. 13; it was answered that that section applied only to buildings, which were separate from the dwelling-house, such as barns and the like. If a dairy were under a dwelling-house, and the only way to it was by a cellar flap, or there was a room in a house, which could only be entered by a door at the outside, the cellar or the room would still be parts of the dwelling-house. But Wilde, C. J., held that this dairy was not part of the dwelling-house, so that a burglary could not be committed in it. (*t*)

Upon an indictment for stealing in a dwelling-house, it appeared that the place where the felony was committed was a bed-room, over a stable, between which and the prosecutor's house there was not any direct communication; there was a wash-house under the same roof as the house, though there was no internal communication from the one to the other; but the stable was a separate building, neither under the same roof, nor communicating with it by means of any other building, and it was held that this was not a stealing in the dwelling-house. (*u*)

A building separated from the dwelling-house by a public road, was holden not to be parcel of the dwelling-house, though the road was very narrow, and the dwelling-house and building were held by the same tenure, and some of the offices necessary to the dwelling-house

(*s*) *Somerville's case*, 2 Lew. 118.

(*t*) *R. v. Higgs*, 2 C. & K. 322.

(*u*) *R. v. Turner*, 6 C. & P. 407,  
Vaughan, B.

adjoined to such building, and though there was an awning which extended to it from the dwelling-house; but they were not connected by any common fence or roof. But it was also holden, that if such building were made a sleeping-place for any of the servants of the dwelling-house, it might be deemed a distinct dwelling-house. J. B. lived in Epsom, and his kitchen, larder, brew-house, and wash-house, were across a public passage nine feet wide; he had an awning over this passage to protect what was brought across; one of his servants, a boy, slept over the brew-house, and that was the sleeping-place allotted him by J. B. The boy's room was broken into, and upon a case reserved, the great majority of the judges thought that it was not parcel of the dwelling-house in which J. B. dwelt, because it did not adjoin to it, was not under the same common roof, and had no common fence; but thought that it was a distinct dwelling-house of J. B.'s, and that as the indictment described it as his dwelling-house, the conviction was right. (*w*)

It should seem that if an outhouse have a communication with a dwelling-house such as is described by the 24 & 25 Vict. c. 96, s. 53, it will not be prevented from being parcel of the dwelling-house by being holden under a distinct title. It was said, indeed, that if a man should take a lease of a dwelling-house from A., and of a barn from B., such barn would be no parcel of the dwelling-house, and not, therefore, a place in which burglary could be committed; (*x*) a position which would seem to lead to the inference, that no outhouse, holden under a distinct title from the dwelling-house, could be the subject of burglary. But upon this, it was observed, that the circumstance of an out-building being enjoyed by the occupier under a different title from his dwelling-house, seemed a very unsatisfactory reason of itself for excluding it from the same protection, if it were within the curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house, in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law. (*y*)

**Inhabitaney.** — The next question relating to the mansion-house is, how far it must be *inhabited*?

It appears to be well settled, that unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it will not have become his dwelling-house in the proper meaning of the word, as applied to the offence of burglary. There are several cases to this effect, which sufficiently overrule any different opinions which may have been formerly entertained. (*z*)

A Mr. Smith having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects, to the value of about ten pounds; the house was put under the care of a carpenter for the purpose of being repaired; but Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his

(*w*) R. v. Westwood, R. & R. 495.

(*x*) 1 Hale, 559.

(*y*) 2 East, P. C. c. 15, s. 10, p. 494, and see 2 Stark. Ev. 279, note (*z*), where the doctrine in 1 Hale, 559, is also questioned.

(*z*) In 1 Hawk. P. C. c. 38, s. 18, it is

said that a house which one has hired to live in and brought part of his goods into, but has not yet lodged in, is one in which burglary may be committed. The point is mentioned in Kel. 46, but not as having been decided, *ideo quære legem* being subjoined.

family, nor any person whatever, sleep therein. While the house was in this situation, it was broken open in the night-time; and, upon a case reserved, the judges were of opinion that it could not be considered as a dwelling-house, being entirely uninhabited; and that, therefore, there could be no burglary. (*a*)

So where the tenant of a house, when the former tenant had quitted, put all his furniture into it, and frequently went thither, in the day-time, but neither himself, nor any of his family had ever slept there; it was ruled that burglary could not be committed therein. (*b*)

Where the prisoner was indicted for a burglary in the dwelling-house of a Mr. Holland, and it appeared that the house was newly built and finished in every respect, except the painting, glazing, and the flooring of one garret; that a workman, who was constantly employed by Mr. Holland, slept in it for the purpose of protecting it, but that no part of Mr. Holland's domestic family had taken possession of it; the Court held, that it was not the dwelling-house of Mr. Holland. (*c*)

So where it appeared that the prosecutor had lately taken the house which was broken open; that he himself had never slept there, nor any of his family; but that on the night in which it was so broken, and for six nights before, he had procured two hair-dressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods and merchandize, which were deposited therein; the Court was of opinion, that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor. (*d*)

Where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights till he can get a tenant, the same rule is established; and the house, under such circumstances, cannot be considered as the dwelling-house of the owner.

This point arose upon an indictment for stealing goods to the value of forty shillings in the *dwelling-house*. (*e*) Mr. Pearce was a brewer living in Milbank-street, and owner of a public-house in Palace-yard, in which the offence was committed. The house was, at the time of the offence, shut up, and in the day-time entirely uninhabited; but a servant of Mr. Pearce's was put to sleep in it at night, for the protection of the goods, until some other publican should take possession of it. There were in the house a number of

(*a*) *R. v. Lyons*, 1 Leach, 185. The case is rather differently reported in 2 East, P. C. c. 15, s. 12, p. 497, where it is stated that no goods were in the house at the time it was broken open, and that the judges were therefore also of opinion that it was no burglary, because, as the indictment charged an intent to steal, it must mean to steal the goods then and there being, and that nothing being in the house, nothing could be stolen; but it is also further stated, that it seemed to be the sense of the judges, and Eyre, B., declared it to be his opinion, that although some goods might have been put into the house, yet if neither the party nor

any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

(*b*) Hallard's case, 2 East, P. C. c. 15, s. 12, p. 498. 2 Leach, 701, note (*a*), Buller, J., and S. P. Thompson's case, 2 East, *ibid.* 2 Leach, 771, Grosse, J.

(*c*) Fuller's case, 2 East, P. C. c. 15, s. 12, p. 498, the Recorder. 1 Leach, 186, note (*b*).

(*d*) Harris's case, 2 Leach, 701, the Recorder. 2 East, P. C. c. 15, s. 12, p. 498.

(*e*) Under the provisions of the 12 Anne, c. 7, now repealed.

beds, chairs, and other articles of furniture, which Mr. Pearce had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally, or by means of any of his servants. Upon a case reserved, the judges were of opinion, that as Mr. Pearce never intended to inhabit the house, it could not, in contemplation of law, be considered as his dwelling-house; and that it would have been no burglary if the house had been broken into in the night. (*f*)

Where the owner of the house has never, by himself or by any of his family, slept in it, though he has used it for his meals, and all the purposes of his business, it is not his dwelling-house, so as to make the breaking thereof burglary. One Clayson took a house in a street, and in it carried on his business of a shopkeeper, and dined, entertained his friends, and passed his days there, and had bedding up stairs; but he always slept at his mother's, two doors off, and he had no servant sleeping in the house. An indictment for burglary described this as his dwelling-house, but the judges held, that it could not be deemed his dwelling-house. (*g*)

When the owner of the house has once entered upon the possession and occupation of it, by himself, or by some of his family, it will not cease to be his dwelling-house on account of any occasional or temporary absence, even though no person be left in it. (*h*) Thus, if A. have a dwelling-house, and upon occasion he and all his family be absent for a night or more, burglary may be committed in their absence; and, so if A. have two mansion-houses, and be sometimes with his family at one, and sometimes at the other, the breach of one of them in the night-time, in the absence of the family, will be burglary. (*i*) Also, if A. have a chamber in a college, or inn of Court, where he usually lodges in term time; and, in his absence in the vacation, the chamber be broken open, the same rule will apply. (*j*)

The following case was decided in conformity with these principles. The owner of a house in Westminster, in which he dwelt, took a journey into Cornwall, with intent to return; and sent his wife and family out of town, and left the key with a friend to look after the house; and, after he had been gone a month, no person being in the house, it was broken open in the night, and robbed. A month afterwards, the owner returned with his family, and again inhabited there. This breaking was holden to be burglary. (*k*)

But in cases of this kind there must be an intention on the part

(*f*) *Davies's, alias Silk's case*, 2 Leach, 876. 2 East, P. C. c. 15, s. 12, p. 499.

(*g*) *R. v. Martin*, MS. Bayley, J.; and R. & R. 108.<sup>1</sup>

(*h*) *Fost. 77*. 1 Hale, 556. 3 Inst. 64. Bac. Ab. tit. *Burglary* (E).

(*i*) 1 Hale, 556. Sum. 82.

(*j*) *Id. ibid.*

(*k*) *R. v. Murry*, 2 East, P. C. c. 15,

s. 11, p. 496, cited also in *Fost. 77*, from MS. Denton and Chapple, as a case upon a burglary in the house of Mr. Nicholls. In *R. v. Kirkham*, 2 Stark. Ev. 279, Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture, and intending to return.

#### AMERICAN NOTE.

<sup>1</sup> The law in America seems to agree with this. See Bishop, ii., s. 104; *S. v. Outlaw*, 72 N. C. 598; 3 Greenl. Ev. ss. 57, 81.



of the owner to return to his house, *animus revertendi*; for if the owner has quitted without any intention of returning, the breaking of a house so left will not be burglary. (l)

The prisoners were indicted for a burglary in the dwelling-house of a Mr. Fakney, and stealing divers goods. Mr. Fakney stated that he made use of the house in question, which was situated at Hackney, as a country house, in the summer time, his chief residence being in London; about the end of the summer before the offence was committed, he removed with his whole family to London, and brought away a considerable part of his goods: and in the November following his house was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen furniture, nor any thing else for the accommodation of a family. Being asked whether, at the time he so disfurnished his house, he had any intention of returning to reside there, he declared that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The Court were of opinion that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, the house could not, under these circumstances, be deemed his dwelling-house at the time the fact was committed. (m)

**House used as a warehouse.** — So, if a man leaves his house without any intent of living in it again, and means to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house. One Cox lived in St. Martin's-lane, but removed to the Haymarket, and kept the house in St. Martin's-lane as a warehouse only; none of his family or servants remained there, but two women who worked for him in his business slept there to guard the property; the prisoner stole to the amount of about forty shillings in the house, and the judges held that an indictment against him describing the house as the dwelling-house of Cox was wrong. (n)

**House inhabited by a servant and his family.** — But though a man leave his house, and never mean to live in it again, yet if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by the servant and his family is a habitation by the owner, and the shop will still be considered part of his dwelling-house. The indictment was for burglary in the dwelling-house of Bendall, the place broken into was a shop, parcel of a dwelling-house, which he had inhabited; he had left the dwelling-house, and never meant to live in it again, but retained the shop, and let the other rooms to lodgers; after some time he had put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought putting

(l) *Fost.* 77. 4 *Blac. Com.* 225.

(m) *Nutbrown's case.* *Fost.* 76. The

prisoners were convicted of stealing the clock, &c.

(n) *R. v. Flanagan.* *R. & R.* 187.

in a servant and family to live, very different from putting them in merely to sleep, and that this was still to be deemed Bendall's house, and that the conviction was right. (*o*)

**Casual inhabitancy.** — It seems that the mere casual use of a tenement as a lodging, or the using it only upon some particular occasions, will not be such an inhabitancy as will constitute it a dwelling-house in which burglary can be committed. (*p*) Thus, it was agreed by all the judges that the fact of a servant having slept in a barn, on the night in which it was broken open, and for several nights before, he being put there for the purpose of watching thieves, made no sort of difference in the question, whether the offence was burglary or not. (*q*) And the circumstance of a porter lying in a warehouse, to watch goods, which is only for a particular purpose, does not make it a dwelling. (*r*) The question, therefore, respecting burglary in such barn or warehouse will remain just as if no person had slept in them, to be disposed of by the principles which have been before discussed, as to their being or not being *parcel* of the mansion or dwelling-house. (*s*)

A point of some nicety arises in the case of an executor putting servants into the house of his testator, but not going to live there himself. A case of this kind occurred, which is thus stated. A. died in his house, and B., his executor, put servants into it, who lodged in it, and were on board wages; but B. never lodged there himself: and upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The Court inclined to think it might, because the servants lived there. (*ss*) It was not necessary to decide the point in that case, as it turned out on the evidence that there was not a sufficient breaking of the house; and perhaps it would be difficult to reconcile the opinion, to which the Court is said to have inclined, with some of the decided cases and principles upon this subject, if the facts were that the executor did not contemplate any occupation of the house by himself, and that he merely put the servants there for the purpose of taking care of the house and furniture, till they should be properly disposed of according to his trust. (*t*)

**Ownership of the mansion-house.** — It remains further in treating of the mansion or dwelling-house, to inquire as to the person who is to be deemed the *owner* of it, in order to be able to state correctly in the indictment the name of the party, in whose dwelling-house the burglary is alleged to have been committed, although in most cases where a mistake has been made in this respect the Court would amend the indictment under the 14 & 15 Vict. c. 100, s. 1, noticed vol. i. p. 54.

The subject is rather of a complicated nature, but, from the cases which have been hitherto decided, it seems that the material point to be ascertained will be, whether the ownership remains with the

(*o*) *R. v. Gibbons*, MS. Bayley, J. Easter T. 1821.

(*p*) 2 East, P. C. c. 15, s. 11, p. 497.

(*q*) *Brown's case*. 2 East, P. C. c. 15, s. 11, p. 497, and s. 14, p. 501.

(*r*) *Smith's case*, by ten of the Judges, cited from Lord King's MS. 96, and Serjeant

Forster's MS. in 2 East, P. C. c. 15, s. 11, p. 497.

(*s*) *Ante*, p. 14, *et seq.*

(*ss*) *Jones's case*, from Chapple's MS. 2 MS. Sum. 305, cited, in 2 East, P. C. c. 15, s. 12, p. 499.

(*t*) See *Davies's case*, *ante*, p. 22.

proper owner of the dwelling-house, and is exercised by him, either by his own occupation, or by that of other persons on his account, or whether the proper owner has given such an interest to other persons, in the whole or in parts of the dwelling-house, as to constitute an ownership in such other persons.

The owner of a dwelling-house may exercise his ownership by his own personal occupation, or by the occupation of any persons who by law are deemed to be part of his family. This doctrine has been carried to a great extent in the case of a wife. For where it appeared that a lady, whose house was robbed, had for many years lived separate from her husband; and that, when she was about to take the house, a lease of it was prepared in her husband's name, but that he refused to execute, and said he would have nothing to do with it, in consequence of which she agreed with the landlord herself, and had constantly paid the rent; it was holden upon an indictment for breaking open the house that it was well laid as the dwelling-house of the husband. (*u*) So where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use, it was held, that a house which she had hired to live in might be described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. The indictment described the dwelling-house first as the house of J. S., and secondly as the house of his wife. It appeared that they lived apart, and that the wife subsisted upon property which had been hers before marriage, and which was vested in trustees for her separate use; that the house was no part of the settled property, but was hired by the wife who paid the rent for it, and the husband had never been in it. Upon a case reserved, the judges were clear that this was to be deemed in law the dwelling-house of the husband; it was the dwelling-house of some one; it was not that of the trustees, for they had nothing to do with it; it was not the wife's, because, at law, she could have no property; it could then only be the husband's. (*v*) In a later case the indictment was for burglary in the dwelling-house of Gillings, who did not live there, but the house was his for a long term, and he suffered his wife to live there separate from him. He had agreed to the separation, and had given her up the house, because he suspected a criminal intercourse between her and one Websdale, and had allowed her also to take a bed, and what furniture she chose. She lived there with Websdale, who paid the housekeeping expenses, but neither rent nor taxes. Upon a case reserved, the judges thought that this was properly described as the house of Gillings. (*w*) Where a prisoner was indicted for breaking into the dwelling-house of Elizabeth A., and it appeared that her husband had been convicted of felony, and was in prison under his sentence when the house was broken into, it was held, on a case reserved, that the house was improperly described, although the wife continued in the possession of it. (*x*) But if a case should arise in which the law would adjudge the separate property of the mansion to

(*u*) *Farre's case*, Kel. 43, 44, 45. See *R. v. Smyth*, 5 C. & P. 201, per Lord Tenterden, C. J.

(*v*) *R. v. French*, R. & R. 491.

(*w*) *R. v. Wilford*, R. & R. 517.

(*x*) *R. v. Whitehead*, 9 C. & P. 429. C. R. As to the present law of forfeiture for felony, see vol. i. p. 108.

be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be committed in her mansion-house, and not in that of her husband. (*y*)

**Occupation by servants of owner.** — The owner of a dwelling-house may also occupy it by means of servants. Thus, in a case which has been already mentioned, where the servant of a farmer, and his family, lived in a cottage adjoining his master's house, which he took to by agreement with his master, when he went into the service, but for which he paid no rent; only an abatement was made in his wages, on account of his family being to reside in the cottage; all the judges (with the exception of Buller, J., who doubted) held that this was no more than a licence to the servant to lodge in the cottage, and not a letting of it to him; and that the cottage, therefore, continued part of the mansion-house of the farmer. (*z*)

**By partners.** — A house, the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of them resides in it. (*a*)

Another case appears to have proceeded upon the same principle. The prisoners were indicted for a burglary in the dwelling-house of Messrs. Moore, Harrison, and Hamilton, who were partners in their business of bankers, and also in a brewery concern; and were the owners of the house in question. The lower rooms of the house were three in number, having only one entrance from without, by a door opening to the street, which was the door broken open to commit the felony. It opened into one of the three rooms in which the clerk's business relating to the brewery was transacted: that room communicated by a doorway with an inner room, where the banking business was done, and where the cash, notes, &c., were deposited; and the inner room communicated in the same manner with a further room, which was the private room of the partners. The business of Messrs. Moore and Co. was transacted only in these lower rooms of the house, in which no person slept. When the entrance door which opened to the street was locked up at night, upon leaving the offices, the clerk who had the custody of the key left it in the care of one Stevenson, who inhabited the upper rooms of the house, from whom it was received again, when the offices were to be opened in the morning. Stevenson was a servant to Messrs. Moore and Co. in their brewery, as their cooper, at weekly wages, with firing and lodging for himself and his family: but the contract as to the lodging was not, in general terms, that he should be provided with lodging, but that he should have the particular rooms which he inhabited for the lodging of himself and his family. There was a separate entrance to these rooms from without; they were not in any way used for the business which was carried on in the lower rooms, some papers only of no consequence being kept in them by Messrs. Moore and Co.; and the only communication between the upper rooms and the lower ones was

(*y*) 2 East, P. C. c. 15, s. 16, p. 504. See 45 & 46 Vic. c. 75 (the Married Woman's Property Act, 1882) and the Divorce Act, 20 & 21 Vict. c. 85, ss. 21, 25.

(*z*) Brown's case, 2 East, P. C. c. 15,

s. 14, p. 501. Wilson, J. And see *Bertie v. Beaumont*, 16 East, 33. See *R. v. James*, *post*, p. 32.

(*a*) *R. v. Athea*, R. & M. C. C. R. 329.

by a trap-door in the floor of one of the upper rooms and a ladder. Since the robbery, this trap-door and ladder, had been constantly used, in order to go down to the lower rooms, and bolt the street door of the offices in the inside, for better security; but none of the witnesses knew of their having ever been used for any purpose previous to the robbery, although they might have been so used at any time, as the trap-door was never kept locked or fastened, and the key of it was left in Stevenson's custody. There were six windows in the upper rooms which were assessed in the name of Stevenson; but the duty was paid by Messrs. Moore and Co. The lower rooms had nine windows, but were not charged with any window tax, the assessors not considering them as inhabited. Upon these facts, two questions were submitted; first, whether this inhabitancy could be considered as the inhabitancy of Messrs. Moore and Co. by their servant Stevenson, or whether Stevenson, by the contract, became tenant, and the upper part of the house was his dwelling-house, and not that of Messrs. Moore and Co.; and, secondly, if these premises were the dwelling-house of Messrs. Moore and Co., the further question arose, whether there was such a severance of the lower part as to prevent its being included as part of their dwelling-house. After hearing the argument on behalf of the prisoners, Lord Ellenborough, C. J., said, 'Could Stevenson have maintained trespass against his employers for entering these rooms? or, if a man assigns to his coachman the rooms over his stable, does he thereby make him a tenant? Whether the assessors formed a right or a wrong judgment can make no difference; nor is it material to which trade Stevenson was a servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened; and it can make no difference whether the communication between the rooms was through a trap-door, or by a common staircase.' And Mansfield, C. J., said, 'Many persons have houses given them to live in, as porters at park-gates; if a master turns away his servant, does it follow that he cannot evict him till the end of the year? Could not the prosecutors have turned out this man when they would?' (b)

On the trial of a burglary in the house of E. Jones, it appeared that Jones was in the service of Mr. Doulton, the landlord of the house; part of the house was used as store rooms for Doulton's goods, and in the other part Jones resided: no one else ever resided there. Doulton paid the rent and taxes, and nothing was paid by Jones for his occupation, either by deduction from his wages or otherwise; and it was held that the house ought to have been described as Doulton's. (c)

**Apartment in palaces, noblemen's houses, or in the houses of a public company.** — The same rule, of the occupation of the servant being

(b) *R. v. Stockton*, 2 Taunt. 339. 2 Leach, 1015. Eight of the judges thought that Stevenson was not tenant, but inhabited only in the course of his service. Thomson, B., Graham, B., Lawrence, J., and Chambre, J., *contra*. 8 C., under the name of *R. v. Stock* in R. & R. 185. The judges did not afterwards pronounce any further opin-

ion; but the prisoners were executed according to their sentence.

(c) *R. v. Courtenay*, 5 Cox, C. C. 218. The Recorder, after consulting Alderson, B., still entertained doubts whether the house was not rightly described. The marginal note speaks of 'a house close to B.'s place of business,' of which there is no evidence in the report.

that of the master, will hold with respect to all persons standing in the relation of servants, and not having the exclusive possession nor paying rent. Therefore, apartments in the King's palaces, or in the houses of noblemen for their stewards and chief servants, must be laid as the mansion-house of the King or nobleman. (*d*) Accordingly, where three persons were charged with having broken into the lodgings of Sir H. Hungate, at Whitehall, it was agreed that the indictment should be for breaking the King's mansion, called Whitehall. (*e*) So where a man was indicted for breaking into a chamber in Somerset-house, and the indictment charged it to be the mansion-house of the person who lodged in it, it was agreed that the whole house belonged to the Queen-mother, and therefore that the indictment was bad. (*f*) And where a house at Chelsea was broken into, which was used for an office under government, called the Invalid Office, and the rent and taxes of which were paid by government; it was holden that the indictment was defective in laying it to be the house of a person who occupied the whole of the upper part of it. (*g*) An indictment for a burglary in the Custom-house rightly describes it as the dwelling-house of the King, as he occupies it by his servants. (*h*) An indictment, also, for a burglary in the dwelling-house of the East India Company was holden to be good, the house being inhabited by the servants of that company. (*i*) And where an indictment charged a burglary in breaking into the mansion-house of the master, fellows, and scholars of Bennet College, in Cambridge; the fact being that the prisoner broke into the buttery of the college, all the judges, upon reference to them, held that it was burglary. (*j*)

The prisoner was indicted for breaking the mansion-house of S. Story, in the night-time. It appeared that the house belonged to the African Company; Story was an officer of the company; he and many other persons, as officers of the company, had separate apartments in the house, in which they inhabited; and the apartment of Story was that which was broken open. It was holden that the apartment of Story could not be called his mansion-house, because he and the others inhabited the house merely as officers and servants of the company. (*k*)

**Servants or agents using premises as dwelling-house.** — Greaves and Co. had a house and buildings where they carried on their trade; Mettran, their servant, lived with his family in the house, and paid £11 per annum for rent and coals, such rent being much below the

(*d*) 1 Hale, 556, 557. 2 East, P. C. c. 15, s. 14, p. 500.

(*e*) R. v. Williams, 1 Hale, 522.

(*f*) Burgess's case, Kel. 27.

(*g*) Peyton's case, 1 Leach, 324. In Bac. Abr. tit. *Burglary* (E), in the notes, there is a *qu.* in whose house stealing in the Invalid Office at Chelsea should be laid to be.

(*h*) R. v. Jordan, 7 C. & P. 432, Gaselee, J., and Gurney, B.

(*i*) Picket's case, 2 East, P. C. c. 15, s. 14, p. 501.

(*j*) Maynard's case, 2 East, P. C. c. 15, s. 14, p. 501.

(*k*) R. v. Hawkins, Fost. 38, Holt, C. J.,

Tracy, J., and Bury, B. The case is cited from Tracy, J.'s MS., from which it appears that the jury was discharged of the indictment laying the breaking to be in the mansion-house of Story; and that it was amended by laying the breaking in the mansion-house of the company. Foster, J., says that this report is warranted in the substantial parts of it by the record. Fost. 39. But note that the prisoner was acquitted of the burglary in the mansion-house of the company, and convicted of the larceny only. Fost. 39. It does not, however, appear why she was acquitted of the burglary.

value; Mettran was allowed to live there because he was servant; Greaves and Co. paying the rates and taxes. One of the buildings having been broken into, the indictment charged a burglary to have been committed in the dwelling-house of Greaves and Co., and it was urged that Mettran's occupation was their occupation; that the house he occupied might be deemed their dwelling-house; and that all their buildings might be deemed part of their dwelling-house. But upon a case reserved, the judges held that as Mettran stood in the character of tenant, and Greaves and Co. might have distrained upon him for rent, and could not arbitrarily have removed him, Mettran's occupation could not be deemed their occupation, and that the conviction as to the burglary was wrong. (*l*) The tolls at a gate between Leeds and Wakefield were let to Ward, who employed Ellis to collect them, and Ellis lived for that purpose in a house belonging to the trustees, and built by them for that purpose: he had a weekly sum from Ward, and the family of Ellis lived with him in the house. A burglary having been committed in the house, it was described in the indictment as the house of Ellis: and upon a case reserved, all the judges were unanimous that it was rightly described; for Ellis had exclusive possession; it was unconnected with any premises of Ward's, and Ward did not appear to have any interest in it. (*m*)

The agent, a Mr. Sylvester, kept a blanket warehouse in Goswell-street, and resided, together with his wife and children, in the house over the warehouse. The warehouse was on the ground floor, and consisted of four rooms, the second of which was the room that was broken into; and there was an internal door from the warehouse to the dwelling-house. All the blankets were the property of Sellman and others, a company of blanket manufacturers, consisting of sixty or more, at Witney, in Oxfordshire, none of whom ever slept in the house. The lease of the premises was in the company, and the whole rent of both dwelling-house and warehouse was paid by them. Sylvester acted as their servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free. It was contended, by the counsel for the prisoners, on the authority of *Hawkins's Case*, that this must be considered as the dwelling-house of the company, and ought to have been so charged in the indictment, and not as the house of Sylvester, who inhabited it merely for them, and as their servant. But the court is said to have been clearly of opinion, that it was rightly charged to be the dwelling-house of Sylvester; and that although the lease of the house was held, and the whole rent paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense, to consider it as their dwelling-house, especially as it was evident, that their only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. That the dwelling so furnished was a means by which they in part remunerated Sylvester for his agency, and precisely the same thing as if they had paid him as much more as the rent would

(*l*) *R. v. Jarvis*, MS. Bayley, J., and R. & M. C. C. R. 7.

(*m*) *R. v. Camfield*, MS. Bayley, J., and R. & M. C. C. R. 42.

amount to, and he had paid the rent; but that the company in this case preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein, towards the salary which he was to receive from them. And that the house was, therefore, essentially and truly the dwelling-house of the person by whom it was occupied. (n)

The prisoner was indicted for stealing the property of Bontillior, in the dwelling-house of Bunyon; it appeared that Bunyon was secretary of the Norwich Union and Life Office, at the time the felony was committed; no one of the company ever dwelt in the house; Bunyon, his family, and servants were the only persons occupying the house, and he lived there as secretary to the company; the rent and taxes were paid by the company. The property stolen was deposited in a safe, in the lower part of the house, which was used as the office of business of the company, for safety till the next morning, when it would have been carried away by Bontillior. The business of the office closed at five o'clock, and the rooms of business were not locked, but left equally accessible to Bunyon, or any part of his family or servants, with any other part of the house. It was objected that the house ought to have been laid as the house of the company; but the Recorder, on the authority of the preceding case, overruled the objection, and, upon a case reserved, the judges were of opinion that the house was properly described as Bunyon's house, as he and his family and servants were the only persons who dwelt there; they and they only were liable to be disturbed by a burglary, and though the judges would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as Bunyon's, and that the conviction was right. (o)

Upon an indictment for a burglary in the dwelling-house of J. Lewis, it appeared that Lewis was a gardener to the Baron de Rutzen, and that he occupied, as gardener, a cottage in his master's garden, that he slept in the cottage, and kept the key, but took his meals with the

(n) *R. v. Margetts*, 2 Leach, 980, Graham, B., and Grose, J. It is also stated, that the Court further gave as a reason for their judgment, that 'the punishment of burglary was intended to protect the *actual occupant* from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that the terror, which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney, in Oxfordshire.' But the accuracy of this reasoning may perhaps be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the terror in this case not having affected the company at Witney, the same might have been said of the terror of the East India Company, or the African Company, in the cases of burglaries in their houses, which have been before mentioned, *ante*, p. 28, but see the

next case. There is a note to this case of *Margetts*, which states that Grose, J., asked whether there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and that Mr. Knapp informed the Court that his father was clerk at the Haberdashers' Company, and resided in the hall which was broken open; and in that case the Court held it to be his father's house.

(o) *R. v. Witt*, R. & M. C. C. R. 248. The Recorder observed, 'If the principle stated in *Margetts's* case be correct, namely, that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, how could that possibly operate upon this company had the house been broken and entered in the night with intent to commit murder upon the person of Bunyon, or any of his family or servants?'



other servants in the house; he paid no rent, and considered himself liable to give up the cottage whenever he ceased to be gardener. It was objected that Lewis took no interest in the cottage, but merely occupied it in right of his master, and that it should therefore have been described as the dwelling-house of the master. Lord Denman, C. J., 'As the building in which the servant slept is quite distinct and apart from the master's place of residence, and he had a perfect control over it, and kept the key, I think that it is well described as the dwelling-house of the servant; but I do not think that the indictment would have been bad, had it laid the house as that of the master.' (p)

Upon an indictment for burglary, in one count alleged to have been committed in the dwelling-house of Bromage, and in another in the dwelling-house of the Earl of Coventry; it appeared that Bromage had the house and firing for the services he had performed for the Earl during fifty years, but he did no work, and was allowed so much a week as an old servant; Littledale, J., held that this was sufficient to support the indictment, as the house of Bromage, or at all events, as the house of the Earl of Coventry. (q)

**Caretakers.** — Where a policeman was allowed to live in a house, in order to take care of it, and a wharf adjoining, it was held that the house was properly described as the dwelling-house of the policeman, on the ground that he must live somewhere; and he was not otherwise the servant of the owner than in the particular matter. (r) But where upon an indictment for burglary in the dwelling-house of Bird, it appeared that Bird worked for one Woodcock, who did business as a carpenter for the New River Company, and put him in to take care of the house and flock mills adjoining, which belonged to the company, and he received no more wages than he did before he lived there, nor had any agreement for any; it was doubted whether the house was properly laid, and it was thought that there might be some difference between this and the preceding case, as here the man was put in by a person who did the work for the company, and it was thought the safest course to consider the indictment as not properly laying it to be the dwelling-house of Bird. (s)

Upon an indictment for house-breaking, describing the house in one count as the dwelling-house of Mary Moulder, and in another count as the dwelling-house of G. B. P. Primm, no proof of the Christian names of Primm was given; but it appeared that Moulder had been put into the house by Primm to take care of it, till it could be let, and she was to have coals for firing found by Primm; she paid no rent for the house; she had been occasionally a servant of Primm for thirty or forty years, and done work for him, for which she had always been paid; it was objected that the house was not the dwelling-house of Moulder but of Primm. Littledale, J.: 'I think the evidence is sufficient to support the first count. The prosecutrix has had the exclusive occupation of the house, and although there are very nice distinctions between the cases, I think this was her dwelling-house. She was not put in as a servant, to take care of the furniture or

(p) *R. v. Rees*, 7 C. & P. 568.

(q) *R. v. Ballard & Everall*, Worcester Lent Ass. 1830. MSS. C. S. G. See *R. v. Jobling*, *post*, p. 34.

(r) *R. v. Smith*, cited in *R. v. Rawlins*, 7 C. & P. 150.

(s) *R. v. Rawlins*, 7 C. & P. 150, Vaughan and Gaselee, JJ.

goods, which has generally been the case where such questions have arisen.' (t)

**Workhouse.** — The governor of the Birmingham workhouse was appointed under contract for seven years, and was to have the chief part of a house for his own and his family's occupation, but the guardians and overseers who had appointed him, reserved to themselves the use of one room for an office, and three others for store-rooms. The governor was assessed for the house, excepting these rooms. The office was broken open, and the indictment stated it to be the governor's dwelling-house: but on a case reserved, the judges held the description wrong. (u)

In an indictment for burglary the house and goods stolen were described as the dwelling-house and goods of the guardians of the poor of the Pontypool Union in one count, and of T. Perkins in another, and it appeared that the workhouse of the Pontypool Union had been broken into in the night, and goods provided for the poor stolen therefrom; Platt, B., held that the house was properly described in the first count. (v)

**Club.** — On an indictment for stealing plate, the goods of T. Howse, in his dwelling-house, it appeared that Howse was the house-steward of the Junior United Service Club, and lived and slept in the house; he stated that he had the charge of the plate, and was responsible for it; he was appointed by the committee, and there were minutes of the appointment, and he had given a bond to the club; but neither the bond nor the minutes were produced. After the business of the club was over, the plate was delivered into the care of the under-butler, who was appointed by the club, and put into a regular strong closet in the pantry. The plate was stolen from a table in a room of the club by the prisoner, who was a member of the club. It was held that Howse was merely a servant of the club, and therefore the indictment was wrong in alleging the club to be his house, and the plate to be his property. (w)

**Apartments occupied by guests, &c., in an inn.** — Where persons are abiding in a house as guests, or by sufferance, or otherwise, having no fixed or certain interest in any part of it, and a burglary is committed in any of their apartments, the indictment should lay the offence as in the mansion of the proprietor of the house. (x) So that if the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper. (y) It is indeed said, that if A., a lodger in an inn, goes to his chamber to bed, and his door is latched or locked, and afterwards in the night he rises, opens his chamber door, steals goods in the house, and goes away, it may be a question whether this be a burglary; and it is also said, that it seems it would not, because A. had a kind of special interest and property in his chamber, and therefore that the opening of his own door was no breaking of the innkeeper's house. (z) But though

(t) *R. v. George James*, Gloucester Lent, Ass. 1830, MSS. C. S. G. Brown's case, ante, p. 26, note (z), was relied upon in support of the objection.

(u) *R. v. Wilson*, MS. Bayley, J., and R. & R. 115.

(v) *R. v. Frowen*, 4 Cox, C. C. 266. Platt, B., seems to have thought that the house was wrongly described in the second

count, but that the goods were, for the purpose of this indictment, the goods of Perkins; but *quære* the latter point.

(w) *R. v. Ashley*, 1 C. & K. 198, Law, Recorder.

(x) 1 Hawk. P. C. c. 38, s. 26.

(y) 1 Hale, 557.

(z) Ibid. 554.

this is the inclination of the opinion of a very great lawyer, the foundation on which it proceeds cannot easily be reconciled with the doctrine which he admits in the same page, and also in a subsequent part of his work, namely, that if A. had opened the chamber of B., another lodger in the inn, to steal his goods, it would have been burglary; and that though a lodger has a special interest in his chamber, yet a burglary committed in it must be laid as in the mansion-house of the innkeeper. (a) And it has been remarked, that this doctrine is also at variance with the reasoning, in a case subsequently decided, which supposes that a guest has not even the possession of a room in an inn for himself, but that it remains still in the possession of the host. (b)

In this last-mentioned case, the prosecutor, who was a Jew pedlar, came to a public-house to stay all night, and fastened the door of his bed-chamber: when the prisoner, pretending to the landlord that the prosecutor had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment; and the prisoner accordingly stole them; Adams, B., doubting whether the bed-chamber could properly be called the dwelling-house of the prosecutor, as stated in the indictment, the case was submitted to the judges. They all thought, that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger; that he had no *certain* and *permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in that room, even for the goods then in question, which he could not be, unless the room were deemed to be in his possession. They thought also, that the landlord might have gone into the room when he pleased, and would not have been a trespasser to the guest: and that, upon the whole, the indictment was insufficient. (c)

The landlord in this case does not appear to have been privy to the felonious intent of the prisoner; but, on the contrary, was imposed upon by him, and induced to assist in breaking open the chamber, upon the supposition that the guest within it had been guilty of felony: but even if the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it has been said that if the host of an inn break the chamber of his guest in the night to rob him it is burglary, (d) that doctrine is questioned; and it was well observed, that there seems to be no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which should not be burglary. (e)

**Tenant at will.**—The lessee of a house suffered his son-in-law

(a) 1 Hale, 554, 557.

(b) 2 East, P. C. c. 15, s. 15, p. 503, where the learned writer says, that this deserves to be well weighed before any final resolution upon the point.

(c) Prosser's case, 2 East, P. C. c. 15, s. 15, p. 502, Adams, B.

(d) Dalt. c. 151, s. 4.

(e) 2 East, P. C. c. 15, s. 15, p. 502. Kel. 84.

to live in it, who failed and left it; but one of the son-in-law's servants continued in it. The lessee died, and the house was given up to the landlord, whose steward suffered the servant to continue in the house, and the only goods in it belonged to the servant. Upon an indictment for breaking the house in the day-time, the house was laid to be the servant's, and upon the point being saved, the judges thought that it was rightly laid, as the servant was there not as servant, but as tenant at will. (f) One Gent, a workman in a colliery, had fifteen shillings a-week, and a cottage for himself and family, free of rent and taxes: he occupied chiefly for his own benefit, and not for his master's. An indictment for burglary described this as the dwelling-house of Gent, and Holroyd, J., thought that it might be considered, as to third persons, either as the master's house or the workman's: and the point being saved, the judges held that it might be described as the workman's, and that the conviction was right. (g)

On an indictment for burglary in the house of J. West, it was proved that he had become insolvent, and his daughter had taken the house in which the burglary was committed, and there he and his wife lived, the latter carrying on a business in connection with the daughter, who resided many miles distant; the furniture belonged to the daughter, but the father paid the taxes; and Erle, J., held that it was rightly laid as the dwelling-house of the father. (h)

**Lodgings.** — Though different opinions appear to have been formerly entertained upon the point, whether in the case of burglary in the hired apartment of an inmate it should be laid to be committed in the mansion-house of the inmate or of the owner; (i) it is now settled, that if the owner who lets out apartments in his house to other persons sleeps under the same roof, and has but one outer door at which he and his lodgers enter, all the apartments of such lodgers are parcel of the one dwelling-house of the owner; (j) but that if the owner does not himself dwell in the same house, or if he and his lodgers enter by different outer doors, the apartments so let out are the mansion, for the time being, of each lodger respectively. (k)

(f) *R. v. Collett*, MS. Bayley, J., and R. & R. 498.

(g) *R. v. Jobling*, MS. Bayley, J., and R. & R. 525. See *ante*, p. 31, and the cases *post*, tit. *Arson*.

(h) *R. v. Bridges*, 1 Cox, C. C. 261.

(i) 1 Hale, 556. Kel. 83, 84. 1 Hawk. P. C. c. 38, s. 27. Bac. Ab. tit. *Burglary* (E), notes. *R. v. Ditchet*, 9 B. & C. 176.

(j) Where a lodger occupied one room in a house, the landlady keeping the key of the outer door, it was held that this could not be described as his dwelling-house. *Monks v. Dykes*, 4 M. & W. 567, but it would be otherwise if a house were divided into several chambers with separate outer doors, *ibid.* *Fenn v. Grafton*, 2 B. N. C. 617. 2 Scott, 56.

(k) 4 Blac. Com. 225. *Lee v. Gansel*, Cowp. L. 2 East, P. C. c. 15, s. 18, p. 503,

adopting the doctrine in Kel. 83, 84. And in Rogers's case, 1 Leach, 90, is the following note by the editor: 'I have been favoured with the following opinion of Holt, C. J., upon this subject, from the manuscript notes of Parker, C. B. — If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally with their families, yet, if they enter into the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. Mr. Tanner, an ancient clerk of the court, said, that the constant opinion and practice had been according to the opinion of Kelynge, C. J., which opinion was cited by Holt, C. J., upon this occasion at the Old Bailey October Sessions, 1701.'

A burglary was committed in a house which belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week: and an inmate named Jordan had two apartments in the house; namely, a sleeping-room up one pair of stairs, and a workshop in the garret; which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. And upon a case referred to the judges for their consideration, whether the indictment had properly charged the burglary in the dwelling-house of Jordan, ten of them were of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment was good. (*kk*) So upon an indictment on the 3 & 4 W. & M. c. 9 (now repealed), for robbery in a dwelling-house, where it appeared that the house was situated in a mews, and the whole of it let out in lodgings to three families, with only one outer door, which was common to all the inmates; one of whom rented the parlour on the ground floor, and a single room up one pair of stairs; and the parlour on the ground floor was the part of the house broken open; all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (*l*) And in a later case it was held, that if two or more rent of the owner different parts of the same house, so as to have amongst them the whole house, and the owner does not reserve or occupy any part, the separate parts of each may be described as the dwelling-house of each. Choice rented of the landlord a shop and other rooms in a house, and Ryan rented in the same house another shop and all the other rooms of the landlord also; the staircase and passage were in common, and the shops opened into the passage, which was inclosed, and was part of the house; all the taxes were paid by Choice. The prisoner broke open the passage door of Ryan's shop, and was indicted for burglary in the dwelling-house of Ryan: and upon the point being saved, the judges had no doubt but that this was rightly described as the house of Ryan. (*m*)

The owner of a house let the whole of it in apartments to different persons, and did not inhabit any part himself. One of the inmates rented the bottom part of the house, namely, a shop, a parlour, and a cellar, (which ran underneath the shop and parlour), at a yearly rent; but the owner had taken back the cellar for the purpose of keeping wood and lumber in it, and made an allowance to the inmate of ten shillings a year, which was deducted from the rent. The entrance to the house was by a common outer door from the street. The shop and parlour were broken open. And upon an indictment for burglary, laying the offence

(*kk*) Carrell's case, 1 Hawk. P. C. c. 38, s. 32. 1 Leach, 237. 2 East, P. C. c. 15, s. 18, p. 506. The judges relied on Rogers's case. 1 Leach, 90, *post*, p. 36, note (*n*). The two other judges (Eyre, B., and Buller, J.), who thought that it was not the mansion-house of Jordan, were of opinion that it might have been laid to have been the mansion-house of Nash; to which some of

the other judges inclined, if it were not the mansion of Jordan.

(*l*) Trapshaw's case. 1 Hawk. P. C. c. 38, s. 30. 1 Leach, 427. 2 East, P. C. c. 15, s. 18, p. 506.

(*m*) *R. v. Bailey*, MS. Bayley, J., and *R. & M. C. C. R.* 23. See *R. v. Mayor of Eye*, 9 Ad. & E. 670.

to have been committed in the dwelling-house of the inmate, nine of the judges agreed that this was proper; that it could not have been laid to be the dwelling-house of the owner, as he did not inhabit any part of it, but only occupied the cellar; but that it would have been otherwise if the owner had occupied any part of the house. (*n*)

**Apartments where actual severance, and no internal communication.**<sup>1</sup>—Where there is an actual severance of a house in fact, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, separate and distinct mansions in law will be constituted. (*o*) And this may be, though the rent and taxes of the whole premises be paid jointly out of the partnership fund of the several occupants.

The prisoner was indicted for burglary and larceny in the dwelling-house of Smith and Knowles. It appeared that these persons were in partnership, and lived next door to each other. The two houses had formerly been one house only, but had been divided for the purpose of accommodating the respective families of each partner, and were then perfectly distinct and separated from each other, there being no communication from the one to the other without going into the street. The house-keeping, servants' wages, &c., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The prisoner was servant to Smith, and it was in his house that the burglary was committed. It was objected upon these facts, that although the two houses were the joint property of both the partners, yet they were the separate and respective mansions of each, and, therefore, that the burglary ought to have been laid as committed in the house of Smith only. And the Court held the objection to be well founded. (*p*)

The indictment was for stealing in the dwelling-house of Moreland; and the evidence was that Moreland and one Gutteridge were co-partners; Moreland was the lessee of the whole premises, and paid all the rent and taxes for them, and Gutteridge had an apartment in the house, and allowed Moreland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in the shop. It was contended that Gutteridge, under these circum-

(*n*) Rogers's case, 1 Hawk. P. C. c. 38, s. 29. 1 Leach, 89. 2 East, P. C. c. 15, s. 19, p. 506, 507.

(*o*) 2 East, P. C. c. 15, s. 17, p. 504.

(*p*) R. v. Jones, 1 Hawk. P. C. c. 38, s. 34. 1 Leach, 537. 2 East, P. C. c. 15, s. 17, p. 504. In Tracy v. Talbot, 2 Salk. 532 (a case upon a distress for a poor's rate), it was ruled by Holt, C. J., that if two several houses are inhabited by several families who make and have but one common

avenue or entrance for both; yet, in respect of their original, both houses continue rateable severally, for they were at first several houses; and if one family goes, one house is vacant. But if one tenement be divided by a partition, and inhabited by different families, namely, the owner in one and a stranger in another, these are several tenements, severally rateable while they are thus severally inhabited; but, if the stranger and his family go away, it becomes one tenement.

#### AMERICAN NOTE.

<sup>1</sup> See C. v. Bowden, 14 Gray, 103; Smith v. P. 115 Ill. 17. C. v. Thomson, 9 Gray,

108. Mason v. P. 26 N. Y. 200. Quinn v. P., 71 N. Y. 561. P. v. Griffin, 77 Mich. 585.

stances, had a joint possession of the shop and warehouses, and that the indictment should have been framed accordingly, but, on a case reserved, the judges were of opinion that the indictment was right. (g)

If a house be let to A., and a warehouse under the same roof, with an inner communication, to A. and B., the warehouse cannot be described as the dwelling-house of A. (r)

**Owner of a house breaking open apartments.** — As, according to the rule which has been stated as now established upon this subject, where the owner of a house lets out apartments in it to lodgers, but continues to inhabit some part of the house himself, and has but one outer door common to him and his lodgers, such apartments must be considered as parcel of his dwelling-house; (s) it will be a necessary consequence that if he should break open the apartments of his lodgers in the night and steal their goods, the offence will not be burglary, on the ground that a man cannot commit burglary by breaking open his own house. (t)

#### SEC. IV.

##### *The Time — viz., The Night.*

The definition of burglary now leads us to the *time* at which the offence must be committed. This time must be the *night*, for in the day-time there can be no burglary. (u) It appears that anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but it was afterwards settled as the better opinion that if there were daylight or twilight enough begun or left whereby the countenance of a person might be reasonably discerned, it was no burglary. (v) But this did not extend to moonlight. (w)

But the 24 & 25 Vict. c. 96, s. 1,<sup>1</sup> provides that, '*for the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.*' (x)

**Breaking and entering need not be both in the same night.** — The breaking and entering need not both be done in the same night; for if thieves break a hole in a house one night, with intent to enter another night and commit felony, and come accordingly another night

(g) *Parminster's case*, 1 Leach, 537, note (a).

(r) *R. v. Jenkins*, MS. Bayley, J., and R. & R. 244. See *R. v. Hancock*, R. & R. 171, *post*.

(s) *Ante*, pp. 32, 33.

(t) 2 East, P. C. c. 15, s. 18, p. 506. *Ante*, p. 33.

(u) 4 Blac. Com. 224.

(v) 3 Inst. 63. 1 Hale, 550, 551. Sum.

79. 1 Hawk. P. C. c. 38, s. 2. Bac. Ab. tit. *Burglary* (D). 4 Blac. Com. 224. 2 East, P. C. c. 15, s. 21, p. 509.

(w) 1 Hale, 551.

(x) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 4, the words in italics being substituted for the words, '*so far as the same is essential to the offence of burglary,*' as there are other cases besides burglary to which this clause extends.

#### AMERICAN NOTE.

<sup>1</sup> There are similar provisions in most of the American States. See *C. v. Williams*,

2 Cuah. (Mass.) 582. *C. v. Glover*, 111 Mass. 395.

and commit a felony through the hole they so made the night before, this is burglary, for the breaking and entering were both *noctanter*, though not the same night. (y) It is said, however, that if the breaking be in the day-time and the entering in the night, or the breaking in the night and entering in the day, it will not be burglary. (z) But upon this position it has been remarked, that the authority upon which it appears to have proceeded (a) does not fully prove the point for which it is cited, but only furnishes a resolution to the effect, that if thieves enter in by night at a hole in the wall, which was there before, it is not burglary, without stating who made the hole, and of course not coming up to the case of a hole made by the thieves themselves in the day-time, with intent to enter more securely at night. (b) And it is observable that it is elsewhere given as a reason why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry; (c) which reasoning, if applied to a breaking in the day-time, and entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering also a burglary.

Upon an indictment for housebreaking against Jordan, Sullivan, and May, it appeared by the evidence of an accomplice that Jordan and Sullivan accompanied May, who was to secrete himself in the house, that during the night he might commit the robbery, and that the door being latched, they assisted him in gaining admission by opening an umbrella to screen him from observation while he entered, but they went away soon after he had got in and were not seen near the place again until after the robbery had been committed. It was objected that there was no evidence to affect Jordan and Sullivan as principals, for they were not present at the fact. Gurney, B., 'We have considered the objection, and we are of opinion that, assuming the evidence to be true (which is the way to try the question of law), if Jordan and Sullivan were present at the commencement, they must be considered as guilty of the whole. There has been a case of burglary where the breaking was one night and the entry the next, and the judges have decided that a party who was present at the breaking, and not present at the entering, was guilty of the whole. We consider this a much stronger case than that.' (d)

## SEC. V.

### *The Intent to Commit a Felony.*

The last part of the definition of burglary relates to the *intent*. The act of breaking and entering the mansion-house in the night must be done 'with intent to commit some felony within the same,

(y) 1 Hale, 551. *Ante*, p. 13. R. v. Smith, MS. Bayley, J., and R. & R. 417.

(z) 1 Hale, 551.

(a) Crompt. 33 a, ex 8 Ed. 4, cited by Lord Hale, 551.

(b) Note (k) to 1 Hale, 551 (ed. 1800). 2 East, P. C. c. 15, s. 21, p. 509.

(c) 1 Hale, 551.

(d) R. v. Jordan, 7 C. & P. 432. Gaselee, J., and Gurney, B.



whether such felonious intent be executed or not.' (e) And where the breaking is a breaking out of the dwelling-house in the night, there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house. (f)

**An intent to commit a trespass will not be sufficient.** — If the intention of the entry be either laid in the indictment, or appear upon the evidence, to have been only for the purpose of committing a *trespass*, the offence will not be burglary. Therefore an intention to beat a person in the house will not be sufficient to sustain the indictment; for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary. (g) The entry must be for a felonious purpose. (h) It should, however, be observed, that if a felony be actually committed, the act will be *prima facie* pregnant evidence of an intent to commit it; and it is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence. (i) But it seems that this must be confined to cases where the offence intended is in itself a felony. (j)

**Intent to wound a horse.** — The prisoner was indicted for burglary, in breaking and entering the stable of one J. Bayley, part of his dwelling-house, in the night, with a felonious intent to kill a gelding of one A. B. there being. The facts were, that the gelding was to have run for forty guineas, and that the prisoner cut the sinews of his fore leg to prevent his running, in consequence of which he died. Parker, C. B., before whom the prisoner was tried, ordered him to be acquitted, on the ground that his intention was not to commit the felony by killing the horse, but a trespass only to prevent his running, and that, therefore, it was no burglary. (k)

**Intent to take away money left in a trunk.** — The prisoner, being a servant or journeyman to one John Fuller, was employed to sell goods, and receive the money for his master's use. In the course of the trade he sold a large parcel of goods, for which he received a hundred and sixty guineas, none of which he put into the till, nor in any way gave into his master's possession, but deposited ten guineas of the sum in a private place in the chamber where he slept, and carried off the remaining hundred and fifty on leaving his service, from which he decamped before the embezzlement was discovered. He left a trunk containing some of his clothes, as well as the ten guineas, behind him, but afterwards, in the night-time, broke open his master's house, and took away with him the ten guineas which he had so deposited in the private place in his bed-chamber. This was held to be no burglary, because the taking of the money was no felony; for although it was the master's money in *right*, it was the servant's money in *possession*, and the original act was no felony. (l)

(e) *Ante*, p. 1.

(f) *Ante*, p. 7.

(g) 1 Hale, 561.

(h) 3 Inst. 65. 1 Hale, 559, 561.

Sum. 83. Kel. 47. 1 Hawk. P. C. c. 38,

s. 36. Bac. Ab. tit. *Burglary* (F). 4

Blac. Com. 227.

(i) 1 Hale, 560. 2 East, P. C. c. 15,

s. 22, p. 509, s. 25, p. 514, 515. Kel. 47.

(j) 2 East, P. C. c. 15, s. 24, p. 515.

(k) *Dobbs's case*, 2 East, P. C. c. 15, s. 25, p. 513, Parker, C. B. But it appears that the prisoner was again indicted for killing the horse, and capitally convicted. *Id. ibid.*

(l) *Dingley's case*, cited by Const. *arguendo* in *Bazeley's case*, 2 Leach, 840, 841, where he mentions it as cited by Sir B.

**Intent to take away uncustomed tea.** — The prisoners were indicted for a burglary in the dwelling-house of M. Snelling, the intent being laid to steal the goods of one L. Hawkins. It appeared that Hawkins, who was an excise officer, had seized some bags of tea in a shop belonging to Smith, as being there without a legal permit, and had removed them to Snelling's, where he lodged. The prisoners and many other persons broke open Snelling's house in the night, with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses said, that they supposed the tea to belong to Smith; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on the behalf of Smith; and, upon the point being reserved, all the judges were of opinion that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavouring to get back Smith's goods, still there was no intention to steal. (*m*)

**Intent to steal mortgage deeds.** — On an indictment for burglary, in the house of D. Williams, with intent to steal goods and chattels therein, it appeared that the prisoner had, in 1843, executed a mortgage in fee of freehold land to D. Williams for £600, and in 1848 he had executed another mortgage for £200, by way of further charge on the same land, to D. Williams: both deeds contained the usual provisos of redemption, and covenants for payment of principal and interest on the sums advanced. The jury found that the prisoner committed the offence with intent to steal the mortgage deeds; it was objected that the intent was not properly alleged, as, though the mortgage deeds might be the subject of statutable larceny as 'valuable securities,' they were not 'goods and chattels;' and, upon a case reserved, the judges assumed, from the finding of the jury, that the prisoner broke into the house with intent to steal the mortgage deeds in their uncanceled state; that finding made it unnecessary to consider whether the securities savoured of the realty, or were evidence of the title to real estate, so as not to be the subject of larceny, because being subsisting securities for the payment of money, they were clearly choses in action, and, as such, were not properly described in the indictment as goods and chattels. (*n*)

Shower, in his argument in the case of *R. v. Meers*, 1 Show. 53, and there said to be reported by Gouldsborough, 186. Mr. Const further said, that he had been favoured with a manuscript report of it, extracted from a collection of cases in the possession of the late Mr. Reynolds, clerk of the arraigns at the Old Bailey, under the title of *R. v. Dingley*, by which it appeared that the special verdict was found at the Easter Sessions, 1687, and argued in the King's Bench in Hil. T. 3 Jac. 2, and in which it was said to have been determined that this offence was not burglary, but trespass only. See the case cited also as *R. v. Bingley*, 1 Hawk. P. C. c. 38, s. 37, and as a case, Anon. in 2 East, P. C. c. 15, s. 22, p. 510.

(*m*) *R. v. Knight*, 2 East, P. C. c. 15, s. 22, p. 510. Some of the judges held that if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., which was made felony by 19 Geo. 2, c. 34 (now repealed), it would have been burglary. But they agreed that even in that case some evidence would have been necessary on the part of the prosecutor as to the goods being uncustomed, in order to throw the proof that the duty was paid on the prisoners: but that the goods being found in oil cases, or in great quantities in an unentered place, would have been sufficient for that purpose.

(*n*) *R. v. Powell*, 2 Den. C. C. 403.

**Intent to take away a dog.** — Where two poachers went to the house of a gamekeeper who had taken a dog from them, and believing him to be out of the way broke the door and entered, and on an indictment for burglary it appeared that their intention was to rescue the dog, and not to commit a felony; Vaughan, B., directed an acquittal. (o) On an indictment for burglary with intent to commit a larceny, the evidence was, that three persons attacked the house; they broke a window both in front and at the back; the occupier of the house got up and contended with them with a spade for some time, when they went away; there was no evidence of an actual entry, but there was evidence that the prisoners had ample opportunity to enter and plunder, if they were disposed; it was submitted for the prisoners, that there was no evidence to go to the jury; Parke, J., 'There is evidence; it is for the jury to say, whether they went there with an intent or not. Persons do not in general go to houses to commit trespasses in the middle of the night; it is matter of observation that they had the opportunity, and did not commit the larceny, but it is for the jury to say, whether, from all the circumstances, they can infer that or any other intent.' (p)

Where on an indictment for burglary with intent to steal the goods of W. S., it appeared that the prisoner broke a pane of glass, and put in a knife, and pushed back the window fastener, after which he pulled the sash of the window down; he was then disturbed; Alderson, B., held that, though there was a sufficient entry, 'there was no evidence of the intent laid in the indictment. It is the immediate intent with which the entry is effected, that is the material one, and not a remote intent having no immediate connection with that entry.' (q)

It is quite clear, therefore, that the entry must be with a *felonious intent*. And it seems also to be now well established, contrary to some opinions which have been formerly entertained upon the point, (r) that it makes no difference whether the offence intended were felony at common law, or only created so by statute; and the reason given for the better opinion is this, that whenever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. (s)

It is necessary to ascertain with exactness the felony really intended, as it must be laid in the indictment, and proved agreeably to the fact. And a felony intended to be committed will not support an indictment charging a felony actually committed. Thus, where upon an indictment for burglary and stealing goods, it appeared that there were no goods stolen, but that the burglary was with intent to steal, it was that the indictment was not supported by the evi-

(o) Anonymous, Math. Dig. C. L., Burglary, 48. See *R. v. Holloway*, 5 C. & P. 524.

(p) Anonymous, 1 Lew. 37.

(q) *R. v. Tucker*, 1 Cox, C. C. 78. Probably the case is misreported, as it is added, 'the prisoner was subsequently indicted for *breaking and entering with intent, &c.*, and was convicted,' so that the report is inconsistent with itself. In all such cases

it is clearly for the jury to determine whether the intent is proved.

(r) 1 Hale, 562. Crompt. 32. 2 East, P. C. c. 15, s. 22, p. 511.

(s) 1 Hawk. P. C. c. 38, s. 38. 4 Blac. Com. 228. Bac. Abr. tit. *Burglary* (F). 2 East, P. C. c. 15, s. 22, p. 511. *R. v. Locost*, Kel. 30. *R. v. Gray*, 1 Str. 481. *R. v. Knight*, ante, p. 40, note (m).

dence. (t) So, if it be alleged, that the entry was with intent to commit one sort of felony, and it appears upon the facts that it was with intent to commit another, it will not be sufficient. (u) And where the charge is of a felony intended to be committed by stealing goods, and the property in the goods is stated, it must be correctly stated. Thus, where an indictment charged a burglary in the house of one Joseph Davis, with intent to steal the goods of the said Joseph Wakelin; and it appeared that no such person as Joseph Wakelin had any property in the house, but that in fact the name Wakelin had been inserted by mistake in the indictment instead of Davis, though Lawrence, J., before whom the prisoner was tried, inclined to think that the mistake was not material as to the burglary, a majority of the judges were afterwards of opinion (the point being saved for their consideration,) that in an indictment of this description it was necessary to show to whom the property belonged, in order to render the charge complete; and the words, 'of the said Joseph Wakelin' being material, could not be rejected as surplusage. (v)

**Indictment need not state whose goods were intended to be stolen.**

— But where an indictment alleged that the prisoners broke and entered a church 'with intent the goods and chattels therein being' to steal, it was moved in arrest of judgment that it ought to have stated whose property the goods were; but it was held that it was unnecessary; for, in indictments for burglary, it is not usual, in stating the intent to steal, to specify the ownership, but merely to state the intent to steal the goods then being in the dwelling-house. (w) So where an indictment alleged that the prisoners the dwelling-house of R. P., 'unlawfully did break and enter, and then and there unlawfully were in the said dwelling-house of the said R. P., with intent the goods and chattels in the said dwelling-house then and there being, then and there feloniously to steal, take and carry away,' and the prisoners were found guilty, it was objected that the indictment was bad, as it did not state whose goods the prisoners intended to steal; but Erskine, J., having consulted Wightman, J., held the indictment was sufficient. (x)

But if the indictment charge a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed. (y) And it seems sufficient in all cases where a

(t) 2 East, P. C. c. 15, s. 25, p. 514. R. v. Vandercomb, 2 Leach, 708.

(u) 2 East, P. C. c. 15, s. 25, p. 514.

(v) Jenks's case, Macdonald, C. B., Buller, J., and Lawrence, J., 2 Leach, 774. 2 East, P. C. c. 15, s. 25, p. 514, where it is said that this it seems is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery, which is ousted of clergy generally. See R. v. Exminster, 6 A. & E. 598, where a similar mistake in a surname was held not to vitiate an assignment of an apprentice. In R. v. Rudge, Gloucester Spr. Ass. 1841, Coleridge, J., seemed clearly of opinion that an indictment for murder, which alleged an assault on *Martha* Sheddon, and that the prisoner 'the said

*Margaret* Sheddon, did strike, &c.,' was not, therefore, bad. And see R. v. Crespin, 11 Q. B. 913. C. S. G.

(w) R. v. Nicholas, 1 Cox, C. C. 218. Lord Denman, C. J., Alderson, B., and Coltman, J. See R. v. Clarke, 1 C. & K. 421, *infra*.

(x) R. v. Lawes, 1 C. & K. 62. A better objection would have been that the indictment did not allege that the prisoners broke and entered with intent to steal. The words 'with intent, &c.,' do not necessarily refer to the breaking and entering; and if confined to the being in the dwelling-house, no offence is charged.

(y) R. v. Locost, Kel. 30, an indictment for a burglary with intent to commit a rape, and evidence of a rape, actually committed.

felony has actually been committed, to allege the commission of it; as that is sufficient evidence of the intention. (z) But the intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement. (a) For where this is done, the prisoner may be convicted of the burglary with intent to commit the felony though he be acquitted of the felony, or convicted of the felony though he be acquitted of the burglary. An indictment for burglary alleged that the prisoner 'the dwelling-house of E. Bird burglariously did break and enter, with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal,' and then and there stole a quantity of articles of the goods and chattels of the said E. Bird. E. Bird was the tenant of the house; but she and two other ladies lived in it in common, each of the three contributing an equal amount to the establishment, and the articles stolen had been bought by E. Bird; but at the end of the year they would be paid for by the three ladies when they divided the expenses of the establishment; it was objected that the articles were the goods of the three ladies; but it was held that, to support this indictment, it was sufficient to prove that the prisoner broke and entered the house in the night-time, with intent to steal the goods there generally, and therefore the evidence supported the indictment. (b)

An indictment alleged that the prisoner burglariously broke and entered a dwelling-house 'with intent one Alice Davies, in the said dwelling-house then being, violently and against her will then and there feloniously to ravish and carnally know,' and that the prisoner then and there in the said dwelling-house feloniously did wound the said A. Davies, then being in the said dwelling-house; and it was objected that the indictment ought to have alleged the intent to ravish in the said dwelling-house, and not merely 'then and there;' but the objection was overruled. (c)

**Different intents may be laid in the indictment.** — It should be observed also, that different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal the goods of a person; and the second count laid it with intent to murder him; it was objected, upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence; but the indictment was holden good, on the ground that it was the same fact and evidence, only laid in different ways. (d)

Having thus treated of the offence of burglary, according to its definition, we may inquire shortly concerning the proceedings against offenders by indictment.

(z) 1 Hale, 560. 2 East, P. C. c. 15, s. 25, p. 514. *R. v. Furnival*, R. & R. 445.

(a) 1 Hale, 559. *R. v. Furnival*, *supra*.

(b) *R. v. Clarke*, 1 C. & K. 421. *Cole-ridge, J., and Parke, B.*

(c) *R. v. Watkins*, C. & M. 264. *Colt-*

*man, J.* The prisoner was acquitted of the burglary, or the point would have been reserved.

(d) *Thompson's case*. 2 East, P. C. c. 15, s. 26, p. 515.

## SEC. VI.

*Of the Indictment, Trial, &c.*

It is essential that the indictment should state the fact to have been done in the night. (e) Where an indictment for burglary alleged that the prisoners broke into a dwelling-house 'about the hour of eleven in the night,' it was contended that it ought to have been alleged that the offence was committed between the hours of nine o'clock at night and six o'clock the following morning; Patteson, J., 'I think it immaterial whether the time be mentioned or not. The night is the material allegation; and even if the night had not been stated, I think it would, perhaps, be sufficient if the indictment charged the offence to have been done "burglariously." That would do.' (f) It is not necessary, however, that the evidence should correspond with the allegation as to the hour, so that it shows the fact to have been committed in the night. (g)

The offence must be laid, as we have seen, to have been committed in a mansion-house or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. (h) It would not be sufficient to lay it generally as having been committed in a house. (i) Where a burglary had been committed in such an out-house as by law was considered part of the dwelling-house, it must have been laid as having been done in the dwelling-house, or in a stable, barn, &c., part of the dwelling-house; either of which statements might be adopted. (j)

The allegation of the offence having been committed in a mansion-house, must be understood, however, as confined to burglaries in private houses; for though it has been quaintly observed, that a church is *domus mansionalis Dei*, (k) it is the better opinion that the indictment, in the case of a burglary committed in a church, need not proceed upon such a supposition, but will be more properly framed, according to the truth of the fact, by stating the offence to have been committed in the parish church of the parish to which it belongs. (l)

It was formerly necessary to state with the utmost accuracy the name of the owner of the dwelling-house and of the parish in which it was situate, (m) but now if it proved to be incorrect an amendment would be allowed. (n)

(e) 1 Hale, 549. *Ante*, p. 37. Waddington's case. Burn's Just. tit. *Burglary*, s. 1. 2 East, P. C. c. 15, s. 24, p. 513. In 2 Hale, 179, it is said, that the indictment ought to be *tali die circa horam decimam in nocte ejusdem diei felonice et burglariter fregit*; but that according to some opinions *burglariter* carries a sufficient expression that it was done in the night.

(f) *R. v. Thompson*, 2 Cox, C. C. 377.

(g) 2 East, P. C. c. 15, s. 24, p. 513.

(h) *Ante*, p. 14, *et seq.*

(i) 1 Hale, 550.

(j) Garland's case, 1 Leach, 144, where an outhouse having been broken open, the indictment was for breaking and entering the dwelling-house; and Dobbs's case, 2 East, P. C. c. 15, s. 24, p. 512, and s. 25, p. 513, where the indictment was for breaking and entering the stable of J. B., part of his dwelling-house.

(k) 3 Inst. 64.

(l) 1 Hale, 556. 1 Hawk. P. C. c. 38, s. 17. 2 East, P. C. c. 15, s. 24, p. 512.

(m) 2 East, P. C. c. 15, s. 24, p. 513.

(n) See vol. i. p. 53.

Upon an indictment for stealing in a dwelling-house, it has been held, that if it is not expressly stated where the dwelling-house is situated, it shall be taken to be situate at the place named in the indictment by way of venue. The indictment stated, that the prisoner, on, &c., at Liverpool, one coat of J. S., of the value of 40s., in the dwelling-house of W. T., then and there being, then and there feloniously did steal; and, a case being reserved upon the question, whether the indictment shewed sufficiently that the dwelling-house was situate at Liverpool; the judges held that it did. (*o*) So where an indictment for burglary alleged that the prisoners 'late of Norton-juxta-Kempsey, in the county of Worcester,' 'at Norton-juxta-Kempsey aforesaid the dwelling-house of T. Hooke there situate' feloniously did break and enter, &c., and it appeared that Norton-juxta-Kempsey was a chapelry and perpetual curacy; it was objected that the indictment ought to have stated that Norton was a chapelry, or described it in some other manner: but Patteson, J., held that *R. v. Napper* (*p*) was a sufficient authority to shew that this indictment was good; there it was held that an indictment alleging that the prisoner 'at Liverpool' did break and enter a dwelling-house 'there situate' was good; and there was no reason why an indictment alleging a burglary 'at Norton-juxta-Kempsey' was not also good, it being proved that there was such a district. (*q*)

The same accuracy of description formerly applied to burglary, and stealing in a dwelling-house or shop (*r*) but now an amendment would be allowed. (*s*)

Since the 7 Geo. 4, 64, s. 12, (*t*) if a burglary be committed within five hundred yards of the boundary of a county, the offenders may be tried in the adjoining county. An indictment for burglary, which had been found by the grand jury for the county of Hereford, alleged the burglary to have been committed 'at the parish of English Bickner in the county of Gloucester, within five hundred yards of the boundary of the county of Hereford.' Upon the arraignment of the prisoners at Hereford, it was objected that the indictment was bad, on the ground that the 7 Geo. 4, c. 64, s. 12, only applied to larceny, and other transitory felonies, and not to felonies which were local in their nature; but it was held that the indictment was good; the effect of the 7 Geo. 4, c. 64, s. 12, was to give adjoining counties concurrent jurisdiction over one thousand yards; the words 'dealt with' applied to justices of the peace, who had consequently jurisdic-

1 Chit. Crim. Law, 215 *et seq.* 3 Chit. Crim. Law, 1096. Cole's case, Moor, 466. 1 Hale, 558. 2 East, P. C. c. 15, s. 24, p. 513. White's case, 1 Leach, 252. 2 East, P. C. c. 15, s. 24, p. 513. Woodward's case, 1 Leach, 253, note (*a*). Adair, Serjeant, Recorder. 2 Stark. Crim. Plead. 437, note (*z*). *R. v. Richards*, 1 M. & Rob. 177. *J. A. Park*, and *Gaselee*, JJ. See *R. v. St. Mary*, Leicester, 1 B. & A. 327. *R. v. Countesthorpe*, 2 B. Ad. 487. *Walford v. Anthony*, 8 Bing. 75. *R. v. Wright*, 1 A. & E. 434. *R. v. St. John*, 9 C. & P. 40, Parke, B., and Bosanquet, J. *R. v. Frowen*, 4 Cox, C. C. 266.

(*o*) *R. v. Napper*, MS. Bayley, J., and R. & M. C. C. R. 44.

(*p*) *Supra*.

(*q*) *R. v. Brookes*, MSS. C. S. G. S. C., C. & M. 544, which erroneously describes the prisoners as 'late of the parish of Norton-juxta-Kempsey.'

(*r*) *R. v. Perkins*, 4 C. & P. 363. *R. v. Brookes* and others, Wor. Spr. Ass. 1842. MSS. C. S. G. S. C., 1 C. & M. 543. *R. v. Walter Jackson*, MSS. C. S. G. Gloucester Spr. Ass. 1842. *R. v. Howell*, 1 Cox, C. C. 190.

(*s*) See vol. i. p. 53.

(*t*) See the section, vol. i. p. 4.

tion over five hundred yards in the adjoining county to that in which they were qualified to act; the words 'inquired of' applied to the grand jury; 'tried' to the petit jury; and 'determined and punished' to the courts of sessions and assizes. (*u*)

The terms of art usually expressed by the averment 'feloniously and burglariously did break and enter' are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner *broke and entered*, is necessary, because a breaking without an entering, or an entering without a breaking, will not make burglary. (*v*)

An indictment upon the 7 & 8 Geo. 4, c. 29, s. 11, for 'breaking out' of a dwelling-house after committing a felony therein, must have averred that the prisoner broke out of the house, and a statement that the prisoner did 'break to get out,' or did 'break and get out,' is insufficient. (*w*)

With respect to the intent, it is clear that it must be expressly alleged in the indictment, and proved agreeably to the fact, either that the party committed a felony in the dwelling-house, or that he broke and entered the house with intent to commit a felony therein. (*x*) And it seems to be the better course, first to lay the intent, and then to state the particular felony, if a felony has actually been committed.<sup>1</sup> For though where an indictment charges that the prisoner 'the dwelling-house of A. B. feloniously and burglariously did break and enter, and the goods of A. B. then and there feloniously and burglariously did steal, take, &c., it comprises two offences, namely,

(*u*) *R. v. Ruck*, Morgan and another, Hereford Spr. Ass. 1829, Parke, J., MSS. C. S. G. But where an indictment alleged that the defendant, 'late of the parish of St. Martin, in the county of N.,' 'at the parish aforesaid,' made an assault, and had 'Borough of Stamford' in the margin, and was found at the sessions for that borough, and removed by *certiorari* into the Queen's Bench, and sent for trial into Lincolnshire, and it appeared that the assault was committed in that part of the parish of St. Martin which was within the borough, and within five hundred yards of the boundary of L.; but the whole of the parish was in N., it was held that the trial was erroneous, and that under the 7 Geo. 4, c. 64, s. 12, the offence must be laid and tried in one and the same county. *R. v. Mitchell*, 2 Q. B. 636. *R. v. Ruck* was not cited in this case, and the Court do not appear to have noticed that the clause applies to all offences, whether local or not; and that it does not change the locality of the five hundred yards. The clause provides that all the offences mentioned in it may be 'dealt with, inquired of, tried, determined, and punished' in either county, and it is clear that none of these terms apply to the statements in an indict-

ment, and therefore the clause in no way prescribes where the offence is to be alleged to have been committed. The statement, therefore, of the place rests on the general law on the subject, and where the offence is local, as in burglary, housebreaking, &c., the true place must be stated, and it must be averred to be within five hundred yards of the adjoining county, in order to give jurisdiction to try it in that county. Secs. 9 & 10 of the same Act relating to the trial of accessories plainly show that local offences are included in sec. 12. *R. v. Mitchell*, therefore, cannot be supported on the ground that under this Act the offence must be laid and tried in the same county; but it may, perhaps, be supported on the ground that it must appear on the face of the record that the Court had jurisdiction to try the offence, and that it did not so appear in this case, as the offence was laid in one county and the trial was had in another. C. S. G. See vol. i. p. 54.

(*v*) 1 Hale, 550. 2 East, P. C. c. 15, s. 24, p. 512. *Ante*, p. 2.

(*w*) *R. v. Compton*, 7 C. & P. 139. *Vaughan and Patteson*, JJ.

(*x*) 1 Hale, 550. *Ante*, p. 38, *et seq.*

#### AMERICAN NOTE.

<sup>1</sup> In America at all events if a person is indicted for breaking, &c., with intent to steal there being no allegation of larceny he

cannot be convicted of larceny. *Bishop*, i. a. 796. *S. v. Cooper*, 16 Vt. 551. *C. v. Newell*, 7 Mass. 245. *S. v. Bell*, 29 Iowa, 316.



burglary and larceny, and the prisoner may therefore be acquitted of the burglary, and found guilty only of the larceny; yet it seems he cannot be found guilty of the burglary if he be acquitted of the larceny, on the ground that when the offence is so charged the larceny constitutes part of the burglary. (*y*) It has, therefore, been recommended, by high authority, as the better way to charge the prisoner with breaking, &c., with intent feloniously and burglariously to steal, &c., and to add also the particular felony, as upon such an indictment he may be convicted of a simple burglary, though acquitted of the felony. (*z*)

It was also said, by the same high authority, that three offences might have been joined in the same indictment, namely, burglary, larceny, and felony upon the 5 & 6 Edw. 6, c. 9, (*a*) for robbing a person in a dwelling-house, the owner, his wife, &c., then being within, whether waking or sleeping. And that upon such indictment, which need not have concluded against the form of the statute, the prisoner might have been convicted of the burglary, and found not guilty of felony, or convicted of the felony upon the 5 & 6 Edw. 6, c. 9, and found not guilty of the burglary; in either of which cases he would have been ousted of his clergy, or he might have been convicted of the larceny only, and found not guilty of the burglary and the felony upon the statute, in which case he would have been entitled to his clergy. (*b*)

We have already seen that different intents may be stated in the indictment, and such a mode of proceeding, by laying the same fact in different ways, may be rendered expedient by the particular circumstances of the case. (*c*)

Upon an indictment for breaking and entering the house of E. Andrews, and stealing certain goods, laid in the first count to be the property of E. Andrews, and in the second of the Queen, it appeared that the husband of E. Andrews was a convicted felon, and in gaol under his sentence at the time the felony was committed, but the wife continued in possession of the house and the goods till they were stolen; it was submitted that the goods were neither the property of E. Andrews nor of the Queen, until office found; but upon a case reserved, the judges held that the prisoner was rightly convicted of larceny only on the second count, which laid the property of the goods in the Queen. (*d*) It is sufficient to lay the property in the name of a person who is bailee of it. On an indictment for breaking and entering the house of Kyezor, and stealing a watch, the property of Miers, Miers proved that the house was taken by Kyezor, and that the witness carried on the business of a silversmith for the benefit of Kyezor and his family, but had himself no share in the profits, and no salary, but he had power to dispose of any part of the stock, which was worth near £3,000, and that he might, if he pleased, take money from the till as he wanted it, but he should inform Kyezor that he had so done; he sometimes bought goods for the shop, and sometimes Kyezor did

(*y*) 1 Hale, 559, 560.

(*c*) *Ante*, p. 43.

(*z*) 1 Hale, 560. See also *ante*, p. 41.

(*d*) R. v. Whitehead, 9 C. & P. 429.

(*a*) Repealed by the 7 & 8 Geo. 4, c. 27.

Forfeiture for felony is now abolished, see

(*b*) 1 Hale, 561. 2 East, P. C. c. 15, vol. i. p. 108.

a. 27, p. 516.

so. Upon this evidence it was held, that Miers was a bailee of the stock, and therefore in a case of this kind the property might properly be laid in him. (e)

The alteration as to the hours of the night and the punishment in cases of burglary, which were made by the 1 Vict. c. 86, did not render it necessary for the indictment to conclude *contra formam statuti*. (f)

As to an acquittal upon an indictment for burglary in breaking and entering a dwelling-house and *stealing goods* being pleaded in bar to an indictment for burglary for the same breaking and entering *with intent to steal*, see Vol. I. p. 38, and see there generally as to the plea of autrefois acquit and autrefois convict.

On an indictment for burglary and stealing a ham and three loaves, it appeared that what was described as ham was pork which was in the process of curing, and had not yet become ham, and this was traced to the possession of the prisoner shortly after the burglary; and Alderson, B., held that, though the description in the indictment failed, yet the prosecutor might trace into the possession of the prisoner the pork or anything else which had been taken from the house at the same time, and the jury might presume the taking of one article from the possession of another. (g)

Where, upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny, subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed; it was proposed to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence. They said, that the charge contained in the indictment of burglariously breaking and entering the house, and stealing the goods, might unquestionably be modified, by shewing that the prisoners stole the goods without breaking open the house; but that the charge proposed to be introduced went to connect the prisoners with an antecedent felony committed before three o'clock on the day mentioned, at which time it was clear that they had not entered the house; that the transactions were distinct; and that it might as well be proposed to prove any felony, which those prisoners might have committed in that house seven years before. (h)

Where a larceny, whether within or ousted of clergy, was charged in the same indictment with a burglary, it was holden that the prisoner might be found not guilty of the burglary, and convicted of the larceny. (i)

Where the indictment was for a burglary and larceny, and the verdict was 'not guilty of the burglary, but guilty of stealing above the value of forty shillings in the dwelling-house;' and the entry

(e) R. v. Bird, 9 C. & P. 44, Bosanquet, J. It is not stated in the report by whom the house was occupied. C. S. G.

(f) R. v. Polly, 1 C. & K. 77, Erskine,

J. See now as to conclusions of indictments, vol. i. p. 37.

(g) R. v. Purcell, 1 Cox, C. C. 107.

(h) R. v. Vandercomb, 2 Leach, 708.

(i) R. v. Withal, 1 Leach, 88.

by the officer was in the same words; the judges held the finding sufficient to warrant a capital judgment. They agreed that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury; and that the minute was only for his future direction. (*j*)

It has been supposed, that upon an indictment against several persons for a burglary and larceny, the jury could not find one guilty of the burglary and another guilty of the larceny only, upon the same indictment, and the same evidence, as such a finding would shew that the offences of the several prisoners were of a distinct nature, and therefore ought not to have been included in the same indictment. (*k*) But by the opinion of a majority of the judges in a later case, it appears that upon an indictment for burglary and larceny against two, one may plead guilty of the burglary and larceny, and the other be found guilty of the larceny only. Upon an indictment against Moss and two others for burglary and stealing in the dwelling-house to the value of forty shillings, Moss pleaded guilty to the whole, and the other two were found guilty of stealing in the dwelling-house to the amount of forty shillings, but acquitted of the burglary. A case was saved upon the question how the judgment should be entered, and seven of the judges thought that it might be entered against all the three prisoners; against Moss for the burglary and capital larceny, and against the other two for the capital larceny; Burrough, J., and Hullock, B., thought otherwise, but Hullock B., thought that if a *nolle prosequi* were entered as to Moss for the burglary, judgment might be entered against all the three for the capital larceny. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking. (*l*)

Three persons were indicted for burglary, with intent to steal certain articles named in the indictment; the indictment contained only one count. The evidence against two of them was, that they broke and entered, and stole some hens; the evidence against the third was, that he stole a sack of flour, from the same house, in conjunction with the other two, but there was no evidence that he was a party to the burglary. Parke, J., thought that upon this indictment the two first could not be convicted of burglary, and

(*j*) *Hungerford's case*, 2 East, P. C. c. 15, s. 28, p. 518. Many of the judges thought that an entry, 'not guilty of the breaking and entering in the night, but guilty of the stealing, &c.,' would be more correct. But it appeared upon inquiry to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict 'not guilty of murder, but guilty of manslaughter;' or, 'not guilty of murder, but guilty of feloniously killing and slaying;'

and yet murder includes the killing. See R. v. Withal, 1 Leach, 88. 2 East, P. C. c. 15, s. 28, p. 517. *Comer's case*, 1 Leach, 36. 2 East, P. C. c. 15, s. 28, p. 516.

(*k*) *R. v. Turner*, 1 Sid. 171. 2 East, P. C. c. 15, s. 28, p. 519.

(*l*) *R. v. Butterworth*, MS. Bayley, J., and R. & R. 520. An analogous case is the conviction of one for murder, and another for manslaughter on an indictment for murder. See vol. iii., *Murder*, C. S. G.

the other of larceny. He expressed doubts, but thought the jury had better convict all three of larceny in stealing the sack of flour; he was rather of this opinion, as the stealing the sack of flour, to which the third man was a party, was not in the contemplation of the other two when they committed the burglary, but was an after-thought. (m)

**Punishment of burglary.** — Burglary was at common law a felony within the benefit of clergy; (n) but a higher punishment was imposed by the provisions of several statutes now repealed. All the former statutes are now repealed, and by the 24 & 25 Vict. c. 96, s. 52, 'whosoever shall be convicted of the crime of burglary shall be liable, [at the discretion of the Court,] to be kept in penal servitude for life, [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' (o)

Sec. 54. 'Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (o) to be kept in penal servitude for any term not exceeding seven years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' (q)

Upon the trial of any offence mentioned in this chapter, the jury may convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted on an indictment for such attempt, under the 14 & 15 Vict. c. 100, s. 9.

## SEC. VII.

*Being armed, &c., at night with intent to break into houses, &c.*

In order to prevent the commission of felonies in the night, it is provided by the 24 & 25 Vict. c. 96, s. 58, that 'whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow, jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night

(m) Anonymous, 1 Lew. 36.

(n) 3 Inst. 63, 65. 4 Blac. Com. 228.

(o) The words in brackets are repealed by the Statute Law Revision Acts of 1892 & 1893. By the Penal Servitude Act 1891 (54 & 55 Vict. c. 69), for which see vol. i., p. 79, whenever a Court has power to award a sentence of penal servitude, the sentence may be, at the discretion of the Court, for not less than three years and not exceeding five years,

or any greater period authorised by the enactment, or the Court may, in its discretion, award imprisonment for any term not exceeding two years, with or without hard labour.

(q) It is clear that where, on a trial for burglary, the breaking and committing the felony in the house fail, a conviction may take place of the offence in this section, if the evidence proves that offence.

in any dwelling-house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, [at the discretion of the Court,] (r) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.] (s)

**After a previous conviction for felony, &c.** — Sec. 59. ‘Whosoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall on such subsequent conviction be liable, [at the discretion of the Court,] (r) to be kept in penal servitude for any term not exceeding ten years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour.] (t)

**Person found committing an offence.** — Sec. 103. ‘Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act (except only the offence of angling in the day-time), may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law.’ (u)

**Person suspected of felony in the night.** — Sec. 104. ‘Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.’ (v)

**Instrument capable of being used for house-breaking.** — On an indictment charging the prisoner with being found by night in possession of certain implements of house-breaking, to wit, one pair of pincers, ten keys, and one piece of iron, it appeared that the prisoner was found by night in possession of a number of house-door keys and a pair of pincers, all of which were of an ordinary description, such as are commonly used for lawful purposes, but which were capable from their nature of being used for purposes of house-breaking; it was objected that the articles were not any of those mentioned in the 14 & 15 Vict. c. 19, s. 1; but it was left to the jury to say whether the articles might be used for the purpose of house-breaking, and whether, at the time the prisoner was found in possession of them, he intended to

(r) The words in brackets are repealed but the punishment remains the same. See *ante*, p. 50, note o.

(s) This clause is taken from the 14 & 15 Vict. c. 19, s. 1. The distinction between this clause and sec. 54, *ante*, p. 50, as far as relates to being in a dwelling-house with intent to commit a felony, is this, that under sec. 54 the entry must be proved to have been in the night; but under this clause proof that the prisoner was in the dwelling-house by night with the intent to commit felony is enough, and it is unnecessary to prove whether he entered by day or by night.

(t) This clause is taken from the 14 & 15 Vict. c. 19, s. 2. See sec. 116, *post*, *Larceny*, for the form of indictment and proceedings thereon under this clause.

(u) The clause also provides for the issuing of warrants to apprehend and search for stolen goods, &c.

(v) Any person ‘found committing any indictable offence in the night’ may be apprehended by any person, 14 & 15 Vict. c. 19, s. 11; and if the person liable to be so apprehended assaults the person apprehending him, &c., he is guilty of a misdemeanor by sec. 12 of the same Act. See vol. iii.

use them as instruments of house-breaking, and the jury having found him guilty it was held that the conviction was right; for any instrument capable of being used for the purpose of house-breaking, where the prisoner has it in his possession for the purpose of house-breaking, was within the statute. (*w*)

Where several persons are engaged in a common purpose of house-breaking, and one only is armed, all are armed within the meaning of the section. (*x*)

Where on an indictment for having in possession without lawful excuse certain implements of house-breaking the jury found the prisoner guilty of the possession without lawful excuse, but that there was no evidence of an intent to commit a felony, and the indictment omitted the words 'with intent to commit felony,' it was held that the omission did not render the indictment bad, and that it was not necessary to prove an intent to commit a felony. (*y*)

An indictment alleged that the prisoners were found by night armed with a loaded gun, with intent then to break and enter a building, to wit, a malting, and to commit a felony therein. The prisoners were found in a field adjoining to three separate maltings, and were going in a direction which would lead them to any one of the three. The maltings were in the occupation of three different persons. It was objected that the indictment ought to have stated the ownership of the building, and where it was situate, and, on a case reserved, it was contended that a particular intent must be alleged and proved. Cockburn, C. J., 'The first question is, what is the offence created by the Legislature. According to the contention for the Crown, any man found by night with a dangerous or offensive weapon, or some instrument from which it is impossible to doubt that he is going to break into some house or building, is guilty of a misdemeanor. I do not think that is so, and I am of opinion that there must be a definite intention to break into some particular house. As to whether there must be an intention to commit a particular felony, upon that point I say nothing. It is not enough to say that a man intended to break into a house generally. The rules of criminal pleading must not be lost sight of, and it must not be forgotten that there is no opportunity of getting a new trial in criminal cases on the ground of surprise, or that if the defendant had had a better knowledge of what the nature of the offence charged was, he might have been able to meet it. The jury and the prisoner ought to know the precise offence charged against the prisoner, and as this does not appear on the indictment, I think the conviction cannot be sustained.' Pollock, C. B., 'If a man is found at night with a pair of pistols and burglarious instruments upon him, under circumstances that there can be no doubt that he is out for a criminal purpose, the statute never intended that such a case as that should be the subject of penal servitude.' Williams, J., 'I think it is necessary to specify the ownership and situation of the premises the defendant intended to break into.' Crompton, J., 'I think that the indictment is good only in

(*w*) *R. v. Oldham*, 2 Den. C. C. 472, 21 L. J. M. C. 134.

(*x*) *R. v. Thompson*, 11 Cox, C. C. R. 362.

(*y*) *R. v. Bailey*, Dears. C. C. 244.

case it shews an intention to break and enter some definite dwelling-house or building, and to commit some definite felony therein.' (z)

(z) *R. v. Jarrold*, L. & C. C. C. 301, 32 L. J. M. C. 258. Bramwell, B., concurred. With all deference it is submitted that this decision is clearly erroneous. The ground on which Cockburn, C. J., rests the decision of the first point is answered by the second clause of the same section, for under it the mere possession, without lawful excuse, of any instrument of house-breaking in the night, constitutes the offence, without any intent to commit any felony at all. (*R. v. Bailey*, *supra*), and this offence is plainly one step further from the attempt to commit a felony than where the intent to commit some felony exists, though the particular felony is not yet fixed. The case put by Pollock, C. B., is clearly within the second clause as far as 'burglarious instruments' are concerned, even without the purpose there specified. The very section itself, therefore, negatives the ground on which the decision of the first point was rested. It is to be remembered, too, that the 14 & 15 Vict. c. 19, was 'an Act for the better prevention of offences,' and the preamble recited that 'it was expedient to make further provision for the prevention of burglary and other offences in the night;' and how those offences can be better prevented than by nipping the intent in the bud before it has assumed a definite and specific object it is difficult to conceive; and it cannot be doubted that this decision, instead of promoting the object of the Act in this respect, is substantially a repeal of it; for it is hardly conceivable that, in the majority of cases, it will be possible to prove an intent to commit any particular felony.

As to the second point, viz., the rules of criminal pleading, these seem, in this case, to have been misconceived. It is quite a mistake to suppose that these rules require the specification of particulars where it is impracticable to specify them. Wherever this is the case, the rules allow general or other statements instead. The names of the inhabitants of counties or parishes need never be stated. Where the name of an individual is not known, he may be described as unknown; and — what is precisely opposite to the present case — where a criminal purpose is intended, but the offenders have

not proceeded far enough to fix the particular individuals to be victimised, they need not be particularly named: thus where a conspiracy was entered into to injure persons who should on a future day purchase stock, it was held that it was unnecessary to specify the particular persons intended to be injured. *R. v. De Berenger*, 3 M. & S. 67. And this case has been followed in many subsequent cases. See *R. v. King*, 7 Q. B. 782, in error. These cases are exactly in point with a case like this, where the prisoners intended to commit a felony in one of three buildings, but had not yet made up their minds in which it should be; and if the prisoners in this case had been indicted for conspiring to commit a felony, it is quite clear the particular felony need not have been specified. An indictment for having possession of counterfeit coin, with intent to utter it, never specifies the persons to whom it was intended to be uttered.

This clause was framed partly from the 5 Geo. 4, c. 85, s. 4, under which persons frequenting certain places, 'with intent to commit felony,' are summarily punishable. No objection has ever been taken to any conviction under that Act on the ground that the felony intended was not specified; and in *R. v. Brown*, 17 Q. B. 833; *In re Jones*, 7 Exch. R. 586; *Sewell v. Taylor*, 7 C. B. (N. S.), 160; and *In re Davis*, 2 H. & N. 149, the only statement was, 'with intent to commit felony,' and the attention of the Court was expressly called, in two of those cases, to this expression; for it was objected that the word 'there' ought to have been added to it. It seems, also, to be now settled that, in an indictment for burglary, it is unnecessary to state whose goods the prisoner intended to steal. See *ante*, p. 42. As to the prisoner being informed by the indictment of the charge he has to meet; practically, the prisoner is much better informed of the charge by the depositions, and, if in any case there be any real doubt as to what the precise charge is, the Court always orders a particular of the charges to be delivered to the prisoner. The above judgments are from 9 Cox, C. C. 307. C. S. G.

## CHAPTER THE SECOND.

### OF SACRILEGE, OR BREAKING INTO ANY CHURCH OR CHAPEL, AND COMMITTING A FELONY THEREIN.

THE former enactments (*a*) which related to this offence are repealed; but by the 24 & 25 Vict. c. 96, s. 50, 'Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit *any felony* therein, or being in any church, chapel, meeting-house, or other place of divine worship shall commit *any felony* therein and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*b*) to be kept in penal servitude for life, [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.] (*c*)

**Principals in the second degree and accessories.** — Principals in the second degree and accessories before the fact are punishable like the principals in the first degree, and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years, by sec. 98 of the Act.

**Church tower.** — Upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared that the surplices and scarf were stolen from a box kept in the church tower; this tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind; it was objected that the stealing these articles deposited in the tower was not sacrilege; but it was held that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church within the meaning of the 7 & 8 Geo. 4, c. 29, s. 10. (*d*)

**Vestry.** — An indictment alleged that the prisoners broke and entered a church, and stole the sacramental plate: the plate was kept

(*a*) 23 H. 8, c. 1; 1 Ed. 6, c. 12; 7 & 8 Geo. 4, c. 29, s. 12.

(*b*) The words in brackets are repealed but the punishment remains the same. See *ante*, p. 50, note (*o*).

(*c*) This clause is framed on the 7 & 8 Geo. 4, c. 29, s. 10, and 9 Geo. 4, c. 55, s. 10 (1.). The words, 'meeting-house, or other place of divine worship,' were in the latter and not in the former Act. The former enactments were confined not only

to stealing, but to stealing any chattel, *R. v. Rourke*, R. & R. 386. See *R. v. Nixon*, 7 C. & P. 442. *R. v. Baker*, 3 Cox, C. C. 581, where it was held that stealing fixtures was not within the repealed enactments, 7 & 8 Geo. 4, c. 29, s. 44. The present clause includes 'any felony,' therefore these cases are no authority under the present enactment.

(*d*) *R. v. Wheeler*, 3 C. & P. 585, J. A. Parke, J.



in a chest in the vestry; the vestry had in old time been in the porch of the church, and when the church was altered the porch was turned into the vestry room: it had never been used for vestry purposes, but only for the robing of the clergyman, and the custody of the sacramental plate; it had a door opening into the body of the church, and another door opening into the churchyard, but this latter door was always kept locked in the inside. The vestry window had been broken, and an entrance gained thereby. Coleridge, J., held that this vestry was as much a part of the church for the purpose of this indictment as the nave. (e)

'Chapel.' — The word 'chapel,' in the 7 & 8 Geo. 4, c. 29, s. 10, meant a chapel where the rites and ceremonies of the Church of England were performed, and did not include the chapels of Dissenters. (f) But the new clause is so framed as to include every place of religious worship.

**Statement of property.** — The goods of a Dissenting chapel, vested in trustees, cannot be described as the goods of a servant, who has merely the care of the chapel and the things in it, to clean and keep them in order, though he have the key of the chapel, and no person except the minister have another key. (g) Upon an indictment for stealing a bible and hymn-book, the property of J. Bennett and others, it appeared that the books had been presented to the Society of Wesleyan Methodists, from whose chapel they had been stolen, and they had been bound at the expense of the society; Bennett was one of the trustees of the chapel, and a member of the society, but no trust deed was produced; it was held that as Bennett was one of the society, the property of the books was well laid in him 'and others.' (h)

Where the bells, books, or other goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners. (i) And, it is said, that he who takes away the goods of a chapel or abbey, in time of vacation, may be indicted, in the first case, for stealing *bona capellæ*, being in the custody of such and such; and, in the second, for stealing *bona domûs et ecclesiæ*, &c. (j)

An indictment alleged that the prisoners broke and entered a church and stole a certain box, and a quantity of silver and copper coin being in the said church, and the property was laid in the first count in C. T. Wilson (who was one of the churchwardens of the parish) and another; and in the second count in J. Nussey (who was the vicar) and others; and in the last count in S. Tibbetts (who was one of the parishioners) and others. The prisoners were convicted of stealing only, and it was objected that the box was affixed to the freehold, and that there was no count properly framed for stealing a fixture: and, in addition, there was no count laying the property in the vicar, in whom the freehold of the church was vested. The box

(e) R. v. Evans, C. & M. 298.

(f) R. v. Warren, 6 C. & P. 335, note (a). S. P. R. v. Richardson, 6 C. & P. 335. R. v. Nixon, 7 C. & P. 442.

(g) R. v. Hutchinson, R. & R. 412, *post*, tit. *Larceny*.

(h) R. v. Boulton, 5 C. & P. 537, J. A. Parke, J.

(i) 1 Hale, 512. 2 Hale, 81. 1 Hawk. P. C. c. 33, s. 45. 2 East, P. C. c. 16, s. 69, p. 651.

(j) 1 Hale, 512. 2 Hale, 81. 1 Hawk. P. C. c. 33, s. 45. 2 East, P. C. c. 16, s. 69, p. 651. All which rest on the Year Book, 7 Ed. 4, pl. 1, p. 14.

was a very ancient box firmly fixed by two screws at the back to the outside of a pew, in the centre aisle of the church, and by a third screw to a supporter beneath, and over the box was an ancient board with the inscription painted thereon, 'Remember the Poor.' There were two locks to the box, but no evidence was given to shew in whose custody the keys were kept, nor was there any evidence that the money had ever been taken out by the churchwardens or any other person for the purpose of being distributed, although it was proved that both silver and copper had from time to time been dropped in the box. It was contended that the churchwardens could have no property, as churchwardens, in this money; that in no view of the case could the vicar and any others have the property; and that, even if it belonged to the parishioners (which, it was argued, could not be the case), the property should have been laid in them as parishioners; but, upon a case reserved, the judges were unanimously of opinion that the prisoners were properly convicted on the second count. They thought that the box might be presumed, in the absence of any evidence to the contrary, to have been placed in the church pursuant to Canon 84, (*k*) and that the money therein placed was constructively in the possession of the vicar and churchwardens, who jointly are not a corporation, and therefore were properly described in the second count. (*l*)

Upon the trial of any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted upon an indictment for such attempt.

(*k*) Burn's Ecc. Law, tit. Church.

(*l*) R. v. Wortley, 1 Den. C. C. 162.

## CHAPTER THE THIRD.

### OF HOUSE-BREAKING.<sup>1</sup>

BESIDES the nocturnal house-breaking, or burglary, which has been treated of in the first chapter of this book, the law of England, in its especial regard for the safety and security of the habitation of man, provided by several statutes that the forcible invasion of the dwelling-house of another, or house-breaking, when accompanied with felony, should be liable to capital punishment, though committed in the day-time.

The former statutes upon this subject have been repealed; but by the 24 & 25 Vict. c. 96, s. 56, 'Whosoever shall break and enter any dwelling-house, *school-house*, shop, warehouse, or counting-house, and commit *any felony* therein, *or being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same*, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](b)

Sec. 53 provides and enacts, that 'no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

Principals in the second degree, and accessories before the fact, are punishable as the principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years, by sec. 98 of the Act. (c)

By analogy to the cases decided upon the repealed statutes (d) it is conceived that such a breaking and entering as would, if com-

(a) The words in brackets are repealed but the punishment remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 29, ss. 12, 15, and 9 Geo. 4, c. 55, ss. 12, 15 (I.). The former enactments are extended to any school-house, and the clause is extended to 'any felony,' and by the

other words in italics, the offences are made very similar to burglary.

(c) See vol. i. p. 190.

(d) 1 Hale, 522, 523, 526, 548. 2 Hale, 352, 353. 1 Hawk. P. C. c. 34, ss. 2, 3. 2 Hawk. P. C. c. 83, ss. 88, 92. Fost. 108. 2 East, P. C. c. 16, s. 61 s. 72, p. 636, s. 75, p. 638.

#### AMERICAN NOTE.

<sup>1</sup> There are various statutes in American States which in the main follow the wording of English statutes with respect to stealing in particular places, such as "house," "dwelling-house," "shop," "building," &c.; and, in the language of one of the

American judges, "It has always been held that the construction previously given to the same terms by the English Courts is the construction to be given to them by our Courts." C. v. Harnett, 8 Gray, 450, per Metcalf, J.

mitted in the night, constitute a burglary, will be necessary, in order to bring a case within the present statute. And so also any breaking and entering which would be sufficient in a case of burglary, would be sufficient under this Act. Thus, where the prisoner burst open an inner door in the inside of a house, and so entered a shop in order to steal money from the till, it was held that this was a sufficient breaking to support an indictment for house-breaking. (*e*)

Under the former statutes there must have been not only a breaking and entering, but also a larceny in the house, and in order to constitute the offence under sec. 56 of the new Act, there must be some felony committed in the house.

But it was not necessary, under the former statutes, that the chattel should be taken out of the house. Before the 7 & 8 Geo. 4, c. 29, the least removal of the goods from the place where the thief found them, though they were not carried out of the house, was sufficient, as in other larcenies, (*f*) and the same was held under that statute. Upon an indictment for house-breaking, it appeared that the prisoner, after having broken into the house, took two half sovereigns out of a bureau, in one of the rooms, but, being detected, he threw them under the grate in that room; it was held, that if they were taken with a felonious intent, this was a sufficient removal of them to constitute the offence. (*g*)

A person present at the breaking and entering, but not at the stealing, is guilty of the whole offence. Upon an indictment against Jordan, Sullivan, and May, for house-breaking, it appeared that Jordan and Sullivan accompanied May, who was to secrete himself in the house, so that during the night he might commit the robbery; and that the door being latched, they assisted him in gaining admission, by opening an umbrella to screen him from observation while he entered; but they went away soon after he got in, and were not seen near the place again until after the robbery had been committed; it was held that as Jordan and Sullivan were present at the commencement of the transaction, they must be considered as guilty of the whole. There had been a case of burglary where the breaking was one night, and the entry the next, and the judges had decided that a party, who was present at the breaking, and not present at the entering, was guilty of the whole, and that this was a much stronger case than that. (*h*)

An indictment for house-breaking is good, if it alleges that the prisoner broke and entered the dwelling-house, and the goods of A. B. 'in the said dwelling-house then and there being found, then and there (omitting "in the said dwelling-house,") feloniously did steal.' (*i*)

**Description of the house.** — The same accuracy in the statement of the ownership and situation of the dwelling-house is necessary in this offence as in burglary, and it is sufficient to refer to the authorities on

(*e*) *R. v. Wenmouth*, 8 Cox, C. C. 348.

(*f*) 2 East, P. C. c. 16, s. 75, p. 639.

(*g*) *R. v. Amier*, 6 C. & P. 344. J. A. Park, J.

(*h*) *R. v. Jordan*, 7 C. & P. 432, Gaselee, J., and Gurney, B. See this case, *ante*, p. 38.

(*i*) *R. v. Andrews*, C. & M. 121, and MS. C. S. G., Coleridge, J., overruling *R. v. Smith*, 2 M. & Rob. 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided.

these subjects collected in the previous chapter. (*j*) But it must be remembered that any error in these matters may now be amended under the 14 & 15 Vict. c. 100, s. 1. (*k*)

It seems, also, that questions which may arise upon the statute, as to what shall be deemed a *dwelling-house*, must be governed by the same rules as apply to similar questions in cases of burglary, keeping in mind the enactment before mentioned as to buildings within the curtilage. A chamber in one of the Inns of Court was held to be a dwelling-house within the repealed statute, 39 Eliz. c. 15. (*l*)

Upon an indictment for burglary and stealing, if it be proved that the prisoner broke and entered, but not in the night-time, he may be convicted of house-breaking if any goods are stolen. (*m*) So on an indictment for house-breaking and stealing goods therein, if it be not proved that the prisoner broke into the house, he may be convicted of larceny.

Upon the trial of an indictment for house-breaking the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the defendant of an attempt to commit the same, and thereupon he may be punished as if he had been convicted on an indictment for such attempt. (*n*) But they can only convict of the attempt to commit the identical offence charged in the indictment. (*o*)

(*j*) See particularly *R. v. Brookes*, *ante*,  
p. 45.

(*k*) See the clause, vol. i. p. 54.

(*l*) *R. v. Evans*, Cro. Car. 473.

(*m*) *R. v. Compton*, 3 C. & P. 413, Gas-  
lee, J.

(*n*) See the section, vol. i. p. 62.

(*o*) *R. v. M'Pherson*, D. & B. 197, vol. i.  
p. 63.

## CHAPTER THE FOURTH.

### OF STEALING IN A DWELLING-HOUSE, ANY PERSON THEREIN BEING PUT IN FEAR.

THE former enactments on this subject (*a*) are repealed, and by the 24 & 25 Vict. c. 96, s. 61, 'Whosoever shall steal any chattel, money, or valuable security (*b*) in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, (*c*) shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*d*) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'] (*e*)

Principals in the second degree and accessories before the fact are punishable like principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years, by sec. 98 of the Act. (*f*)

Sec. 53 prevents any building, although within the same curtilage, from being deemed part of the dwelling-house, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other. And the observations in the preceding chapter, upon questions which may arise as to what shall be deemed a dwelling-house, will apply to the offence now under consideration. It is clear that no breaking of the house is necessary to constitute this offence; and it should seem that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some person therein should be put in fear. (*g*) But questions of difficulty may perhaps arise as to the degree of fear which must be excited by the thief. Where, however, the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was holden not to be a stealing in the dwelling-house. (*h*)

(*a*) 3 W. & M. c. 29, s. 1, 7 & 8 Geo. 4, c. 29, s. 12, and 7 Will. 4, & 1 Vict. c. 86, s. 5.

(*b*) As to what property is included in these words, see sec. 1, *post*, *Larceny*.

(*c*) The words in the 7 & 8 Geo. 4, c. 29, s. 12, were, 'any person therein being put in fear,' which might be without any menace or threat. C. S. G. Little's case, 1 Lewin, 201. 2 East, P. C. c. 16, s. 71, p. 635.

(*d*) The words in brackets are repealed,

but the punishment remains the same. See *ante*, p. 50, note (*o*).

(*e*) This clause is taken from the 7 Will. 4, & 1 Vict. c. 86, s. 5.

(*f*) See vol. i. p. 190.

(*g*) See *Burglary, ante*, p. 8, and 2 East, P. C. c. 16, s. 55, p. 623.

(*h*) R. v. Leonard, Cheshire Special Com. 1842. Arch. C. P. 340. It is submitted, with all deference, that this decision is erro-

**Menaces.** — Upon sec. 45, which relates to demanding any property ‘with menaces or by force,’ it has been held that the menaces must be of such a nature and extent as to unsettle the mind of the person on whom they operate, and to take away from his acts that element of free voluntary action which alone constitutes consent; and it is a question for the jury whether the evidence in any particular case comes within that principle.<sup>(i)</sup> There is, however, a marked distinction between the two sections. Under sec. 61, not only must menaces be used, but they must put some one ‘in bodily fear;’ but, under sec. 45, if menaces are used with the intent there specified, no one need be put in fear.

Higgins and Murphy were indicted for stealing two pistols and a watch in a dwelling-house, and by menaces putting J. Lewellyn and J. Evans, clerk, then being in the house, in bodily fear; and a second count charged them with stealing in the house to the value of £5. Higgins pleaded guilty. The prisoners and four others went to the house in the evening, some of them having their faces blackened, and others having crape over their faces. Higgins and the four other men went into the house, and ordered the servant boy and maid to sit to the wall with their backs to them, and on no account to look round. A lady ran to the rectory for assistance, and the Rev. J. Evans ran to the rescue, and was caught by both shoulders by a man, who said, ‘You are the very man we want,’ and forced him gently forward without hurting him or trying to hurt him, to the front door, where he was received by a man with crape over his face and a pistol in his hand, who made him sit down in the hall, with his face to the wall, and ordered him to make no noise. There he found by his side two or three more of his neighbours, who, on coming to the rescue, had been caught and treated in the same way. In the meantime some other of the robbers ransacked the house, and, when that was done, Mr. Evans was taken into the dairy, and three men, with pistols in their hands, taking him for the master of the house, required him to tell where the money was. He said he was a stranger. One of them proceeded to search his pockets; another said, ‘Blow out his brains, and do not waste time.’ He was a little frightened at this, and at the sight of the pistols. His pockets were searched, and £20 taken from him. Murphy had admitted that he was at the robbery, but that he merely met the parties outside, and handed them to the front door, and denied that he knew of the violence or the robbery of Mr. Evans, and said that he had told the others that if they hurt any one he would leave them. Two pistols and a watch were stolen from the house. Lewellyn, the servant, said he was not alarmed when he was put against the wall. Williams, J., ‘The question is, whether Murphy took such a part as to be responsible for the acts of the others. If you think he was one of the party who went to rob, and was there standing at the door to render assistance, then he is responsible for the robbery equally with the persons actually taking

neous; the law looks on an act done under the compulsion of terror as the act of the person causing that terror just as much as if he had done it actually with his own hands. Any asportation, therefore, of a chattel

under the effects of terror is in contemplation of law the asportation of the party causing the terror. C. S. G.

(i) R. v. Walton, L. & C. 288, 9 Cox, C. C. 268. See this case, *post*.

the money; so if their common purpose was by their conduct to inspire terror, then the prisoner is responsible for the acts of the others. If you think there was a common purpose to rob, you will say so; and if you think there was a common purpose to use threats, you will say so. As to the first question, to which the second count applied, there cannot be any doubt, if you believe the evidence. Then as to the first count, the prisoner's own statement put it beyond a doubt that the plan was to put the persons' faces to the wall. You will say whether that is not an intention to obtain money by threats. Then comes the question whether the persons were not put in bodily fear. The threat to blow out Mr. Evans's brains was done outside the house. That alone is not sufficient within the words of the statute; but it is a circumstance from which you may infer the line of conduct within the house. You cannot doubt that such conduct, and the use of such language, must inspire fear, however unwilling the witnesses may be to admit they were terrified.'(j)

It was decided upon the 3 Wm. & Mary, c. 9, that the indictment must expressly allege that some person in the house was put in fear by the prisoner. (k) But, if there is no such allegation, the prisoner may be convicted of the larceny. (l)

Upon the trial of any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict of an attempt to commit such offence; and thereupon the prisoner may be punished as if he had been convicted on an indictment for such attempt.

An indictment for attempting to steal goods in a dwelling-house described them simply as 'the goods and chattels of T. Roe:' and on a case reserved it was held good. Where an indictment charges an actual stealing, the goods must be specified; but where an attempt to steal only is charged, it is not necessary to specify the goods, for it cannot be said beforehand what the prisoner intended to steal. (m)

(j) *R. v. Murphy*, 6 Cox, C. C. 340. It is not stated, but it is presumed, that the pistols and watch were worth £5, and that the money stolen from Mr. Evans was not taken into account.

(k) *R. v. Etherington*, 2 Leach, 671. 2

*East*, P. C. c. 16, s. 71, p. 635. *R. v. Marshall*, R. & M. C. C. R. 158.

(l) 2 Leach, 673.

(m) *R. v. Johnson*, 10 Cox, C. C. 13. *L. & C.* 489. 34 L. J. M. C. 24.



## CHAPTER THE FIFTH.

### OF STEALING IN A DWELLING-HOUSE TO THE VALUE OF FIVE POUNDS OR MORE.

THE former enactments on this subject (a) are repealed; and by the 24 & 25 Vict. c. 96, s. 60, 'Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, (b) to the value in the whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (c) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.] (d)

Principals in the second degree and accessories before the fact are punishable like principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years; by sec. 98 of the Act.

According to the construction put upon the 12 Anne, c. 7, (which related to a stealing of this kind to the value of forty shillings) the dwelling-house must be one in which burglary might be committed. (e) But with respect to buildings within the curtilage, the 24 & 25 Vict. c. 96, s. 53, enacts, that no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house, for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered or inclosed passage leading from the one to the other. (f)

The repealed statute of 12 Anne ousted of clergy every person who should feloniously steal any money, goods, &c. of the value of forty shillings or more, *being in any dwelling-house*; the recent statute enacts, that if any person shall *steal in any dwelling-house* any chattel, &c.; but it has been construed upon the same principle, and considered as intended to give greater security only to property deposited in a house, so as to be under the protection of the house, and not to property about the person of the party from whom it is stolen.

(a) 12 Anne, c. 7, 7 & 8 Geo. 4, c. 29, s. 12, and 9 Geo. 4, c. 55, s. 12 (1.).

(b) As to what property is included in these words, see sec. 1, *post*, *Larceny*.

(c) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note a.

(d) This clause is taken from the 7 & 8

Geo. 4, c. 29, s. 12, and 9 Geo. 4, c. 55, s. 12 (1.).

(e) 2 East, P. C. c. 16, s. 81, p. 644, Davies's *alias* Silk's case, *ante*, p. 22; and other cases cited in the Chapter on *Burglary*, *ante*, p. 14, *et seq.*

(f) See *ante*, p. 15, *et seq.*

Where an indictment under the 7 & 8 Geo. 4, c. 29, s. 12, charged the prisoner with stealing in his own house various chattels above the value of five pounds, and the prisoner was convicted, the question was reserved whether the offence amounted to that of stealing to the value of five pounds in the dwelling-house (the house being that of the prisoner himself), or only to a charge of simple larceny, in order to determine what sentence would be legal, and the judges all thought the conviction for the whole offence right. (*g*) The prisoner lodged at Wakefield's, and having invited the prosecutor to sleep in his room, stole the prosecutor's watch whilst it was hanging at the bed's head; and he was convicted of stealing to the value of forty shillings in the dwelling-house of Wakefield; [neither Wakefield nor any of his family knew of the prosecutor's being there; so that he was the guest of the prisoner, and it was doubted whether the prisoner was not to be considered as the owner of the house with respect to the prosecutor; but] upon a case reserved, seven judges against three held the conviction right. (*h*) Upon an indictment for stealing in the dwelling-house under the 7 & 8 Geo. 4, it appeared that the prosecutor had gone with the prisoner, who was a prostitute, to a house, where they were shewn into a room, for which he paid; he fastened the door, and put his watch in his hat, which he placed upon a table, and then went to bed with the prisoner, and went to sleep, and she, while he was asleep, stole the watch; it was suggested that this was not a case within the statute, as the property was not under the protection of the house, which was essential to support the indictment, but under the protection of the person of the prosecutor. Parke, B., and Patteson, J., having considered the point and looked into the cases, said that the preceding case was an authority in support of the indictment; they therefore were of opinion that under the circumstances, and the prosecutor having been asleep when the watch was taken by the prisoner, it was sufficiently under the protection of the house to bring it within the statute. (*i*) So if one, on going to bed, put his clothes and money by the bedside, these are under the protection of the dwelling-house, and not of the person; therefore a party stealing them was held rightly convicted on an indictment for stealing in a dwelling-house; and the question whether goods are under the protection of the dwelling-house, or in the personal care of the owner, is a question for the Court and not for the jury. (*j*) But where money was stolen from under the pillow of a person sleeping in a dwelling-house, it was held, that the case was not within the repealed statute. (*k*) So

(*g*) *R. v. Bowden*, 2 M. C. C. R. 285. In 1 C. & K. 147, it is stated that the facts were that the prosecutor had left a box of jewellery goods in the prisoner's house, which the prisoner stole. It was held in two cases that the statute of Anne did not extend to stealing in a man's own house. *R. v. Thompson*, 1 Leach, 338. 2 East, P. C. c. 16, s. 81, p. 644. Gould's case, 1 Leach, 217. 2 East, P. C. c. 16, s. 81, p. 644.

(*h*) *R. v. Taylor*, MS. Bayley, J., and *R. & R.* 418. I have inserted the statement between the brackets from *R. & R. C. S. G.*

(*i*) *R. v. Hamilton*, 8 C. & P. 49,

Parke, B., and Patteson, J. It is said in a note to this case, 'it would appear that had the prosecutor been awake instead of asleep, in Taylor's case, the property was sufficiently within his personal control to render the stealing of it a stealing from the person;' but it is not stated in the report of *R. v. Taylor* that the prosecutor was asleep, though probably that might be the case. C. S. G.

(*j*) *R. v. Thomas*, Carr. Supp. 295, 3rd edit. C. R.

(*k*) Anonymous, 2 Stark. C. P. 467, note (a), Chambre, J. Mr. Starkie adds,

where a guest, when in bed at an inn, placed his small-clothes containing his money under his head and they were stolen, and the indictment was on the 12 Anne, c. 9, for stealing to the amount of forty shillings in the dwelling-house, it was held that the property having been thus taken under the party's personal protection, it was no longer under the protection of the house. (*l*) Where two boxes, belonging to a Mrs. Douglas, who lodged at 38, in Rupert-street, were delivered at No. 33 in the same street, where the prisoner lodged, by a porter from the Green Man and Still, (but whether by accident or collusion with the prisoner was not proved, as the porter, though called upon his recognizance, did not appear,) and the occupier of the house, No. 33, took them in and paid the portorage, supposing them to be for the prisoner, whose name she did not know, as he had recently taken his lodging with her. Shortly afterwards when the prisoner came she told him of the arrival of the boxes, and of the portorage she had paid, when he said it was all right and he would pay her again. The boxes were put into his room, and he went out two or three times in the course of the evening, carrying bundles each time, and when he went out the last time he did not return again. The boxes were found entirely ransacked. The jury found the prisoner guilty, but upon a doubt whether these goods were sufficiently under the protection of the house to bring the case within the statute, the point was submitted to the judges, who held that the goods were under the protection of the dwelling-house, and that the capital conviction was therefore proper. (*m*)

In a case upon the same statute, where the indictment was for stealing a bank-note of the value of £25, in the dwelling-house of one C. M. Adams, it appeared that the prisoner was a lodger in Mrs. Adams's house, and that, on the day on which the offence was committed, she, wanting to get the note changed, sent her servant with it to his apartments, to request him to give her change for it; when the prisoner after examining his purse, and saying that he had not gold enough about him for the purpose, but that he would go to his bankers and get it changed, left the house with the note in his hand, and never returned. Upon these facts a question arose, whether the case was within the statute, which was considered as having been made to protect such property as might be deposited in the house, and not property which was on the person of the party: and the point having been saved for the opinion of the judges, they were of opinion that the case was not within that statute. (*n*) And, upon the same principle, where a person, in possession of a large sum of money, was deluded by a ring-dropper, who pretended to have found a purse, to go into a public-house, and share its contents, and there induced to lay his money on the table, when the ring-dropper immediately took up the money, and carried it off, it was decided, upon reference to

\* but Ward was convicted and received sentence of death in a similar case, *cor.* Bayley. J., Lancaster Sum. Ass. 1814. *Note.* Ward was a guest at an inn.' See the next note. C. S. G.

(*l*) R. v. Challenor, Dick, Q. S. 245, 5th edit. J. A. Park, J., who said that Ward's case (see the last note), held to the

contrary, might have turned on some peculiar circumstances.

(*m*) R. v. Carroll, R. & M. C. C. 89. See R. v. Mucklow, R. & M. C. C. R. 160, *post*, tit. *Larceny*.

(*n*) Campbell's case, 2 Leach, 564. 2 East, P. C. c. 16, s. 82, p. 644, 645.

the judges, that the case was not within that statute. A majority of them were of opinion that, in order to bring a case within that statute, the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, or money kept in the house, and not things immediately under the eye, or personal care of some one who happened to be in the house. (o)

**Stealing to the amount mentioned in the statute at one time.** — It was decided upon the statute of Anne, that it was necessary the stealing should be to the amount of forty shillings *at one time*. (p) But where property was stolen at one time to the amount of forty shillings, and a part of it only, not amounting to forty shillings, was found upon the prisoner, and produced at the trial, the Court left it to the jury to say whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (q)

Upon an indictment under the repealed Act of 7 & 8 Geo. 4, c. 29, s. 12, for stealing lace in the dwelling-house to more than the value of £5, it appeared that the prisoner sent the lace, which was in several distinct pieces, in a parcel from his master's shop, and no one piece of lace was worth £5; it was suggested that *in favorem vitæ* the judge would take it that the pieces of lace might have been stolen at different times. Bolland, B., 'I cannot assume that to have been so; we find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once; and unless you give some evidence to shew that it was stolen at different times, you do not raise your point; but even if you did, I should think it would be of no avail; for on the last Winter Circuit it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this person did; for it was shewn that he stole the articles, one or two at a time, and under the value of £5, but that he carried them out of his master's house all together, the articles amounting in all to more than £5 value, and Garrow, B., after much consideration, held that as the articles were all brought out of the house together, it was a capital offence.' (r)

(o) Owen's case, 1 Hawk. P. C. c. 36, *Of Larceny from the Dwelling-house*, s. 6. 2 Leach, 572. 2 East, P. C. c. 16, s. 82, p. 645. And the same point was again decided in Castledine's case, O. B. Oct. 1792, which was also referred to the judges; and again in Watson's case. See 2 Leach, 574, note (a). 2 Leach, 640. 2 East, P. C. c. 16, s. 82, p. 645, 646, and s. 107, p. 680, 681.<sup>1</sup>

(p) Petrie's case, 1 Leach, 294.

(q) Hamilton's case, 1 Leach, 348. The

jury found the prisoner guilty of stealing goods in the dwelling-house to the value of forty shillings.

(r) R. v. Jones, 4 C. & P. 217, Bolland, B. See R. v. Dyer, 2 East, P. C. c. 16, s. 154, p. 767, 768, and R. v. Atwell, *ibid.* C. S. G. See also R. v. Shepherd, 37 L. J. M. C. 45; R. v. Thoman, 12 Cox, C. C. R. 54, a case of malicious injury to property. See both cases, *post*, tit. *Larceny*.

#### AMERICAN NOTE.

<sup>1</sup> One having money in a satchel temporarily deposited it on the counter of another person's banking-house, and whilst the owner of the satchel was standing within two feet of it a thief abstracted the money, and it was held that this was a larceny from a house. *Simmons v. S.*, 73 Ga. 609; 54 Am. R. 885. So to steal a watch from a post on which it was hanging under cover of the roof of a house. *Burge v. S.*, 62 Ga. 170; but

not where the owner of a shop put a watch into the hands of a thief who pretended to be a customer and ran away with the watch as soon as the owner's back was turned, for the watch had passed from the protection of the building. *C. v. Lester*, 129 Mass. 101; *C. v. Nott*, 135 Mass. 269. *Martinez v. S.* 41 Texas, 126. See also *U. S. v. Jones*, 3 Wash. C. Ct. 209.

As in cases of burglary, so in indictments for this offence, the name of the owner of the house should be correctly stated in the indictment; as a material variance in this respect will be fatal to the capital part of the charge. (*s*)

The prisoner was convicted upon an indictment, which stated that the prisoner at Liverpool, in the county aforesaid, one coat of the value, &c., in the dwelling-house of W. T., then and there being, then and there feloniously did steal, &c., but a doubt having occurred whether the situation of the house was sufficiently described, and whether the indictment ought not to have stated 'in the dwelling-house of W. T. *there situate*,' the point was submitted to the judges, who held that the indictment shewed sufficiently that the house was situate at Liverpool, and that the conviction was therefore proper. (*t*)

**Value.** — On an indictment for stealing a watch and seals of the value of £7, a witness having sworn that the property, in his opinion, was worth that sum, the jury inquired if they were at liberty to put a value on the property themselves; Parke, B., 'if a gentleman is in the trade he must be sworn as a witness; that general knowledge which any man can bring to the subject may be used without; but if it depends upon any knowledge of the trade, the gentleman must be sworn.' (*u*)

In this, as in most other offences, any one of several persons may be found guilty upon an indictment charging them with a joint offence. Where Hempstead and Hudson were indicted upon the statute of Anne for stealing in the dwelling-house to the value of £6 10s., and the jury found Hempstead guilty as to part of the articles of the value of £6, and Hudson guilty as to the residue; the judges, upon a case reserved, held that judgment could not be given against both, but that upon a pardon or *nolle prosequi*, as to Hudson, it might be given against Hempstead. (*v*)

Where a prisoner was indicted for robbery in a house, or burglary and stealing of goods, and the evidence proved a larceny committed in the dwelling-house to the amount of forty shillings, it was held that he might be acquitted of the robbery and burglary, and found guilty upon the statute of Anne, although there was no special count upon the statute in the indictment. (*w*)

So, upon an indictment for burglary and stealing to more than the amount of £5 the prisoner may be acquitted of the burglary, and found guilty of stealing in the dwelling-house to the amount of £5. (*x*)

Where an indictment charged the prisoners in the first count

(*s*) Unless an amendment be allowed. As to amendment at the trial, see vol. i. p. 53. White's case, 1 Leach, 252, *ante*, p. 45, Woodward's case, 1 Leach, 253, note (*a*) and see other cases, *ante*, p. 45.

(*t*) R. v. Napper, R. & M. C. C. R. 44. See R. v. Richards, 1 M. & Rob. 177, *ante*, p. 45.

(*u*) R. v. Rosser, 7 C. & P. 648, Parke, B., and Vaughan, J. As to allegation in indictment that goods of the value of £5,

see R. v. Stonehouse, 1 Cox, C. C. 69, Gurney, B.

(*w*) R. v. Jordan, 7 C. & P. 432, *ante*, p. 38.

(*v*) R. v. Hempstead, MS. Bayley, J., and R. & R. 344.

(*w*) 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-house*, s. 3.

(*x*) R. v. Compton, 3 C. & P. 418, Gaselee, J.

with stealing in the dwelling-house of A. the moneys and goods of A. above the value of five pounds, and in the second count with simple larceny of moneys and goods (not '*other*' moneys, &c.) of the said A., describing them precisely in the same way as in the first count, and not using the word '*afterwards*;' and the plea was not guilty of the premises; and the jury process was to try whether the prisoners were guilty of *the felony aforesaid*; and the verdict was that the prisoners were guilty of *the felony aforesaid* as by the indictment aforesaid supposed: and the judgment was that the prisoners be transported for ten years: the Court of Queen's Bench held that the word '*felony*' was not *nomen collectivum*, meaning felony generally, but pointed to one particular charge of felony, and therefore that the verdict was bad in not specifying the offence of which it found the prisoners guilty, and that the judgment was erroneous, the Court, not being at liberty to apply it to the first count only. And upon error, the Court of Exchequer Chamber held, that whether or no the word '*felony*' was to be taken as *nomen collectivum* in the judgment, it could mean in the jury process one offence only; and therefore the process was here misawarded, and the judgment could not be sustained. (y)

Upon the trial of any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted upon an indictment for such attempt.

(y) Campbell v. R. 11 Q. B. 799. See 36 Law Mag. p. 1-17.

## CHAPTER THE SIXTH.

### OF BREAKING, &c., AND STEALING IN A BUILDING WITHIN THE CURTILAGE.

THE 24 & 25 Vict. c. 96, s. 53, provides that no 'building although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other;' and by sec. 55, 'whosoever shall break and enter any building, and commit *any felony* therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, *or being in any such building shall commit any felony therein, and break out of the same*, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement'] (b).

By sec. 98, principals in the second degree, and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are liable to imprisonment for any term not exceeding two years.

This enactment, specifying as it does in express terms a building within the *curtilage* of a dwelling-house, appears not to apply to many of those buildings and outhouses, which, although not within any common inclosure or curtilage, were deemed by the old law of burglary, *parcel* of the dwelling-house, from their adjoining to such dwelling-house, and being in the same occupation. The inquiry under this provision of the statute will be simply whether the building in question is within the curtilage or homestall; but it may be useful to refer to some of the points formerly decided in cases of burglary, in which it became material to consider whether particular buildings were parcel of a dwelling-house, and the circumstance of their being situated within a common inclosure appears to have been treated as a material ingredient. It should be observed, however, that in several of these cases the particular build-

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (c).

(b) The clause is taken from the 7 & 8 Geo. 4, c. 29, s. 14, and 9 Geo. 4, c. 55, s. 14 (1.).

ings might possibly have been held to be *parcel* of the dwelling-house independently of that circumstance.

Where the prisoner had broken into a goose-house which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded partly by other buildings of the homestead, and partly by a wall, some of which buildings had doors opening backwards, as well as doors opening into the yard, and there was a gate in one part of the wall opening upon a road, the judges held that the goose-house was *parcel* of the dwelling-house. (c)

Where the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined; all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., so as to be altogether an inclosed yard; the workshop had no internal communication with the house, and it had a door opening into the street, and its roof was higher than that of the dwelling-house; the street-door of the workshop was broken open in the night; and, upon an indictment for burglary, the question arose, whether the workshop was *parcel* of the dwelling-house; and, upon a case reserved, the judges were unanimous that it was. (d) The prosecutor had in one range of buildings a house which he occupied, a house which he let, and a warehouse, all of which opened into a yard which was surrounded by a wall, gates, and buildings; the tenant of the second house had certain easements in the yard, and his house was between the prosecutor's house and the warehouse, and the two houses had formerly been in one. The prisoner was convicted of burglary in breaking into the warehouse, and, upon a case reserved, the judges were of opinion that the warehouse was part of the prosecutor's house; it was so before the house was divided, and it remained so notwithstanding the division. (e)

It seems that a building which was not any *parcel* of a dwelling-house, by the old law of burglary, cannot be considered as a building within the curtilage under the later statute. It will be material, therefore to attend to the connection of the curtilage with some dwelling-house in which burglary might have been committed. And we have seen that, by the express provision of the statute, the building within the curtilage must be occupied with the dwelling-house. (f)

It was holden that burglary could not be committed by breaking into a centre building used for the purposes of trade, but having no internal communication with the dwelling-houses which formed the wings. The building was stated, in the first count of the indictment, as the dwelling-house of M. R. Boulton: in the second, as the dwelling-house of J. Bush; and in the third, as the dwelling-house of W. Nelson. The place broken into was a centre building, having two wings; in such centre building an extensive

(c) R. v. Clayburn, R. & R. 360.

(d) R. v. Chalking, MS. Bayley, J., and

R. & R. 334, and see R. v. Lithgo, R. & R.

357.

(e) R. v. Walters, MS. Bayley, J., and

R. & M. C. C. R. 13.

(f) *Ante*, p. 69.



business was carried on, relating to different manufactories in which one Matthew Boulton was concerned with M. R. Boulton, W. Nelson, and several other persons; and also relating to two other manufactories in which Matthew Boulton was concerned on his own account: in part of one of the wings was the dwelling-house of M. R. Boulton, and in the other part of the same wing, the dwelling-house of J. Bush, mentioned in the second count of the indictment, who was a workman of Matthew Boulton's; but neither of such dwelling-houses had any internal communication with the centre building, except only, in the one occupied by J. Bush, a window, which looked into a passage that ran the whole length of the centre building; and in the other wing was the dwelling-house of W. Nelson, which also had no internal communication with the centre building. In the front of this building there was a terrace or front yard, fenced round in different ways, and at the end of the pile of building, by a wall, with gates for horses and carriages, and a door for foot passengers: the prisoners entered by a door in the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle yard; from thence, through a door which had been left open, up a staircase in the centre building, where they broke open some of the rooms; having so entered the premises by the assistance of a servant of Matthew Boulton's, who acted as an accomplice for the purpose of effecting the apprehension of the prisoners. Upon a case reserved, the judges agreed that the prisoners were not guilty of burglary; and the grounds upon which they so decided are stated to have been, that the centre building, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house; and that it was not to be considered as under the same roof as the houses adjoining, though the roof of it had a connection with the roofs of the houses. (g)

The premises were surrounded by a garden wall, the front wall of the factory, and the wall and gate of the stable yard; they were of the extent of rather more than an acre, and the house was in the centre; there was no other communication between the house and the factory than by one open passage inside the walls. In the factory the prosecutor, the occupier of the dwelling-house, carried on one business of his own, and another jointly with a partner, who lived elsewhere; and the rooms over the factory were used for the joint as well as the separate business. These rooms were broken into, and part of the separate property of the prosecutor, and also part of the joint property was stolen; and upon an indictment for burglary in the dwelling-house of the prosecutor, and after conviction, a case being reserved, the judges held that these rooms were part of the prosecutor's dwelling-house, and that the conviction was right. (h)

Where, upon an indictment for breaking and entering a building within the curtilage, it appeared that there was a large square inclosure at the back of a dwelling-house, surrounded on all sides by a

(g) *R. v. Egginton*, 2 Leach, 913. 2 (h) *R. v. Hancock*, MS. Bayley, J. and East, P. C. c. 15, s. 10, p. 494. 2 Bos. & R. & R. 170. Pul. 508.

barn, cow-sheds, a granary, pig-styes, and walls, and that within such larger inclosure there was a lesser inclosure, abutting on one side on the back of the dwelling-house, and on another on the pig-styes, and the third and fourth sides of which were formed by a wall about four feet high, which separated it from the other part of the large inclosure, and the back-door of the house entered into such lesser inclosure, and out of it there was a gate through the wall into the larger inclosure, into which there was no door immediately leading from the house; and some corn was stolen out of the granary, which was on the opposite side of the large inclosure from the house; it was held that the whole of the larger inclosure was within the curtilage, and not merely the lesser inclosure immediately at the back of the house, and consequently that the granary was a building within the curtilage. (i)

As to an outhouse being parcel of a dwelling-house when held under a distinct title, see *ante*, p. 20.

The prosecutor had a dwelling-house, warehouses, and other buildings, and a yard; the entrance into the yard was through a pair of gates which opened into a covered way; over this way were some of the warehouses, and there was a loop-hole and crane over the gates to admit of goods being craned up; and there was also a trap-door in the roof of the covered way; there was free communication from the warehouses to the dwelling-house: the prisoners opened the gates in the night with intent to steal, and entered the yard, but did not enter any of the buildings, and upon a case reserved, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. (j) So an area-gate opening into the area only is not such part of the dwelling-house, that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such door or other fastening may not be secured at the time. The prisoners opened an area-gate in a street in London, and entered the house through a door in the area which happened to be open, but which was always fastened when the family went to bed, and was one of the ordinary barriers against thieves. Having stolen in the house to the value only of thirty-nine shillings, a question was made whether the breaking the area-gate was breaking the dwelling-house so as to constitute burglary, and as there was no free passage in time of sleep from the area into the house, the judges held unanimously that the breaking was not a breaking of the dwelling-house. (k)

Upon the trial of any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted on an indictment for such attempt.

(i) *R. v. Wood*, Stafford Spr. Ass. 1843. MSS. C. S. G. Wightman, J., after consulting Erskine, J. S. C. as *R. v. Gilbert*, 1 C. & K. 84.

(j) *R. v. Bennett*, MS. Bayley, J., and R. & R. 289.

(k) *R. v. Davis*, MS. Bayley, J., and R. & R. 322.

## CHAPTER THE SEVENTH.

### OF BREAKING, &c., AND STEALING IN ANY SCHOOL-HOUSE, SHOP, WAREHOUSE, OR COUNTING-HOUSE.

THE former enactments on this subject are repealed; and by the 24 & 25 Vict. c. 96, s. 56, 'Whatsoever shall break and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit *any felony* therein, or being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' (b)

Principals in the second degree and accessories before the fact are punishable like principals in the first degree; and accessories after the fact (except receivers) are liable to imprisonment for any term not exceeding two years, by sec. 98 of the Act.

**Shop.**—Upon an indictment on the 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. c. 90, for breaking into a shop and stealing coals, it appeared that the prosecutor sold coal, and was also a blacksmith: the place from which the coal was stolen was a shop, to which persons went who bought it, it being a room beyond the blacksmith's shop; Alderson, B., said, 'To come within the provisions of these Acts the place must be more than a mere workshop, it must be a shop for the sale of articles. A workshop, such as a carpenter's shop or a blacksmith's shop, would not be within the Acts.' (d) But where on an indictment for breaking and entering a shop, the building in question appeared to be an ordinary blacksmith's shop, containing a forge and used as a workshop only, not inhabited nor attached to any dwelling-house; but secured by a door fastened from the outside and a window-shutter bolted within; Lord Denman, C. J., declined to be governed by the preceding case; as in his opinion this building had been proved to be such as to fall within the meaning of the statute. (e)

**Warehouse.**—Upon an indictment for breaking into and stealing goods in a warehouse, it appeared that the prosecutor occupied a shop, which he used for selling various kinds of goods. In a cellar under

(a) The words in brackets are repealed, Geo. 4, c. 29, ss. 12, 15, and 9 Geo. 4, c. 55, but the punishment remains the same. See ss. 12, 15, (1.).  
*ante*, p. 50, note (c).

(b) This clause is taken from the 7 & 8

(d) *R. v. Sanders*, 9 C. & P. 79. Note, however, that the prisoner was convicted.

(e) *R. v. Carter*, 1 C. & K. 173.

the shop, and entered by descending a flight of steps from the street, he kept such goods as he had not at the time occasion to expose for sale in his shop. There was no inner communication between the house and shop or either of them and the cellar. The goods were stolen out of the cellar. Rolfe, B., held that the cellar was a warehouse within the statute, that a warehouse, in common parlance, certainly meant a place where a man stored or kept his goods, which were not immediately wanted for sale; and that there was no reason to suppose that the Legislature used the term in the statute in a sense repugnant to its ordinary meaning. (*f*)

**Counting-house.**—Upon an indictment for breaking and entering the counting-house of D. Gamble, and stealing therein, it appeared that Gamble was the proprietor of extensive chemical works, and that the prisoner broke and entered a building part of the premises, which was commonly called the machine-house, and stole therein a large quantity of money. In this building there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book, in which he entered all goods weighed and sent out. The account of the time of the men, employed in different departments, was taken in that building, and their wages were paid there; the books, in which their time was entered, were brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected that this was not a counting-house; but upon a case reserved, the judges were unanimously of opinion that there was abundant evidence that this was a counting-house within the 7 & 8 Geo. 4, c. 29, s. 15. (*g*)

It has been held that an indictment upon sec. 15 of the 7 & 8 Geo. 4, c. 29, must expressly aver that the prisoner stole the goods in the shop, and that it is not sufficient to aver that the prisoner broke and entered the shop, and the goods 'in the shop then and there being found feloniously did steal.' (*h*)

Upon the trial of any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted upon an indictment for such attempt.

(*f*) *R. v. Hill*, 2 M. & Rob. 458. Rolfe, B., added that the same objection had been taken before, and both he and Parke, B., thought that there was nothing in it.

(*g*) *R. v. Potter*, 2 Den. C. C. R. 235.

(*h*) *R. v. Smith*, 2 M. & Rob. 115, Pat-

teson, J. But upon this case being cited in *R. v. Andrews*, C. & M. 121, Coleridge, J., said he had spoken to Patteson, J., about it, and that that learned judge now thought the decision in *R. v. Smith* was not correct. See *ante*, p. 58. C. S. G.

## CHAPTER THE EIGHTH.

### BREAKING INTO ANY HOUSE, &c., WITH INTENT TO COMMIT FELONY.

By the 24 & 25 Vict. c. 96, s. 57, 'Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding seven years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]

It is clear that, if on the trial of any indictment for burglary with intent to commit any felony, the breaking and entering were proved to have been before nine o'clock at night, the prisoner might be convicted under this clause. But upon an indictment in the ordinary form for house-breaking, &c., the prisoner could not be convicted under this clause; because it does not allege an intent to commit a felony. It will be well, however, to alter the form of the indictments in every case where a breaking into and stealing, &c., in any building mentioned in this clause is charged, and to allege a breaking and entry with intent to commit some felony, in the same manner as in an indictment for burglary with intent to commit a felony, and then to allege the felony that is supposed to have been committed in the house, &c. If this be done, then if the evidence fail to prove the commission of that felony, but prove that the prisoner broke and entered with intent to commit it, he may be convicted under this clause.

Principals in the second degree and accessories before the fact are punishable like principals in the first degree; and accessories after the fact are liable to imprisonment for any term not exceeding two years, by sec. 98 of the Act.

Upon the trial of any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted upon an indictment for such attempt.

Where, therefore, a prisoner was indicted on the 24 & 25 Vict. c. 96, s. 57, for breaking and entering a shop with intent to commit a felony, and it appeared that he had broken a large hole into the roof of the shop, but there was no evidence that he had in any way entered the shop, it was held that he might be convicted of an attempt to commit that felony under the 14 & 15 Vict. c. 100, s. 9. (b)

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (c).

(b) *R. v. Bain*, L. & C. 130.

## CHAPTER THE NINTH.

### OF ROBBERY AND ASSAULTS WITH INTENT TO ROB.<sup>1</sup>

ROBBERY from the person appears to be well defined as a 'felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear.' (a)

#### SEC. I.

##### *Statutes in Force.*

**Robbery or stealing from the person.** (b) — The former enactments on this subject (c) are repealed, and by the 24 & 25 Vict. c. 96, s. 40, 'Whosoever shall rob any person, or shall steal any chattel, money, or valuable security (d) from the person of another shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court.] (e) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' (f)

**Assault with intent to rob.** — SEC. 41. 'If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob,

(a) 2 East, P. C. c. 16, s. 124, p. 707. Hickman's case, 1 Leach, 280. 4 Blac. Com. 243. 1 Hawk. P. C. c. 34. 1 Hale, 532. 3 Inst. 68. The force necessary to constitute robbery must be employed before (or at the time) the property is stolen. If the stealing be first, and the force afterwards, the offence is not robbery, but stealing from the person. Per Park, J., Smith's case, 1 Lewin, 301. See *post*, p. 86. Robbery is an aggravated species of larceny. See Peat's

case, 1 Leach, 228. Lapier's case, 1 Leach, 320.

(b) As to stealing from the person, see *post*, chap. xi.

(c) 7 & 8 Geo. 4, c. 29, 9 Geo. 4, c. 55 (I.), and 7 Will. 4 & 1 Vict. c. 87.

(d) Sec. 1, *post*, *Larceny*.

(e) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(f) This clause is taken from the 7 Will. 4 & 1 Vict. c. 87, s. 5.

#### AMERICAN NOTE.

<sup>1</sup> See *C. v. Snelling*, 4 Binn. 379; *C. v. Humphries*, 7 Mass. Rep. 242. *U. S. v. Jones*, 3 Wash. C. C. 209. *U. S. v. Terrel*, 1 Hemp. 411. *Kite v. S.*, 11 Humph. 167. *Collins v. P.*, 39 Ill. 233. *Brennon v. S.* 25 Ind. 403. In America there are statutes defining robbery which follow the common law definition in general. In some States different degrees of robbery are established.

The old English statutes so far as they can be applied are in force as common law in America. "Highway robbery" and "robbery from a dwelling-house" do not appear as distinct offences; but "being armed with a dangerous weapon" is made a very serious offence in some States. See Bishop, vol. ii. s. 1179. As to robbing the mail, see *U. S. v. Mills*, 7 Pet. 138.

the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.' (g)

Sec. 42. 'Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this Act) be liable, [at the discretion of the Court,] (h) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' (i)

Sec. 43. 'Whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or shall together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (h) to be kept in penal servitude for life, [or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' (j)

**Punishment of whipping.** — The 26 & 27 Vict. c. 44, recites the preceding clause and the 24 & 25 Vict. c. 100, s. 21, and enacts, that 'Where any person is convicted of a crime under either of the said sections, the Court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions:

- '1. That in the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod:
  - '2. That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping:
  - '3. That in each case the Court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used:
- Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence; provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be re-

(g) This clause is taken from the 14 & 15 Vict. c. 110, s. 11.

(h) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(i) This clause is taken from the 7 Will. 4 & 1 Vict. c. 87, s. 6.

(j) Under the 7 Will. 4 & 1 Vict. c. 87, s. 2, robbery accompanied by any stab, cut, or wound was capital; that punishment is abolished, and that section and sec. 3 are incorporated in this clause. The words 'stab' and 'cut' are omitted, because the word 'wound' includes them.

moved to a convict prison with a view to his undergoing his sentence of penal servitude.'

**Demanding money, &c., with menaces.** — By the 24 & 25 Vict. c. 96, s. 44, 'Whosoever shall send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any *property*, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*k*) to be kept in penal servitude for life [or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping.' (*l*)

Sec. 45. 'Whosoever shall with menaces or by force demand any property, chattel, money, valuable, security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*k*) to be kept in penal servitude [for the term of three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'] (*l*)

**Letter threatening to accuse of crime, with intent to extort.** — Sec. 46. 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*k*) to be kept in penal servitude for life, [or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the same abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act.' (*l*)

Sec. 47. 'Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore

(*k*) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (*o*).

(*l*) This section, and the cases bearing upon it, will be found vol. iii. *Threats and*

*Threatening Letters.* This section and secs. 45 & 46 are introduced here in order that they may be seen in connection with the other sections here introduced.



mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, *(n)* and being convicted thereof shall be liable, [at the discretion of the Court,] *(o)* to be kept in penal servitude for life, [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour,] and if a male under the age of sixteen years, with or without whipping.' *(p)*

Sec. 48. 'Whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] *(o)* to be kept in penal servitude for life, [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.]' *(q)*

Sec. 49. 'It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person.' *(r)*

'Property.'—By sec. 1, 'The term "property" shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.' *(s)*

*(n)* 'Robbery' in the 7 & 8 Geo. 4, c. 29.

*(o)* The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note *(o)*.

*(p)* This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 8; 9 Geo. 4, c. 55, s. 8 (I.); 7 Will. 4, and 1 Vict. c. 87, s. 4; and 10 & 11 Vict. c. 66, s. 2.

*(q)* This clause will meet all such cases as *R. v. Phipoe*, 2 Leach, 673, and *R. v. Edwards*, 6 C. & P. 521, where persons by violence to the person, or by threats of accusation of crimes, induce others to execute deeds, bills of exchange, or other securities. The valuable security need not necessarily be negotiable and the following document was held to be a valuable security within the section: 'London, July

19, 1875, I hereby agree to pay you £100 sterling, on the 27th instant, to prevent any action against me.' *R. v. John*, 13 Cox, C. C. 100, Brett, J.

*(r)* This clause is intended to meet cases where a letter may be sent by one person and may contain menaces of injury by another, and to remove the doubts occasioned by *R. v. Pickford*, 4 C. & P. 227, and see *R. v. Smith*, 1 Den. C. C. 510; and also to meet cases where property may be demanded by one person with menaces of violence or injury to be caused by another.

*(s)* This clause is taken from the 20 & 21 Vict. c. 54, s. 17; but for the words 'the original subject of a trust,' in that section, the words 'originally in the possession or under the control of any party,' are sub-

Principals in the second degree and accessories before the fact are punishable like principals in the first degree; and accessories after the fact (except receivers) are liable to imprisonment for any term not exceeding two years, by sec. 98 of the Act.

## SEC. II.

### *The Felonious Taking.*

The taking may be of money or goods 'of any value.' The value, therefore, of the property taken is quite immaterial: a penny as well as a pound, forcibly extorted, makes a robbery; the gist of the offence being the force and terror. (*t*) Thus the taking of a slip of paper, which contained a memorandum of a sum of money due to the prosecutor, has been held sufficient. (*u*) But something must be taken, and it must be of some value, (*v*) otherwise the offence will be only that of an assault with intent to rob; but it need not be of the value of any known coin, even of a farthing. (*w*)

The property taken must not only be of some value, but it must be taken from the peaceable possession of the owner. Where the prisoner had obtained a note of hand from a gentleman by threatening with a knife held to his throat to take away his life; and it appeared that the prisoner had furnished the paper and ink with which it was written, and that the paper was never out of her possession; it was holden not to be robbery. The judges were of opinion that the note was of no value; that as the legislature at the time of passing the 2 Geo. 2, c. 5, s. 3, whereby the stealing a chose in action was made felony, could not possibly have a case like this in contemplation, it was not within that Act of Parliament; that the note did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of the least value to him, that he had not even the property of the paper on which it was written, as it appeared that both the paper and ink were the property of the prisoner, and the delivery of it by her to the prosecutor could not, under the circumstances, be considered as vesting it in him; but that if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, so as to constitute the crime of robbery. (*x*)

stituted, in order to embrace other cases than those where 'a trust' has existed. So also, instead of 'the proceeds thereof respectively, and anything acquired by such proceeds,' the words 'anything acquired by such conversion or exchange, whether immediately or otherwise,' are used; so that, however many exchanges may have been made in the property, any fraudulent disposal of the proceeds ultimately obtained may be included within this clause. The words 'goods, raw or other materials,' after 'personal property,' are omitted as manifestly falling within these terms.

(*t*) 3 Inst. 69. 1 Hale, 532. 1 Hawk.

P. C. c. 34, s. 16. 4 Blac. Com. 243. 2 East, P. C. c. 16, s. 125, p. 707.

(*u*) R. v. Bingley, 5 C. & P. 602. Gurney, B.

(*v*) Phipoe's case, 2 Leach, 673, 680.

(*w*) R. v. Morris, 9 C. & P. 349. Parke, B., *infra*, tit. *Larceny*. See also R. v. Clark, R. & R. 181, *infra*, *Larceny*.

(*x*) Phipoe's case, 2 Leach, 673. The form of the note was — 'Two months after date I promise to pay to Miss Maria Theresa Phipoe, or order, the sum of two thousand pounds sterling for value received. — John Courtoy, Oxendon-street.' See R. v. Hart, 6 C. & P. 106, *post*, *Larceny*.

The prisoners were indicted under the 7 & 8 Geo. 4, c. 29, s. 6, for feloniously demanding of Mr. Gee, with menaces, a deed, and a valuable security, and it appeared that they had decoyed the prosecutor into a house, and then forced him into a retired place, so constructed that no cries could be heard, where they pushed him down on a bench, and a chain was passed across his breast and a rope round his neck, and his legs were fastened with a cord to some staples in the ground; whilst he was so fastened, two sheets of paper, pens, and ink, were brought to him, and he was compelled to write on the paper so brought to him a check for a sum of money, and a letter requesting certain deeds to be delivered to the bearer; these documents remained with him for half an hour while he wrote some letters, and it was contended that as they were in his possession during that time, the case was distinguishable from the preceding one. Patteson, J., 'Mr. Gee was chained and padlocked, a rope was put round his neck, and he could not move hand or foot except just to write; they bring him pens, ink, and paper, and he writes the orders; he had the papers, it was true, in his hands; but, chained as he was, is it possible to conceive that he had such a peaceable possession of them as to be at liberty to do what he pleased with them? For that is the meaning of peaceable possession. I cannot perceive the difference between the case of Courtois and the present, except that the latter is the stronger of the two. The ground of the decision in that case must govern the decision of the Court in this case. A robbery cannot be committed unless the person has the property in his peaceable possession to do with it as he chooses. If Mr. Gee had brought the documents ready written, the case would have been different, but he does not write them until he is chained.' (y)

By the 'taking,' necessary in this offence, is implied that the robber must be in *possession* of the thing taken. So that if a man, having a purse fastened to his girdle, be assaulted by a thief, and the thief, in order the more easily to take the purse, cut the girdle, and the purse thereby fall to the ground, this is no taking; for the thief never had the purse in his possession. (z) And, upon the same principle, in a case where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could take it up, so as to remove it from the spot where it lay; the judges were of opinion that the offence of robbery was not completed. (a) But if in the former case the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, this would have been a taking, though he had never taken it up again; for the purse would have been once in his possession. (b) And it is not necessary that the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying, 'If you value your purse, you will please to take it back, and give me the contents of it;' but was

(y) *R. v. Edwards*, 6 C. & P. 521. Pat-  
teson, J., and Bosanquet, J.

(z) 3 Inst. 69. 1 Hale, 533.

(a) *R. v. Farrell*, 1 Leach, 322, note (b).

(b) 3 Inst. 69. 1 Hale, 533.

apprehended and secured before the gentleman had time to give him the contents of the purse; the Court held that there was a *sufficient taking* to complete the offence, although the prisoner's possession continued only for an instant. (c) And in a case where, while a lady was stepping into her carriage, the prisoner snatched at her diamond earring, and separated it from her ear by tearing her ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; the judges, upon the case being submitted for their consideration, were all of opinion, that there was a *sufficient taking* from the person to constitute robbery. They thought that it was sufficient, as the ear-ring was in the possession of the prisoner separate from the lady's person, though but for a moment, and though he could not retain it, but probably lost it again the same instant. (d) It should, however, be observed, with respect to cases of this description, that though it may have been formerly holden that a sudden taking or snatching of any property from a person unawares was sufficient, the contrary doctrine appears to be now established: and that no taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some injury be done to the person, as in the case last cited, or unless there be some previous struggle for the possession of the property, or some force used to obtain it. (e)

Where the offence of robbery is once actually completed by taking the property of another into the possession of the thief, it cannot be purged by any subsequent re-delivery. (f) Thus, if A. requires B. to deliver his purse, and he delivers it accordingly, when A., finding only two shillings in it, gives it him again, yet this is a *taking* by robbery. (g)

Not only a taking in fact, but a taking in law, is sufficient to constitute a robbery. (h) It has, therefore, been holden, that if thieves attack a man to rob him, and, finding little or nothing about him, force him by menace of death to swear to fetch them money, which he does accordingly, and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law. (i) And if upon A. assaulting B., and bidding him to deliver his purse, B. refuse to do so, and then A. pray B. to give or lend him money, and B. does so accordingly, under the influence of fear, the taking will be complete. (j) For where the thief receives money, &c., by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket. (k)

**Animus furandi.** — The taking must in all cases be accompanied

(c) Peat's case, 1 Leach, 228.

(d) Lapiet's case, 1 Leach, 320 (see R. v. Simpson, Dears. C. C. R. 421; *post*, *Stealing from the Person*).

(e) Macauley's case, 1 Leach, 287. Baker's case, *id.* 290. Horner's case, 2 East, P. C. c. 16, s. 121, p. 703, *post*, p. 88. R. v. Mason, *post*, p. 89.

(f) 1 Hawk. P. C. c. 34, s. 2.

(g) 1 Hale, 533.

(h) 3 Inst. 68. 1 Hale, 532

(i) *Id.* *ibid.* 2 East, P. C. c. 16, s. 129, p. 714.

(j) 1 Hale, 533.

(k) 2 East, P. C. c. 16, s. 128, p. 711, s. 129, p. 714. And see further as to cases of this kind, *post*, p. 91, *et seq.*, where 'the putting in fear' is spoken of.

with a felonious intent, or *animus furandi*; but if a man *animo furandi* say — ‘Give me your money,’ — ‘Lend me your money,’ — ‘Make me a present of your money,’ or words of the like import, they are equivalent to the most positive order or demand; and, if anything be obtained in consequence, such a taking will be within the definition of robbery. (*l*) There is, however, a case of considerable nicety, which should be here noticed, where, though the original assault was clearly with a felonious intent, the taking of the goods was holden to be no more than a trespass. A. assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money, but finding none, he pulled off the bridle of B.’s horse, and threw that and some bread, which B. had in pannels, about the highway, but did not take anything from B.; and it was resolved, upon a conference with all the judges, that this was not robbery, because nothing was taken from B. (*m*) But it is remarked upon this case, that the better reason for the decision seems to be, that the particular goods were not taken with a felonious intent, as surely there was a sufficient taking and separation of the goods from the person. (*n*)

Upon an indictment for robbing Green of three wires and a pheasant, it appeared that the prisoner had set the wires, in one of which a pheasant was caught, and Green, a gamekeeper of the manor where the wires were set, took up the wires and the pheasant, and put them in his pocket, the prisoner soon after came up, and said, ‘Have you got my wires?’ Green replied that he had, and a pheasant that was caught in them. The prisoner then asked Green to give the pheasant and wires to him, which Green refused; whereupon the prisoner lifted up a large stick, and threatened to beat Green’s brains out if he did not give them up. Green fearing personal violence did so. For the prosecution it was contended that the prisoner had no property either in the wires or the pheasant. Vaughan, B., ‘If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable for a trespass in setting them, it would not be a robbery. The gamekeeper had a right to take them, and when so taken they never could have been recovered from him by the prisoner; yet still if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretence, it would be robbery. The question for the jury is, whether the prisoner did honestly believe he had a property in the snares and pheasant or not.’ (*o*)

Where on an indictment for robbery it appeared that the prosecutor owed the prisoner money, and had promised to pay him £5, and being drinking at the prisoner’s inn, the prisoner pressed him for payment, and, on refusal, induced him to go into a private room, and there, after repeating his demand for money, declared that he would have it, knocked him down, and tried to take it from him, and the

(*l*) By Willes, J., delivering the opinion of the judges in *Donnally’s case*, 1 Leach, 196. And see further upon the subject of the felonious intent, *post*, p. 87, *et seq.*, in the cases relating to ‘violence or putting in fear;’ and *post*, *Larceny*.

(*m*) Anon., 2 East, P. C. c. 16, s. 98, p. 662.

(*n*) 2 East, P. C. c. 16, s. 98, p. 662.

(*o*) *R. v. Hall*, Gloucester Lent. Ass. 1828, MSS. C. S. G. S. C. 3 C. & P. 409. See similar cases, *Larceny*.

prosecutor said if he would let him get up he would give him a cheque for £4, and did so. The prisoner, however, repeated his demand for money, declared he would have it, and knocked him down again, and his money dropped out of his pockets, but it was not known what became of it; Erle, C. J., said he thought the jury could hardly convict of a felonious robbery. The essence of the offence charged was the felonious intent, and that it was impossible to find on these facts. (*p*)

**Assault with intent to recover money under a semblance of right.**<sup>1</sup>—The prisoner was indicted for assaulting T. Simcocks, with intent to rob him. It appeared that Simcocks' father had been at a fair at Congleton a few days before the alleged offence, and a person had there given him eleven sovereigns for the purpose of buying a horse; and the father put the money in his pocket and refused to give it back. The person who gave him the money followed him to an entry, and there, in company with the prisoner, assaulted the father and endeavoured to get the money out of his pocket. Simcocks came up, and said that the person who gave his father the money was the man that had robbed Cotterell at Leek fair, and thereon that person ran away. The prisoner called the next day at Simcocks' father's, and demanded the eleven sovereigns; but the father refused to give him them, and said he would give them to the man from whom he had received them, if he would come and ask for them. Afterwards the prisoner saw Simcocks receive at Leek fair seven sovereigns for a cow that he had sold, and said, 'Pay me the eleven sovereigns you owe me,' and then knocked Simcocks down, and put his hand into Simcocks' pocket where he had seen the sovereigns placed, but was prevented from getting them; and Parke, B., held that there was too much semblance of a right to claim the sovereigns to justify proceeding with the case for the felony. (*q*)

**Property taken under colour of a purchase.**—Some questions as to the felonious intent have arisen where the property has been taken under colour of a purchase. Thus, though it is clear that if a person by force, or threats, compel another to give him goods, and by way of colour oblige him to take, or if he offer, less than the value, it is robbery; (*r*) yet it has been doubted whether the forcing a higler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. (*s*) So that where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited,

(*p*) *R. v. Hemmings*, 4 F. & F. 50.

(*q*) *R. v. Boden*, 1 C. & K. 395. These cases accord with the Roman Law. 'Qui aliquo errore ductus, rem suam esse existimans, et imprudens juris, eo animo rapuerit, quasi domino liceat etiam per vim rem suam auferre a possessoribus, absolvi debet; cui

scilicet conveniens est nec furti teneri eum qui eodem hoc animo rapuerit.' Just. Inst. Lib. iv. Tit. 2, s. 1.

(*r*) *R. v. Simons*, 2 East, P. C. c. 16, s. 128, p. 712.

(*s*) 1 Hawk. P. C. c. 34, s. 14. 4 Blac. Com. 244.

#### AMERICAN NOTE.

<sup>1</sup> See *P. v. Vice*, 21 Cal. 344. A mere pretended claim is no defence. *S. v. Bond*, 8 Iowa, 540.

because of the doubt whether the intent were felonious on account of the money given. (*t*) It is suggested, however, with much reason, that questions of this kind should properly be referred to the consideration of the jury; and that the circumstance of the full value or more being offered at the time should be left to them to shew that the intention of the party was not fraudulent, and so not felonious. (*u*) For though it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is, therefore, not felonious: yet it is submitted, that such a circumstance would be pregnant evidence in the negative. (*v*) But cases where the owner is induced to part with his property at less than its value, by fear of the violence of any individual, or of the outrages of a mob, come under a different consideration, and constitute a sufficient taking with a felonious intent. (*w*)

**Taking in the presence of the owner.**<sup>1</sup>—The taking need not be immediately from the person of the owner; it will be sufficient if it be in his presence. (*x*) Therefore if A., upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A. will be sufficient. (*y*) So it has been said, that if a man's servant be robbed of his master's goods in the sight of his master, this shall be taken for a robbery of the master. (*z*) So, if the thief having first assaulted A. takes away his horse standing by him; or, having put him in fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A.; for he takes it openly and before his face while under his immediate and personal care and protection. (*a*) So where on an indictment for robbery and stealing from the person it was proved that the prosecutor, who was paralysed, received, whilst sitting on a sofa in a room, a violent blow on the head from one prisoner, whilst the other prisoner went and stole a cash-box from a cupboard in the same room; it was held that the cash-box being in the room in which the prosecutor was sitting, and he being aware of that fact, it was virtually under his protection; and it was left to the jury to say, whether the cash-box was under the protection of the prosecutor at the time it was stolen. (*b*) But it is clear, that the property must be taken in the presence of the owner; and where it appeared upon a special verdict that some thieves gently struck the

(*t*) *The Fisherman's case*, 2 East, P. C. c. 16, s. 98, p. 661, 662.

(*u*) 2 East, P. C. c. 16, s. 98, p. 662.

(*v*) *Id.* *Ibid.*

(*w*) *Post*, p. 94, *et seq.*

(*x*) 1 Hale, 533. 1 Hawk. P. C. c. 34, s. 6. R. v. Francis, 2 Str. 1015.

(*y*) 3 Inst. 68. 1 Hale, 533.

(*z*) *Per Rolle*, C. J. R. v. Wright, Style, 156.

(*a*) 1 Hale, 533, and 1 Hawk. P. C. c. 34, s. 6. 4 Blac. Com. 243.

(*b*) R. v. Selway, 8 Cox, C. C. 235. *The Common Serjeant*, after consulting Crowder, J., and Channell, B.

#### AMERICAN NOTE.

<sup>1</sup> One who binds another in one room and compels him to tell where valuables may be found in another room. (*S. v. Calhoun*, 72 Iowa, 432; 2 Am. St. 252), or

confines another in his smoke-house fifteen steps from the dwelling-house. (*Clements v. S.*, 84 Ga. 660; 20 Am. St. 385), commits robbery.

prosecutor's hand, whereby some money, which he had taken out from his pocket to give change, fell to the ground, and that, upon his offering to take it up, the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and the thieves 'then and there *immediately*' took it up; a great majority of the judges held, that even by this statement it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding. (c) In a case where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day-time, but did not rob the goods till night, much doubt appears to have been entertained; some having holden it to be a robbery from the first force, but others having considered that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves. (d)

Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoners assaulted the prosecutor, upon which his brother laid down the bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from the person or in his presence; the bundle in this case was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it? (e)

**The taking must not precede the violence, or putting in fear.** — It may also be observed, with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or, rather, that a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery. Thus, where a thief clandestinely stole a purse, and, on its being discovered in his possession, denounced vengeance against the party if he should dare to speak of it, and then rode away, it was holden to be simple larceny only, and not robbery, as the words of menace were used after the taking of the purse. (f) But, if the purse had been obtained by means of the menace, the offence would have amounted to robbery. (g)

(c) *R. v. Francis*, 2 Str. 1015. *R. v. Grey*, 2 East, P. C. c. 16, s. 126, p. 708. S. P. In *R. v. Francis*, the judges clearly thought it a case of grand larceny, and therefore would not discharge the prisoners, but directed a new indictment to be preferred, considering themselves confined to the doubt of the jury, whether there was a sufficient taking, and that they could not give judgment for a larceny.

(d) 2 East, P. C. c. 16, s. 126, p. 707, 708.

(e) *R. v. Fallows*, 5 C. & P. 508,

Vaughan, B. The prisoners were convicted of a simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as it was the violence of the prisoners that made him put it down, and it was taken in his presence. See *R. v. Wright*, *ante*, p. 85. C. S. G.

(f) Harman's case, 1 Hale, 534. 1 Hawk. P. C. c. 34, s. 7.

(g) By Lord Mansfield in *Donnally's* case, 2 East, P. C. c. 16, s. 130, p. 726.



## SEC. III.

*The Taking 'Against the Will' of the Party.*

One Salmon and several others, in order to obtain for themselves the rewards given by Act of Parliament for apprehending robbers on the highway, concerted a plan by which a robbery might be effected upon Salmon by a person named Blee, who was one of the confederates, and two strangers procured by Blee. It was expressly found that Salmon was a party to the agreement; that he consented to part with his money and goods under colour and pretence of a robbery; and that for such purpose, and in pursuance of this consent and agreement, he went to a highway at Deptford, and waited there till the colourable robbery was effected. The judges were of opinion that, in consideration of law, no robbery was committed upon Salmon; and the reason given was, that his property was not taken against his will. (*h*)

## SEC. IV.

*'The Violence or Putting in Fear.'*

The words of the definition, as given at the beginning of the chapter, are in the alternative, 'violence or putting in fear;' and it appears, that if the property be taken by *either* of these means against the will of the party, such taking will be sufficient to constitute robbery. (*i*) The principle, indeed, of robbery is violence; but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence. (*j*)

It appears to have been sometimes considered that fear is a necessary ingredient in all cases of robbery, even in those effected by actual violence; (*k*) but if so, it will be presumed. And there are cases of this description in which fear can hardly be supposed to have existed; as if a man be knocked down without previous warning, and stripped of his property while senseless, he cannot with

(*h*) *R. v. M'Daniel*, Fost. 121, 128. The case of Norden, *post*, p. 92, was cited on the part of the Crown; but Mr. Justice Foster remarks upon it as distinguishable upon many grounds, Fost. 129.

(*i*) 2 East, P. C. c. 16, s. 127, p. 708, and the authorities there cited. Fost. 128.

(*j*) *Donnally's case*, 1 Leach, 196. 2 East, P. C. c. 16, s. 130, p. 727. Reane's

case, 2 Leach, 619. 2 East, P. C. c. 16, s. 132, p. 735.<sup>1</sup>

(*k*) Fost. 128, where the learned writer says, that there are opinions in the books which seem to make the circumstance of fear necessary, but that he had seen a good MS. note of Lord Holt to the contrary, and that he was himself very clear that the circumstances of actual fear at the time of the robbery need not be strictly proved.

## AMERICAN NOTE.

<sup>1</sup> The same doctrines prevail in America. The exciting of an actual fear, without the employment of force is sufficient. *S. v. Davis*, 1 Ired. N. C. 125. *P. v. Yslas*, 27 Cal. 630. *C. v. Brooks*, 1 Duv. 150. *S. v.*

*Howerton*, 58 Mo. 581. *Glass v. C.*, 6 Bush, 436. *S. v. Sims*, 3 Strobb. (S. C.) 137. *S. v. Neely*, 74 N. C. 425. *Bishop*, vol. ii. s. 1174, and see vol. i. s. 438.

propriety be said to be put in fear, and yet that would undoubtedly be robbery. (*l*)

**The degree of violence.** — With respect to the degree of actual 'violence,' where the taking is effected by that means, it appears to be well settled that a sudden taking, or snatching from a person un-awares, is not sufficient. Thus, where a boy was carrying a bundle along the street in his hand, after it was dark, when the prisoner ran past him, and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. (*m*) And the same was holden in a case where it appeared that as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the head of one of them, and ran off with it. (*n*) The same doctrine has been held in four other cases; in one of which the hat and wig of a gentleman were snatched from his head in the street; (*o*) in another, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street; (*p*) and in a third, a watch was jerked, with considerable force, out of a watch-pocket; (*q*) and in a fourth, a watch was snatched from the hands by catching hold of the ribbon and key without touching the hands. (*r*) But if any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual 'violence.' Thus, in the case which has been already mentioned, where an ear-ring was snatched from a lady's ear, and the ear torn through, and blood drawn by the force used, it was holden to be robbery. (*s*) So, where a heavy diamond pin, with a cork-screw stalk, twisted very much in a lady's hair, which was close frizzed and strongly crêped, was snatched out, and part of the hair torn away at the same time, it was holden that this was a sufficient degree of violence to constitute a robbery. (*t*) And in a case where it appeared that the prisoner snatched at a sword while it was hanging at a gentleman's side, and that the gentleman perceiving him get hold of the sword, instantly laid tight hold of the scabbard, which occasioned a struggle between them, in which the prisoner got possession of the sword, and took it away; the Court held that it was a robbery. (*u*) In a case where the prosecutor's watch was fastened to a steel chain, which went round his neck,

(*l*) Fost. 128. 4 Blac. Com. 244. 2 East, P. C. c. 16, s. 128, p. 711.

(*m*) Macauley's case, 1 Leach, 287. Baker's case, id. 290. S. P.

(*n*) Robins's case, 1 Leach, 290, note (*a*).

(*o*) Steward's case, 2 East, P. C. c. 16, s. 121, p. 702.

(*p*) Horner's case, 2 East, P. C. c. 16, s. 121, p. 703.

(*q*) R. v. Gnosil, 1 C. & P. 304. Garrow, B., saying, 'The mere act of taking being forcible will not make this offence highway robbery; to constitute the crime of highway robbery the force used must be either before or at the time of the taking, and must be of such a nature as to shew that it was intended to overpower the party

robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.'

(*r*) R. v. Wallis, 2 C. & K. 214, Patten-son, J.

(*s*) Lapier's case, 1 Leach, 300, ante, p. 82.

(*t*) Moore's case, 1 Leach, 335.

(*u*) Davies's case, 2 East, P. C. c. 16, s. 127, p. 709. 1 Leach, 290, note (*a*).

the seal and chain hanging from his fob, and the prisoner laid hold of the seal and chain, and pulled the watch from the fob; but the steel chain still secured it; upon which the prisoner, by two jerks, broke the steel chain, and made off with the watch; upon a case reserved, the judges were unanimous that this was a robbery, as the prisoner did not get the watch at once, but had to overcome the resistance made by the steel chain, and used actual force for that purpose. (v) So that the rule appears to be well established, that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it. (w) Where a prisoner ran up against a person, for the purpose of diverting his attention while he picked his pocket, the judges held that the force was sufficient to make it a robbery, it having been used with that intent. (x)

But where, on an indictment for robbery, it appeared that the prosecutrix had tied a basket by the handles to the rail of a cart in which she was riding, and the prisoner tried to lift off the basket by stealth, but the string prevented him, and the prosecutrix stretched out her arm to lay hold of the basket, and just at that moment the prisoner cut the string through with a knife, and at the same time inflicted a wound on the wrist of the prosecutrix, the pain and fright consequent on which caused her to withdraw her hand, and leave him in possession of the basket, with which he made off; Alderson, B., held that, in order to constitute the crime of robbery, there must be intentional violence and force; here the wound appeared to have been inflicted undesignedly and by mere accident, and therefore the case did not amount to robbery. (y)

One Merriman, who was taking cheeses along the highway in a cart, was stopped by a person named Hall, who insisted upon seizing them for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Merriman and Hall agreed to go before a magistrate to determine the matter; and, during Merriman's absence, other persons riotously assembled on account of the dearness of provisions, and, in confederacy with Hall, for the purpose, carried away the goods. It was objected (upon an action against the hundred, on the Statutes of Hue and Cry), that this was no robbery, because there was no force; but Hewitt, J., overruled the objection, and left the case to the jury, who were of opinion that Hall's conduct, in insisting upon seizing the cheese for want of a permit, was a mere pretence, for the purpose of defrauding Merriman, and found that the offence was robbery; which was afterwards confirmed by the Court of King's Bench, on a motion for a new trial. (z) It is well observed upon this case, that the opinion that it amounted to a robbery must have

(v) *R. v. Mason*, MS. Bayley, J., and R. & R., 419.

(w) *Ante*, p. 81.

(x) Anonymous, mentioned by Holroyd, J. 1 Lewin, 300.

(y) *R. v. Edwards*, 1 Cox, C. C. 32.

(z) *Merriman v. The Hundred of Chippenham*, 2 East, P. C. c. 16, s. 127, p. 709.

been grounded upon the consideration that the first seizure of the cart and goods by Hall, being by violence, and while the owner was present, constituted the offence of a robbery. (a)

The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of having committed an assault upon a woman who lodged in her house. The magistrate at the office, having examined the complaint, ordered her to find bail; but at the same time advised the parties to make the matter up, and become good friends. The magistrate then left the office, and the prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, and acted occasionally as a runner to the police office, but had no regular appointment either as constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, (b) took her to an adjacent public-house, where her husband was waiting in expectation that she would be discharged. When her husband found that the matter was not settled, he requested that the prisoner would wait a short time, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked her up for some time in a stinking place, and then brought her out and threatened to carry her immediately to prison. She was terrified, and implored him to wait till her husband returned; and producing a shilling from her pocket, offered to give it him, or even to give him half-a-crown, if he would comply with her request; but he refused, and immediately handcuffed her to a man whom he had in custody on a charge of assault, and who, as the prisoner alleged, had before rescued himself. The prisoner then kicked her, thus handcuffed, before him; and shoved her and her companion into a coach, which he ordered to drive to the New Prison. He then came into the coach; and almost immediately upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her the shilling, which she continued to hold in her hand, saying, at the same time, 'This will buy us a glass a piece.' He then asked her, if she had any more money in her pocket, said that he was sorry for her children, and that if she had as much money as would pay for the coach, she should not go to prison. She exclaimed that she had no more money; but the man who was handcuffed to her rattled the handcuff against the side of her pocket, and the prisoner put his hand into her pocket, and took out three shillings. He then continued to promise to carry her back, but did not give any directions to the coachman to change his course. In about ten minutes after he had so taken the three shillings, he stopped the coach at a public-house, called for some gin, drank some himself, gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused, but at last drank, upon his insisting she should do so; (c) he then gave the

(a) 2 East, P. C. c. 16, s. 127, p. 709, note (a).

(b) In the report of this case in East, it is said that the prisoner alleged that the magistrate made out a warrant of commit-

ment for the prosecutrix, but that it was not produced.

(c) In the report of this case in Leach, it is said, that he induced her to drink a glass by repeating his promise that she should not be detained.

shilling which he first took from her to pay for the gin, and took sixpence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public-house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid a shilling, or one shilling and sixpence for the coach; but returned no part of the money to the prosecutrix. Nares, J., who tried the prisoner, said that, in order to commit the crime of robbery, it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head, or a dagger to the breast; and that a violence, though used under a colourable and specious pretence of law, or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intent of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colourable means of putting his felonious intention into execution. And upon the case being referred to the twelve judges, they were unanimously of opinion, that as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence was clearly a robbery. (d)

Blackham assaulted a woman with intent to ravish her, and she, without any demand from him, offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted; and this was holden to be robbery by a considerable majority of the judges; on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent were to commit a rape. (e)

**The putting in fear.** — With respect to 'the putting in fear,' or constructive violence, when that is the means by which the taking is effected, it may be considered, with reference, first, to those cases in which the fear excited has been of injury to the *person*; secondly, to those in which the fear excited has been of injury to the *property*; and thirdly, to those in which the fear excited has been of injury to the *character*. It should, however, be remembered, as generally applicable to cases of this description, that where property is extorted by

(d) Gascoigne's case, 1 Leach, 280. 2 East, P. C. c. 16, s. 127, p. 709. And see the Sess. Pap. 295.

(e) Blackham's case, 2 East, P. C. c. 16, s. 128, p. 711.

fear, it will constitute a robbery by putting in fear, though it may be taken in the shape of a colourable gift. (*f*) So that if a man, whether with or without a drawn sword, or other offensive weapon, but with such circumstances of terror as indicate a felonious intention, ask alms from a person who gives to him through mistrust and apprehension of violence, it will be robbery: and so it will be if the thief, after having first made an assault, cease to use force, and ask money for alms, which is given him by the party attacked, while there remained a reasonable ground for the continuance of the fear excited by the assault. (*g*) And if thieves come to rob A., and, finding little about him, enforce him, by menace of death, to swear to bring them a greater sum, which he does accordingly, this is robbery, if the fear of that menace continued upon him at the time he delivered the money. (*h*)

The fear of injury to the *person* is that which is commonly excited on the commission of this offence; and where property is obtained by this means, it will amount to robbery, though there be no great degree of terror or affright in the party robbed. It is enough if the fact be attended with such circumstances of terror, such threatening, by word or gesture, as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person. (*i*) Where, therefore, on an indictment for robbery, it appeared that the prisoners and their companions hung around the prosecutor's person in the streets of Manchester, so as to render all attempts at resistance hazardous, if not vain, and rifled him of his watch and money, but it did not appear that any force or menace was used; it was held that this was a robbery; for if several persons so surround another, as to take away the power of resistance, that is force. (*j*) And it is not necessary that actual fear should be strictly and precisely proved; as the law, *in odium spoliatoris*, will presume fear, where there appears to be a just ground for it. (*k*)

One Norden, having been informed that one of the early stage-coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, till the highwayman came up to the company in the coach, and to him, and presenting a weapon demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with the pistol in his hand, and, with the assistance of some others, took the highwayman. This was holden to be a robbery of Norden. (*l*)

(*f*) *Ante*, p. 82, *et seq.*

(*g*) 2 East, P. C. c. 16, s. 128, p. 711.  
4 Blac. Com. 244. *Ante*, p. 82, *et seq.*

(*h*) *Ante*, p. 82. Fitzh. Coron. pl. 464.  
3 Inst. 68. 1 Hale, 532. 2 East, P. C. c. 16, s. 129, p. 714, in which last book the reason given by Hawkins (1 Hawk. P. C. c. 34, s. 1) for this doctrine, and which would seem to lead to the conclusion that it would be robbery in such case, though the party delivered the money solely under the mistaken conscientious compulsion of his oath, is denied. And from note (*n*) in East,

P. C., *ibid.*, it seems that the delivery of the money was an act more immediately consequent upon the menace and oath than would appear from the statement of the case as given in the text from 3 Inst., and 1 Hale.

(*i*) Fost. 128. 4 Blac. Com. 243, 244. Donnally's case, 1 Leach, 197.

(*j*) Hughes's case, 1 Lew. 301, Bayley, J.

(*k*) Fost. 128. 2 East, P. C. c. 16, s. 128, p. 711. See *ante*, p. 84.

(*l*) Fost. 129.

If a person by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer, less than the value, it is robbery; as where the prisoner took a quantity of wheat worth eight shillings, and forced the owner to take thirteen-pence half-penny for it, threatening to kill her if she refused, the offence was clearly holden to be robbery by all the judges upon a conference. (m) But whether the forcing a chapman to sell his wares, and giving him the full value for them, will amount to robbery, has been considered as doubtful. (n)

Where a case was put in argument of a man walking with his child, and delivering his money to another person, upon a threat that, unless he did so, the other would destroy his child, Hotham, B., said, that he had no doubt that it would be a robbery. (o) And in a subsequent case, Eyre, C. J., said, that a man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; and that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in unless he gave him money. (p)

Upon an indictment for robbing the wife of P. Abraham, it appeared that the money was obtained from the wife by a threat to accuse her husband of an unnatural offence, and the money so obtained was the property of her husband. Littledale, J., said, 'the case was new and perplexing; he thought it was rather a misdemeanor. To make a case of this description a robbery, the intimidation should be on the mind of the person threatened to be accused, and the apprehension of the wife was of a different character. The 7 & 8 Geo. 4, c. 29, s. 7, is in terms confined to threats made to the party himself. The principle is, that the person threatened is thrown off his guard, and has not firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened. Even as a misdemeanor, the case was new, though he thought that the only way to treat the offence.' He therefore directed an acquittal. (q) But see the 24 & 25 Vict. c. 96, s. 47. *Ante*, p. 78.

(m) *Simons's case*, 2 East, P. C. c. 16, s. 128, p. 712.

(n) 1 Hawk. P. C. c. 84, s. 14. 4 Blac. Com. 244, *ante*, p. 84.

(o) *Donnally's case*, 2 East, P. C. c. 16, s. 130, p. 718.

(p) *Reane's case*, 2 East, P. C. c. 16, s. 132, p. 735, *post*, p. 102.

(q) *R. v. Edward*, 1 M. & Rob. 257, S. C. 5 C. & P. 518. The prisoner was afterwards tried for the misdemeanor, but acquitted, the prosecutor not appearing. See *R. v. Knewland*, 2 Leach, 721, *post*, p. 97, which seems to support the view of the learned judge that if this was not robbery, it was only a misdemeanor. But it seems to deserve consideration whether as 'the law considers the fear of losing character by such an imputation as equal to the fear of

losing life itself, or of sustaining other personal injury;' [per Ashhurst, J., delivering the judgment in *R. v. Knewland*] it might not well be contended that the fear of such a charge being made against a husband would operate as strongly on the mind of the wife as *any* threat of personal violence, or even of death to him could possibly do; and especially as 'the bare idea of being *thought* addicted to so odious and detestable a crime is of itself sufficient to deprive the injured person of all the comforts and advantages of society; a punishment more terrible, both in apprehension and reality, than even death itself,' [per Ashhurst, J., *ibid.*] and therefore, the threat of making such a charge must operate in the strongest possible manner on the mind of the wife, indeed much more forcibly than any threat of injury

**The fear of injury to the property.**—The cases in which the offence of robbery has been committed by means of a fear of injury to the *property* of the party are principally those in which the terror excited was of the probable outrages of a mob.

The prisoner, who was a ringleader in some riots amongst the tanners in Cornwall, came with about seventy of his companions to the house of the prosecutor, and said that they would have from him, the same as they had had from his neighbours, namely, a guinea, or else they would tear his mow of corn, and level his house. He gave them a crown to appease them; when the prisoner swore that he would have five shillings more, which the prosecutor, being terrified, gave him. They then opened a cask of cyder by force, drank part of it, and ate the prosecutor's bread and cheese; and the prisoner carried away a piece. The indictment contained two counts, one for robbing the prosecutor of ten shillings in his dwelling-house, by assault and putting him in fear, and the other for putting the prosecutor in fear, and taking from him in his dwelling-house a quantity of cyder, pork, and bread. It was holden robbery in the dwelling-house. (s)

**Money demanded by a mob.**—During the riots in London, in the year 1780, a boy with a cockade in his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, 'God bless your honour, remember the poor mob.' The prosecutor told him to go along; on which he said, 'Then I will go and fetch my captain,' and went away; but soon afterwards the mob, to the number of a hundred, armed with sticks, and such other things as they had been able to procure, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up, the bystanders said, 'You must give them money,' and the boy said, 'Now, I have brought my captain;' and some of the mob said, 'God bless this gentleman, he is always generous.' The prosecutor then said to the prisoner, 'How much?' to which the prisoner answered, 'Half-a-crown, sir;' upon which the prosecutor, who had before only intended to give a shilling, gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery. (t)

On an indictment for robbery, it appeared that the prisoners went with a mob to the prosecutor's house, and that one of the mob very civilly, and as the prosecutor then thought, with a good intention, advised him to give them something to get rid of them, and to prevent mischief, and that in consequence of this, he gave them the money stated in the indictment. To shew that this was

to any property could possibly do. It should be observed, that in *R. v. Knewland* it was contended on the trial that if the fear was not sufficient to constitute the crime of robbery, the prisoners might be convicted of larceny, if they obtained the money fraudulently, with a felonious design to convert it to their own use; but this point was neither noticed by the Court on the trial, nor by the twelve judges upon the case reserved; indeed

the only question submitted to them seems to have been whether the circumstances were sufficient to constitute the crime of robbery. C. S. G.

(s) *Simons's case*, 2 East, P. C. c. 16, s. 131, p. 731. See another case against the same prisoner, where the threat was of injury to the person, *ante*, p. 93.

(t) *Taplin's case*, 2 East, P. C. c. 16, s. 128, p. 712.



not *bona fide* advice, but in reality a mere mode of robbing the prosecutor, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different times of the same day, when some of the prisoners were present; it was objected that the fact, that money had been demanded at other places would be no proof of any demand made on the prosecutor; and that this was, in effect, trying the prisoners upon other charges, which they could not be prepared to meet. But it was held, that what was done before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when the prisoners were present, might be given in evidence. (*u*)

In another case, which occurred also upon the trial of some of the rioters in the year 1780, the prosecutor swore that the prisoner and another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, 'Put one shilling into my hat, or I have a party that can destroy your house presently;' upon which he gave him a shilling. It was also sworn by another witness, that the prisoner also said, that if the prosecutor 'would keep the blood within his mouth, he must give the shilling.' This offence was also holden to be robbery. (*v*)

The prosecutor had corn belonging to other persons in his possession when the prisoner came to him, together with a great mob marching in military order. One of the mob said, that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold corn for thirty shillings, which was worth thirty-eight shillings. This was ruled to be robbery. (*w*)

Some years subsequent to the cases which have been mentioned, and during the riots at Birmingham, a case occurred where money was obtained from the owner by a threat that if he did not give it, his house should be destroyed by a mob. The prisoners were indicted for robbing one Grundy. The prisoners, together with a man who was unknown, went to the house of Grundy, near Birmingham; when, upon Grundy coming out, they pulled off their hats, and shouted, 'Church and King;' upon which Grundy did the same, and advanced towards the prisoners in much alarm, when the stranger accosted him, and said, 'I am come out of friendship to you, Grundy, to let you know your house is marked to come down to-morrow morning at two o'clock. I am the head of the mob; they are two thousand strong in Birmingham; I must have something to make my men drink; I can bring two or three hundred in an hour's time, or keep them back.' Grundy said, 'As to something to drink, you shall have anything you have a mind for.' The stranger then said, 'I must have

(*u*) *R. v. Winkworth*, 4 C. & P. 444, Parke and Alderson, JJ., and Vaughan, B. Lord Tenterden, upon having this ruling communicated to him, concurred in it.

(*v*) *Brown's case*, 2 East, P. C. c. 16, s. 131, p. 731.

(*w*) *Spencer's case*, *cor.* Buller, J., 2 East, P. C. c. 16, s. 123, p. 712. As to cases where the owner has been compelled to part with his property under colour of a purchase, see *ante*, p. 93.

money.' Grundy offered him a half-a-crown, which he rejected with contempt; upon which Grundy asked what he wanted? and he replied that he must have twenty guineas; and upon Grundy telling him that he had not so much in the house, said, that if Grundy did not give him something handsome for his men to drink, his house should come down. Grundy said, that he might have nine or ten guineas; which he asked to see. While Grundy was taking his purse out of his pocket, one of the prisoners told him he might depend upon it that the stranger was the head of a mob, with other discourse of a similar kind as to his power; and particularly that he was the first man who had entered every house that had been destroyed. This expression so struck Grundy that he immediately took the money, which amounted to nine guineas and a half, out of his purse, and gave it to the stranger; who counted it, and demanded something to drink; when they all went into Grundy's house and had some liquor: after which, in going away, they assured Grundy that he should be protected. There was no evidence that the prisoners had any of the money at the time; but it appeared that a small share of it was given to them afterwards. Grundy, in giving his evidence, said, that he was greatly alarmed, but not for his person; that no injury was threatened to his person; but that, when he delivered his money, his apprehension was, that if he had refused to do so, the men would have gone to Birmingham, and have returned with other persons, and pulled down his house and plundered it, (before he could remove his wife, who was in the house in great agitation), as they had threatened, and as different houses in Birmingham had been before pulled down. Upon these facts it was objected, on behalf of the prisoners, that there was no evidence of robbery, as the prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension of future injury to his house, by pulling it down. The truth of the evidence was, however, left to the jury; who found the prisoners guilty, saying, that they were satisfied that Grundy did not deliver his money from any apprehension of danger to his life or person, but from an apprehension that, if he refused, his house would at some future time be pulled down, as the prisoners and the stranger threatened, in the same manner as other houses in Birmingham had been before; and, the facts of the case being afterwards submitted to the judges, for their opinion, whether the evidence amounted to robbery, a majority of them held that it did. (x)

**The fear of injury to the character.** — The cases of robbery in which the property has been obtained by means of a fear being excited of injury to *the character* of the party robbed appear to be all of one description. Indeed it has been said, that the terror which leads a party to apprehend an injury to his character has never been deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. (xx) In the case in which this doctrine

(x) Astley's case, 2 East, P. C. c. 16  
a. 131, p. 729.

(xx) This has been extended to accusa-

tions of immoral conduct. R. v. Tomlinson,  
W. N. 1895, p. 24. See this case in ad-  
denda to this volume.

is laid down it appeared that the prisoners, assisted by other persons got the prosecutrix into a house, under pretence of an auction being carried on there, forced her to bid for a lot of articles which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened that she should be taken to Bow-street, and from thence to Newgate, and be imprisoned till she could raise the money; that after these threats had been used, a pretended constable was introduced, who said to the prosecutrix, 'Unless you give me a shilling you must go with me,' upon which she was induced to give the pretended constable a shilling; and that the prosecutrix parted with the shilling, being in bodily fear of going to prison, as a means of obtaining her liberty, and to avoid being carried to Bow-street and to Newgate, and not out of fear or apprehension of any other personal force or violence. The judges, after argument, and a minute discussion of the circumstances of the case, were of opinion that they were not sufficient to constitute the crime of robbery. They thought that the threat used of taking the prosecutrix to Bow-street, and from thence to Newgate, was only a threat to put her into the hands of the law, which she might have known would have taken her under its protection and set her free, as she had done no wrong; that an innocent person need not in such a situation be apprehensive of danger; and, therefore, that the terror arising from such a source was not sufficient to induce an individual to part with property, so as to amount to robbery. And they said, it was a case of simple duress for which the party injured might have a civil remedy by action, which could not be, if the fact amounted to felony. (y)

But the fear of injury to character, which may be excited by accusing a person of sodomitical practices had been holden to come under a different consideration, long before the 7 & 8 Geo. 4, c. 29. As the imputation of being addicted to so odious and detestable a crime would be sufficient to deprive the injured person of all the comforts and advantages of society, and would inflict a punishment more terrible than death, both in apprehension and reality, the law considered the fear of losing character by such an imputation, as equal to the fear of sustaining personal injury, or even of losing life itself. (z)<sup>1</sup>

**Accusing of unnatural crimes.** — With regard to the offence of accusing or threatening to accuse any person of any unnatural offence, under sec. 47 of 24 & 25 Vict. c. 96, (a) it is to be observed that under this clause it is not necessary that any property should be actually obtained, and the intent may be either to obtain the property from the party accused or from any other person. With respect to the nature and degree as the *intimidation* it should seem that if the accusation or threat produces a reasonable fear of loss of character,

(y) *R. v. Knewland*, 2 Leach, 721. 2 East, P. C. c. 16, s. 131, p. 732. It appears from the latter book that Ashhurst, J., Hotham, B., Perryn, B., and Buller, J., were absent. But the opinion of the judges was

afterwards delivered by Ashhurst, J., who did not state that he in any way dissented.

(z) By Ashhurst, J., in *R. v. Knewland*, 2 Leach, 731.

(a) *Ante*, p. 78.

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<sup>1</sup> See *Long v. S.*, 12 Geo. 293. *Britt v. S.*, 7 Humph. (Tenn.) 45. *P. v. Macdaniels*, 1 Parker, C. R. (N. Y.) 198.

the *intimidation* will be sufficient, though the accusation or threat be not accompanied with any actual violence, and though it do not produce any fear of being taken into custody, or exposed to any punishment.

The prisoner was indicted for a highway robbery. The prosecutor and the prisoner, not being at the time at all acquainted, pressed together with a great crowd, into the upper gallery of the play-house at Covent-garden, after which the prisoner took his seat by the side of the prosecutor. During the play the prisoner asked the prosecutor whether a journeyman who had spoken to him was of his company; to which the prosecutor replied in the negative; and no other conversation passed between them during the play. When the play was over the prisoner followed the prosecutor out of the house, and as they were crossing Bow-street proposed to him to have something to drink, to which the prosecutor assented, and they went together to an adjoining public-house. In a few minutes, and after they had drunk some porter, the prisoner turned towards the prosecutor and asked him what he meant by the liberty he had taken with his person in the play-house. The prosecutor said, that he knew of no liberties being taken; when the prisoner replied, 'Damn you, Sir, but you did; and there were several reputable merchants in the house who will take their oaths of it.' The prosecutor, much alarmed, immediately rose from his seat, paid for the porter, and went out of the house, saying to the prisoner, that he did not know what he meant. The prisoner followed him into the street, where there was a considerable crowd, and hallooed out, 'Damn you, Sir, stop! for if you offer to run, I will raise a mob about you;' and then seizing him violently by the arm, exclaimed, 'Damn you, Sir! this is not to be borne! you have offered an indignity to me, and nothing can satisfy it!' The prosecutor, terrified by these expressions, and the manner in which they were uttered, replied, 'For God's sake, what do you want, what would you have me do?' to which the prisoner said in a lower tone of voice, 'A present—a present—you must make me a present.' The prosecutor asked him, 'A present of what?' upon which the prisoner said, 'Come, come, what money have you? How much can you give me now!' The prosecutor said, he had but little money, but that the prisoner should have what he had about him; and accordingly gave him three guineas and some silver. The prisoner said, it was not enough and demanded more. During the whole of this conversation the prisoner held the prosecutor fast by the arm, and thereby defeated several efforts which he made to get away; and at length, when he suffered the prosecutor to walk on, still accompanied him, keeping tight hold of his arm, down another street. At length the prisoner loosed his arm, but did not leave him; and as he refused to tell his name, or where he lived, followed him to the door of his lodgings. Early the next morning the prisoner called at his lodgings, and frightened the prosecutor out of a further sum of forty pounds. The prosecutor soon afterwards communicated what had happened to a friend, and by his advice determined to apprehend the prisoner when he could meet with him; but he was not apprehended till some months after, when he again called upon the prosecutor, and again threatened to impeach his character, unless he would give him more

money. The prosecutor swore, that at the time he parted with his money he understood the threatened charge to be the imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which the prisoner had detained him in the street had put him in fear for the safety of his person. The case was left to the jury, with a direction to consider whether the prosecutor parted with his money under the impression of fear; and the jury found the prisoner guilty; declaring, that they thought that such an accusation would strike a man with as much or more terror than if he had a pistol at his head. The point was afterwards considered by the judges; and they were of opinion, that the conviction for a highway robbery was proper; that in order to constitute robbery, there was no occasion to use weapons, or real violence; and that taking money from a man in such a situation as rendered him not a free man (as if a person so robbed were in fear of a conspiracy against his life or character) was such a putting in fear as would make the taking of his money under that terror a robbery. (b) And a case which had been previously decided upon the same point was mentioned with approbation. (c)

In the latter case, which was so mentioned with approbation by the judges, it appears that there was some actual violence, used in the assault, and a laying of hands on the party; and in the former case, there was, as has been seen, a continual force and violence, and a threat to deliver the party up to the mob as a sodomite, besides the fact of laying hold of the arm; circumstances which were afterwards urged as giving a peculiar character to those cases, and as making them distinguishable from one in which no such circumstances should exist. (d) But the circumstances of actual violence appear to have been considered as not material in a case in which the judges, after great discussion, held the offence to amount to robbery.

The prosecutor, a young gentleman, was passing through Soho-square, between the hours of six and seven o'clock in the evening, when he met the prisoner, whom he had never seen before. The prisoner accosted him, and desired that he would give him a present. The prosecutor said, 'For what?' The prisoner answered, 'You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime.' The prosecutor then gave him half-a-guinea, which the prisoner said was not sufficient; but the prosecutor had no more in his pocket. On the next day but one, about four o'clock in the evening, the prosecutor met the prisoner again in Oxford-street, who made use of the same threats as before; telling the prosecutor that he knew what had passed in Soho-square, and that unless he would give him more money, he would take him before a magistrate and accuse him of the same attempt; adding, that it would go hard against him, unless he could prove an *alibi*. The prosecutor then went to the shop of a grocer in Old Bond-street, the

(b) Jones's *alias* Evans's case, 1 Leach, 139. 2 East, P. C. c. 16, s. 130, p. 714.

(c) Brown's case, 2 East, P. C. c. 16, s. 130, p. 715, Eyre, B., when Recorder, where Harrold's case, *alias* Hutton's case, is mentioned, as one in which the prisoner was convicted for a similar robbery.

(d) See the judgments of Perryn, B., and Blackstone, J., in Donnally's case, 2 East, P. C. c. 16, s. 130, p. 717, 718, 721, and the judgment of the Court, as delivered by Willes, J., in Donnally's case, 1 Leach, 193.

prisoner following him, and staying on the outside of the door; and the prosecutor, being in the shop, took a guinea out of his pocket, gave it to the grocer, and desired that he would give it to the man at the door, which the grocer did, and the prisoner then went away. The prosecutor stated, that he was exceedingly alarmed at both the times, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life. The jury were directed to consider, first, whether they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger; and, secondly, if they should not think that the prosecutor apprehended that his life was in danger, then, whether the money was not obtained by means of the prisoner's threats, and against the will of the prosecutor; for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty, and said that they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. But, doubts being entertained respecting the conviction, the question was submitted to the judges, and after argument, and very full consideration, they at length all agreed that it amounted to robbery. Their opinions were delivered *seriatim*, and contain some learned and interesting discussions relating to the nature of the fear by which a party may be induced to part with his property, in cases where no actual violence is employed to obtain it; (e) and Willes, J., afterwards delivered the result of their deliberations. He said, that the facts of the case shewed that there was the necessary felonious intention in the prisoner to rob the prosecutor; and that it was impossible to raise a doubt, that there was a sufficient taking from the prosecutor's person. With respect to the putting in fear, it is not necessary to lay a putting in fear in the indictment; and the circumstance of actual fear need not be proved upon the trial; for if the fact be laid to be done violently and against the will, the law *in odium spoliatoris* will presume fear. There need not be actual violence, a reasonable fear of danger caused by constructive violence being sufficient; and that where such terror is impressed upon the mind as does not leave the party a free agent, and he delivers his money in order to get rid of that terror, he may clearly be said to part with it against his will, so as to constitute robbery. That no actual danger is necessary, as a man may commit a robbery without using any offensive weapon, as by using a tinder-box or candlestick instead of a pistol. And that when a villain comes and demands money, no one knows how far he will proceed. The learned judge then referred to the facts and circumstances of the case, as sufficient to bring it within these rules of law. He stated, that the situation of the prosecutor was that of a young gentleman accosted at night, in the streets of London, by a person he never saw before, and whom he must have suspected to be a villain; and that this person demanded a present. Even that seemed sufficient to satisfy the legal idea of robbery. But the prisoner went further, and used the words, 'You had better comply, or I will take you before a magistrate.'

(e) These opinions are given at length in the report of the case in 2 East, P. C. c. 16, a. 130, p. 716 to 726.

This then was a threat of personal violence; for the prosecutor had everything to fear in being dragged through the streets as a culprit charged with an unnatural crime. It was a threat which must necessarily and unavoidably produce intimidation, and occasion a reasonable fear, which might operate *in constantem virum*, as well as *in meticulosum virum*. He then observed, upon the argument urged by the counsel for the prisoner, that this was a fraudulent taking, and not a taking by violence; and said, that in many cases fraud would supply the place of violence, as in burglary, where, though it was necessary to charge a breaking in the indictment, yet there might be a constructive breaking by a person fraudulently getting admission into a house by colour of law, or under pretence of taking lodgings, or of having business. (f) But he said, that the judges did not determine the case entirely on this ground, but were of opinion that there was proof of a constructive violence, which they thought was sufficient; and that they were all of opinion, that enough was proved in this case for the jury to find the prisoner guilty of robbery. (g)

This doctrine appears to have been acted upon in subsequent cases, (h) in one of which the party delivered his money solely from fear of losing his character.

Hickman was indicted for robbing one John Miller of two guineas. It appeared that the prosecutor had some employment in the palace of St. James's, and an apartment there in which he was accustomed to sleep, and that the prisoner was occasionally a sentinel on guard at the palace. One night the prosecutor treated the prisoner with some bread and cheese and ale, in his room. About a fortnight afterwards, very late in the evening, the prosecutor was going upstairs to his apartment, when he heard somebody close behind him, and, on turning round, saw that it was the prisoner, who said, 'It is me.' The prosecutor asked him, what brought him there at that time of night? upon which the prisoner answered, 'I am come for satisfaction; you know what passed the other night; you are a *sodomite*; and if you do not give me satisfaction, I will go and fetch a sergeant and a file of men, and take you before a justice; for I have been in the black hole ever since I was here last, and I do not value my life.' The prosecutor then asked him, what money he must have, when the prisoner said, 'I must have three or four guineas.' The prosecutor gave him two guineas, which was all he had, and promised to give him another guinea the next morning; and the prisoner took the two guineas, saying, 'Mind, I don't *demand* anything of you.' The next morning he came and received the other guinea; and, in a few days after, upon making an application for more money upon the same pretence, he was apprehended. The prosecutor swore, that he was very much alarmed when he gave the prisoner the two guineas, and did not very well know what he did; but that he parted with his money under an idea of preserving his character from reproach, and not from the fear

(f) *Ante*, p. 8, *et seq.*

(g) *Donnally's case*, 1 *Leach*, 193. 2 *East*, P. C. c. 16, s. 130, p. 715 to 728.

(h) *Staples's case*. *Hickman's case*, 2 *East*, P. C. c. 16, s. 130, p. 728. *Staples* was executed, but *Hickman* was reprieved

on condition of transportation. It appears from *Hickman's case* (1 *Leach*, 278) that *Donnally* was not executed, and that some doubts had been entertained as to the opinion of the twelve judges in that case.

of personal violence. The learned judge who tried the prisoner, in leaving the case to the jury, remarked, upon the point in which it might be supposed to differ from that of *Donnally*, (*i*) that in *Donnally's* case the prosecutor had sworn that he delivered his money under an apprehension of personal danger, as well as from the fear of losing his character; but that in the present case the prosecutor had sworn that he parted with his money for the sake of his character only, and not from any apprehension of danger to his person. The jury found the prisoner guilty; and that the prosecutor parted with his money, against his will, through a fear that his character might receive an injury from the prisoner's accusation; but as some doubt was entertained whether the case was within the principle upon which *Donnally's* proceeded, it was submitted to the consideration of the judges; and their opinion was afterwards delivered by Ashurst, J., to the following effect: 'Some doubts having been entertained as to the opinion of the twelve judges, in the case of *Donnally*, the learned judge, who tried the prisoner, thought it proper that the present case should, likewise, be referred to their consideration. They have, accordingly, conferred upon it; and, they are of opinion that it does not materially differ from the case of *Donnally*; for that *the true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury. The principal ingredient in robbery is a man's being forced to part with his property; and the judges are unanimously of opinion, that, upon the principles of law, and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes is, as in the present case, a sufficient force to constitute the crime of robbery, by putting in fear.*' (*j*)

This case seems to have gone to the full extent of the doctrine upon which it proceeded, and must be considered as in some measure qualified and restrained by subsequent decisions; in one of which it was holden, that as the prosecutor had parted with his property for the purpose of convicting the prisoners, and after the apprehension of injury to his character, from the foul charge, had ceased, it was not robbery; (*k*) and in the other, it was holden by a majority of the judges, that in order to constitute robbery, in a case of this kind, the property must be taken upon an immediate apprehension of present danger, upon the charge being made, and not after the parties have separated, and there has been time to deliberate and procure assistance, and after a friend has actually been consulted respecting the transaction. (*l*)

Reane was indicted for a highway robbery, and taking nineteen guineas and a shilling; and Watkins was charged, in the same indict-

(*i*) *Ante*, p. 101.

(*j*) *Hickman's case*, 1 Leach, 278, 2 East, P. C. c. 16, s. 130, p. 728. The prisoner was not executed; see *ante*, note (*h*).

(*k*) *Reane's case*, 2 Leach, 616. 2 East, P. C. c. 16, s. 132, p. 734.

(*l*) *R. v. Jackson*, 1 East, P. C. *Adenda*, xxi.



ment, as an accessory before the fact. The evidence was, that on the 12th of May, 1794, the prosecutor met Reane in the street. He was an entire stranger to the prosecutor; but he asked for money, saying that he was in great distress; and, upon the prosecutor's refusing to give him any, went away muttering expressions of anger and discontent. On the next day he again met the prosecutor in the street, and repeated his request for money; and, on being refused, said, 'You shall be the worse for it.' On Friday, the 23rd of May, he again accosted the prosecutor in the street, and told him that he had taken indecent liberties with him in the park, and that it had been seen and could be proved by a third person. The prosecutor, with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day the prosecutor received a letter from him containing similar charges, and mentioning his place of residence; in consequence of which the prosecutor, having consulted with a friend, was induced to write to him, and appoint to meet him in the street to hear what he had to say. He accordingly met him there, when Reane said, that if the prosecutor did not give him money he could prove his having committed indecencies with him in the park, as a third person had seen it; upon which the other prisoner, Watkins, joined them, saying, 'Yes, I saw you.' The prosecutor exclaimed, that it was a horrid abominable falsity; upon which Watkins said, 'You have great interest with the government; I shall be glad of a place as a clerk, either in the customs or excise.' The prosecutor said that he would apply for one, upon which Watkins went away. Reane then said, 'You have given that man a certainty; I will have a certainty also;' upon which the prosecutor told him that he should. On the following morning Reane met the prosecutor by appointment, and told him that he had considered the matter, that he must have twenty pounds in cash, and a bond for fifty pounds a year; upon which the prosecutor, in pursuance of a plan which he had previously concerted with his friend, told him that he could not give them to him then, but that if he would wait a few days he would bring him the money and the bond. The prosecutor, on his next interview with Reane, offered him the twenty pounds; but he refused to take the money without the bond, upon which the prosecutor fetched the bond, and gave it, together with nineteen guineas and a shilling, to Reane, who carried both the bond and the money away with him, saying, that he would not give the prosecutor any further trouble. It was objected on behalf of the prisoners that this proof was defective; as in order to constitute robbery there must be a violence, or fear of danger, to the person or character; and that such violence, or fear, must exist at the time when the property is parted with; but the case was left to the jury, who found the prisoner guilty; upon which the opinion of the judges was taken. At the first conference the judges (Buller, J., being absent) were inclined to think that this was not robbery, as there was neither violence nor fear at the time the prosecutor parted with his property. Eyre, C. J., observed, 'That it would be going a step further than any of the cases to hold this to be robbery. That the principle of robbery was violence; and where the money was delivered through fear, that was constructive violence. That the

principle he had acted upon, in such cases, was to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoners, he negatived the robbery. That this was different from Norden's case, *(m)* where there was actual violence; for here there was neither actual nor constructive violence. A man might be said to take by violence who deprived the other of the power of resistance, by whatever means he did it. And he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges of a man holding another's child over a river, and threatening to throw it in unless he gave him money.' The judges thought the matter deserving of further consideration; but they ultimately adhered to the opinion to which they had at first inclined; and held (Buller, J., being absent) that the conviction was wrong; as there was no violence either actual or constructive. *(n)*

Jackson, Shipley, and Morris were indicted, in 1802, for robbing one W. S. in the dwelling-house of one S. Rowe. The evidence of the prosecutor was, that while he was threshing in his father's barn, at a place called Gidling, the prisoners Shipley and Morris came to him, and asked if W. S. lived there, to which he answered that he was the man. They then asked him if he remembered lying with two soldiers some time before; and upon his saying that he did, they said that one of the soldiers, named Jackson, had said that he had abused him; and that Jackson was then come over to Carlton (an adjoining place,) and would certainly follow the law, unless he would come and make it up with him; but that, if he went there, and made it up with Jackson, there would be no more of it. The prosecutor answered, that he knew nothing of the sort, but that he would go and hear what Jackson had to say. Shipley and Morris then went away; and the prosecutor followed them to a public-house, kept by S. Rowe, at Carlton, where he also found the prisoner Jackson, and another soldier. Some conversation took place in a private room, when Jackson preferred the same charge against the prosecutor of his having unnaturally abused him; which was positively denied by the prosecutor. At last Jackson told the prosecutor, that if he would pay him the expenses, there should be no more of it: and upon the prosecutor saying that he was willing to pay anything in reason, Morris and Shipley made out a sort of account, by setting down in writing the following articles as mentioned by Jackson: — 'Doctor, £1 11s. 6d.; for abusing me, £1 8s.; Morris, 10s.; Shipley, 5s.; the other soldier, 2s. 6d.;' the total was £3 17s.; but they asked to have four guineas. The prosecutor said he had no such money; but upon their insisting upon having it, he said he would try to get it from his parents; and asked one of them to accompany him, which Shipley accordingly did. The prosecutor swore that he was much frightened and hurried, and did not know what best to do. He went, however, accompanied by Shipley, to his mother's; and, under the pretence of a soldier having been hurt, obtained from her four

*(m)* *Ante*, p. 92.

*(n)* Reane's case, 2 East, P. C. c. 16, s. 132, p. 734. 2 Leach, 616.

guineas. On their return to the public-house, the prosecutor stopped at the house of one Shelton, and prevailed upon Shelton to go along with him. Shelton inquired what was the matter; and, upon being informed by Shipley, declared his disbelief of the charge, and said that if it were his own case he would not pay the money; upon which Shipley said, that if the prosecutor did not pay the money, it would cost him £50 or £100, or perhaps his neck; that he was himself a constable, and would go for a warrant the next morning. This language frightened the prosecutor very much. When the prosecutor, Shipley, and Shelton got to the public-house, Jackson, Morris, and the other soldier were in the same room in which the prosecutor had left them. The prosecutor sat down, and after a few minutes, laid the four guineas upon the table, and asked who would take it; upon which they all said 'Jackson;' but Shipley took it up; and amongst them they returned back six shillings to the prosecutor, half-a-crown of which was said to be for his friend's expenses (meaning Shelton). The prosecutor asked for a receipt; but Morris said his friend would do as well: and Shelton made some inquiries as to the doctor to whom Jackson had applied, but received only evasive answers. The prosecutor swore to the falsehood of the charge, but said he was scared at it, and that was the reason why he parted with his money. On his cross-examination, it appeared that Jackson had first made the charge on the morning after the night they had lain together, but did not repeat it then; and that they continued eating and drinking for several hours after; that afterwards he had heard of Jackson's having repeated the charge in several companies, which had caused him much agitation. Shelton's evidence went to confirm the prosecutor in his account as to the part of the transaction which happened in his presence, and he also swore, that, as they were going to the public-house, he called the prosecutor back, and advised him not to pay the money. And he added, that the prosecutor was quite scared out of his wits. The jury found the prisoners guilty; but on a doubt whether the case did not go somewhat beyond those which had been previously decided; and principally, because the prosecutor had a friend present during the transaction, the case was submitted to the judges, and a majority of them were of opinion that it did not amount to robbery, though the money were taken in the presence of the prosecutor, and the fear of losing his character were upon him. Most of such majority thought that, in order to constitute robbery, the money must be parted with *from an immediate apprehension of present danger, upon the charge being made*, and not, as in this case, where the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance: and had applied to a friend, by whom he was advised not to pay it, and who was actually present at the very time when it was paid; which circumstance, they thought, had the appearance rather of a composition of a prosecution than of a robbery, and seemed like a calculation whether it were better to lose his money than risk his character. And one of the judges who agreed that it was not robbery, thought that there was not such a *continuing fear* as could operate in *constantem virum* from the time when the money was demanded until it was paid; as, in the interval, the prosecutor had taken advice, and might have procured assistance. Those

judges who thought the case did amount to robbery, considered the question as concluded by the finding of the jury, that the prosecutor had parted with his money through fear continuing at the time, which fell within the definition of robbery, which had been long adopted and acted upon: and they said that it would be difficult to draw any other line. They thought, also, that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for assistance; the money being given to prevent the public disclosure of the charge. (o)

Mr. East, who cites this case, from MS. Jud. (p) suggested a question, whether the decision did not, in a great measure, overrule the case of Hickman, which is mentioned in the preceding pages. (q) But it should be observed, that the circumstances of these cases materially differ; and, particularly, that in Hickman's case, the two guineas were given *immediately* upon the charge being made, and that there was no previous application to any friend, or other person, from whom advice or assistance might have been procured.

Hickman's case was again observed upon, in a case which occurred shortly afterwards. The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite and b——r. The prosecutor took him each time before a magistrate, who discharged the prisoner. On leaving the magistrate, the prisoner followed the prosecutor, again called him a sodomite and b——r, and asked him to make him a present, said he would never leave him till he had pulled the house down, but if he did make him a handsome present, he would trouble him no more. He asked four guineas, and the prosecutor being frightened for his reputation, and from fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted before Hotham, B., (Le Blanc, J., and Chambre, J., being present,) but upon a doubt in the Privy Council, the opinion of the judges was taken. Most of the judges thought that this was within Hickman's case, and nine of them (r) seemed to think Hickman's case binding, but the three others (s) thought it not law. (t) It seems that the prisoner was pardoned. (u)

But in a case where the prisoners had been with the prosecutor at ten o'clock in the morning, and had threatened to prefer the charge of an attempt to commit an unnatural crime, if he did not give them £10; one of them pretended to be an assistant police officer, and to him the prosecutor had given £10 the night before. The prosecutor fixed to meet them the next morning at nine

(o) *R. v. Jackson*, 1 East, P. C. *Adenda*, xxi.

(p) *Id.* xxiv., in the margin.

(q) *Ante*, p. 101, *et seq.*

(r) *Chambre, Le Blanc, Rooke, Thomson, Grose, Heath, Hotham, M'Donald, and Lord Alvanley.*

(s) *Graham, Lawrence, and Lord Ellenborough.*

(t) Lord Ellenborough thought that the prosecutor's principal inducement in the present case to part with his money was the fear of a loss of his place, and his lordship said that he should feel no difficulty in recommending a pardon.

(u) *R. v. Elmstead*, Mich. T. 1802, MS. Bayley, J.

o'clock, but they came again that night at nine, and said they could not wait, and that, as the prosecutor had not £10 about him, they must take him to Bow-street. He then agreed to go, and they called a coach, and he got in. They then said if he would procure the money they would not prefer the charge. He went to a friend's, and got £10, and gave it to them. He was there about five minutes. The prisoners went to the house with him, and waited for him in the street. Upon the trial, the prosecutor said he was under the apprehension of being carried by force into custody, but that he did not give the money under the impression of danger to his person. The prisoners were convicted, and, upon a case reserved, ten of the judges held that the calling the coach, and getting in with the prosecutor, was a forcible constraint upon him, and sufficient to constitute a robbery, though he had no apprehension of further injury to his person; but five (*v*) of the judges thought that some degree of force or violence was essential, and that the mere apprehension of danger to the character would not be sufficient to constitute the offence. Five (*w*) others of the judges seemed to think it would. (*x*)

In a later case the point came again under the consideration of the judges, and it appears now to be settled that fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody, or of punishment. The prisoner saw the prosecutor, a servant, whom he knew, at his master's door, and applied to him for £5, saying money he would have, and that of the prosecutor. He then demanded £1, and said, that if he did not instantly get it he would go in to the prosecutor's master and swear that the prosecutor wanted to take diabolical liberties with him. Then hearing some money jingle in the prosecutor's pocket he demanded it, and the prosecutor gave it him, being one shilling and some halfpence. He then inquired about the prosecutor's clothes, and swore that money he would have, or the value, before he left the house, upon which prosecutor fetched him up a coat, and he then went away. The prosecutor stated in his evidence, that he gave the property for fear of his character and place, that his fear was, that the prisoner would go in to his master, but that he had no fear of being taken into custody, or of punishment. The prisoner was convicted, and, upon a case reserved, all the judges, except Graham, B., thought that this was within Hickman's case, and that they were bound by that case, and could not properly depart from it. And Richards, C. B., Bayley, J., and Holroyd, J., expressed their opinions that Hickman's case was right, because the charge conveyed such a degree of terror as might be expected to overpower a firm and constant mind. None of the other judges, except Graham, B., intimated a contrary opinion. And the conviction was affirmed. (*y*)

(*v*) Lord Ellenborough, the Chief Baron, Lawrence, Chambre, and Graham.

(*w*) Heath, Grose, Thomson, Le Blanc, and Wood.

(*x*) *R. v. Cannon*, MS. Bayley, J., and R. & R. 146.

(*y*) *R. v. Egerton*, MS. Bayley, J., and R. & R. 375.

**Immaterial whether the party be guilty of the crime or not.**—Upon an indictment for robbery it appeared that the prisoner had obtained the money by threatening to accuse the prosecutor of an unnatural crime; the prisoner's defence was, that the prosecutor had made an attempt to commit such crime, and had voluntarily given him the money not to prosecute him for it. Littledale, J., ruled that it was equally a robbery to obtain a man's money by intimidating him with a threat of an accusation of an infamous crime, whether the prosecutor were really guilty of the crime or not; as if he was guilty, the prisoner ought to have prosecuted him, and not have extorted money from him. (z)

The prisoner applied to Fry to lend him 10s., and upon his refusal threatened to charge him with an unnatural crime, and got from him £1 10s. Fry parted with it from an anxiety that his master's family might not be disturbed, and in expectation that he might secure the prisoner: and he immediately stated the circumstances to his master, and to a friend, and planned with them what he should do in case of the prisoner applying again. The prisoner did apply again; and Fry fixed to meet him, marked some money, engaged a constable, and having met the prisoner, gave him the money, and had him apprehended; he parted with this money in order that he might prosecute, because he knew himself innocent, and not from the threats. Upon a case reserved, the judges held that this taking did not constitute a robbery, and the prisoner was recommended to a limited pardon. (a)

The prisoner was indicted for having feloniously charged and accused A. B. with having committed an infamous offence; the evidence was, that he had threatened to procure witnesses to support a charge already made; it was objected, that the statute applied only to the threatening to accuse prospectively, and that this was at most a threat to support such a charge by evidence. Bayley, J., 'Threatening to procure witnesses to support a charge already made is not within the Act of Parliament which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, it is another to procure witnesses to support an accusation already made.' (b)

The word '*accuse*' in the 7 & 8 Geo. 4, c. 29, s. 7, was not confined to a threat to prefer a charge before a tribunal competent to entertain it, but included a threat to accuse before any third person, and '*threatening to accuse*' had a like extensive meaning. (c)

On the trial of an indictment upon the 1 Vict. c. 87, s. 4, for extorting money by intimidating a person, by threatening to accuse him of an infamous crime, the jury need not confine themselves to expressions used before or at the time the money was given; but if those expressions are equivocal, may connect them with what was afterwards said by the prisoner when taken into custody. (d)

(z) *R. v. Gardner*, 1 C. & P. 479, Littledale, J.

(a) *R. v. Fuller*, MS. Bayley, J., and R. 408.

(b) Gill's case, 1 Lew. 305. The indictment was upon the 4 Geo. 4, c. 54, s. 5, now repealed. Bayley, B., seemed also to think

that a threat to prosecute would amount to a threat to accuse.

(c) *R. v. Robinson*, 2 M. & Rob. 14. S. C. 2 Lew. 273. The words were, 'Give us our allowance money, and we will say nothing about it.'

(d) *R. v. Kain*, 8 C. & P. 187 *cor.* J. A. Park, J., and Parke, B.

On an indictment for feloniously accusing H. C. S. of an assault with intent to commit an unnatural offence, with intent to extort money, it appeared that the prosecutor was taking shelter under a portico, when the prisoner, a sentry there, after some conversation, seized him by the collar, and charged him with having indecently touched or assaulted him, took him to the guard-house, and said to the sergeant, 'I charge this man with indecently assaulting me.' The prosecutor was then taken to the station, where the prisoner made the same charge. On hearing the charge before the magistrate, the prisoner stated that the prosecutor caught hold of his private parts; and Cresswell, J., held that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house, and accuse him of an unnatural crime, was admissible. The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question was, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof was to show that he would be likely to know that a certain result would follow, and if it could be proved out of his own mouth that he was aware that such a result would be produced, it was an ingredient in the necessary proof that he contemplated it. His whole conduct was to be interpreted with reference to the charge made against him, and what was said by him under similar circumstances to the present, was admissible. (e)

But where, on a similar indictment, it appeared that the prosecutor had gone into a urinal for the purpose of easing himself, when the prisoner came from an adjoining partition, and said to him, 'If you do not give me a sovereign, I will charge you with an indecent assault;' Erle, J., held that proof that the prisoner had made a similar charge against another person two years before, and when taken into custody gave a false address, was not admissible. The decision in *R. v. Cooper* (f) was not applicable. There the main question turned upon the intent with which the accusation was made, and the evidence was there admitted to throw light upon that subject. But in this case the intent was quite manifest if the prosecutor was believed. (g)

In one case since the 1 Vict. c. 87, s. 4, which was similar to section 47 of the present Act (*ante*, p. 78), it was held that an indictment in the ordinary form for robbery was not supported by proof of extorting money by threats of accusing of an infamous crime within that section. Therefore a person present to aid A. B. to extort money by such a charge, could not be convicted of a robbery with A. B., effected by him with actual violence, such person being no party to such violence. Upon an indictment in the ordinary form, against Taunton and Henry for robbery, it was proved that about nine o'clock at night Henry induced the prosecutor to walk

(e) *R. v. Cooper*, 3 Cox, C. C. 547.

(f) *Supra*.

(g) *R. v. M'Donnell*, 5 Cox, C. C. 153.

In *R. v. Braynell*, 4 Cox, C. C. 402, Williams, J., held that depositions containing the accusation against the prosecutor were admissible, but not the cross-examinations of the prisoners. See this case, '*Threats and Threatening Letters*,' vol. iii.

with him into a house in Westminster, then fitting up as a cook's shop, under the pretence of shewing him the fittings: when he had entered, the prisoner locked the door, seized him by the collar, told him he had him in his power, and if he made a noise he would send for the police, and charge him with sodomitical practices: this induced the prosecutor not to give the alarm, and then Henry rifled his pockets of a sovereign and a shilling, and proceeded to take the watch-guard from his neck, and the watch from the fob, and immediately afterwards took some rings from his fingers; some noise was made while this was going on, and Taunton, who was in the house, came to the door of the room, and after trying in vain to gain admittance through it, got in at the window; he came into the room after Henry had rifled the prosecutor's pockets, and whilst he was removing the watch-guard; there was a candle burning in the corner of the room; Taunton took no part in the robbery, and it was not quite clear that he saw it. The jury found Henry guilty, and that Taunton was present at the time of the taking of the rings, and was a party with Henry to a design to bring the prosecutor there, and obtain money and property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the robbery committed by Henry, by taking from the person of the prosecutor. It seemed to Parke, B., that since the 1 Vict. c. 87, s. 4, the offence of robbery and of obtaining money or goods, on a charge of sodomy were distinct offences, and that Taunton could not be considered, under these circumstances, as a principal in the second degree to the robbery; and, upon a case reserved, the judges thought that inasmuch as the 1 Vict. c. 87, repeals the 7th section of the 7 & 8 Geo. 4, c. 29, the offence intended by Taunton was that of extorting money by accusation, &c., under the 1 Vict. c. 87, and no longer robbery, under the 7 & 8 Geo. 4, c. 29, and that the conviction was therefore wrong. (*h*)

The preceding decision was questioned in the following case. Stringer and Newstead were convicted on an indictment for assaulting with intent to rob. The prosecutor proved that he was in Hyde Park at a little after nine at night, when he was accosted by Newstead, who asked him the nearest way to the City, which the prosecutor told him. Almost immediately after Stringer came up from behind, and seized the prosecutor by the collar, and said to him, 'You damned beast, you have been indecently exposing your person; I have been watching you with your friend' (pointing to Newstead) 'for three-quarters of an hour.' Stringer then forced prosecutor to go to a police-station, Newstead accompanying them part of the way. At the station Stringer repeated the charge which he had made when he first seized the prosecutor, and added that the private parts of both men were exposed; that one had his arms round the neck of the other; and each of them had hold of the private parts of the other. The

(*h*) *R. v. Henry*, 2 Moo. C. C. R. 118. S. C. 9 C. & P. 309. Robbery is a common law felony, and it seems quite clear that no enactment of a new offence alters or prevents a prosecution for that offence. See *Williams v. R.* 7 Q. B. 250. So, if there

are several felonies created by statute, it is no objection to an indictment for one, that the evidence proves another also. Neither in *R. v. Henry*, nor *R. v. Norton*, *infra*, was this point noticed. C. S. G.



whole charge was a fiction, and many circumstances were proved to shew that the whole was a preconcerted plan between the prisoners for the purpose of extorting money from the prosecutor. No money, however, was given. Rolfe, B., told the jury that if Stringer was acting in pursuance of a previous plan, arranged with Newstead, with a view to induce the prosecutor to give him money, in order that he might escape the annoyance attending such a charge, that was an assault with intent to rob; and, upon a case reserved upon the question whether the conviction could be sustained, the subject of the charge made by Stringer against the prosecutor not coming within the terms of the 7 & 8 Geo. 4, c. 29, ss. 8 & 9, or 1 Vict. c. 87, ss. 4 & 22, the judges thought the conviction good, as the prisoners intended to get the money by the violence of the assault, as well as by the charge, which would be a common law robbery. And they doubted whether *R. v. Henry* (i) was rightly decided on the ground on which it was decided, viz., that it was not robbery to obtain money by threat of a charge of sodomy. (j)

The first count, framed on the 1 Vict. c. 87, s. 4, charged that the prisoner threatened to accuse the prosecutor of having attempted to commit with him an abominable crime, and thereby extorted a sovereign, &c. The second count charged the prisoner with robbery in the common form. The third count, framed on sec. 7, of the 1 Vict. c. 87, charged the prisoner with demanding money of the prosecutor with menaces. The prosecutor stated that he was induced to meet the prisoner, by his telling him that if he did not he would rue it as long as he lived; when I saw him he said, 'Walk this way;' I followed him, and after we got into rather a lonely place, he said, 'Can you not lend me some money?' I said, 'You have no claim on me, I cannot do so, you can have no money from me;' he then said, 'I am now going to say something of very great importance to you, and it is no use your calling out for help, or giving me into the hands of the police, for if you do, remember, I am armed, and if you do, by God! I will have my revenge; and if you do not assist me I will say you took indecent liberties with me some time ago.' He was exceedingly excited while saying this; he threw his arms about and used violent gesticulation; I thought he was going to attack me, it was a lonely spot; I was so completely paralysed and overcome I scarcely knew what I was about; I was induced, in consequence of that threat, to give him some money on the spot. The prosecutor added, that he gave him the money both from fear of personal violence, and from the attack on his character. For the prisoner it was contended that the evidence did not support the first count, as the words used did not necessarily import an intention to accuse of an attempt to commit the whole capital crime. That with respect to the second count, the charge of robbery was not sustainable, as since the 1 Vict. c. 87, the charge of robbery was only sustainable by shewing that the money was obtained by actual force, or the fear of personal violence. With regard to the third count, it was not supported, as the proof was of another offence, namely, the actual obtaining of the money with threats. The Recorder in summing up

(i) *Supra*.(j) *R. v. Stringer*, 2 M. C. C. R. 261.

said, 'There is this distinction between the present statute and the 7 & 8 Geo. 4, c. 29, that in the latter the words are "if any person shall accuse," &c. "every such offender shall be deemed guilty of robbery," whereas in the former the words are "shall be guilty of felony." There are also in the present statute separate provisions for the punishment of robbery, and also a provision for demanding property with menaces. The difference is, that in the present statute the offence is not asserted to be robbery but only felony, and it may be that the Legislature intended to say, "We will allow the law to remain as it is on the cases decided, as to the crime of robbery; but we will not allow of a constructive robbery further than that, but will provide for it by the provisions of this Act." The statute is not very clear; I shall therefore take your opinion as to the matters of fact upon each of the separate charges. With respect to the first count, I am of opinion that the threat must be to accuse of an attempt to commit the complete capital offence; and you will say upon the evidence, whether such a threat has or has not been proved. As to the second count, the question is, whether the prosecutor parted with his money under bodily fear, such as would operate upon a man of firm mind; and if you shall be of opinion that the property was parted with from the influence conjointly of the violence offered and the vague threat of an undefined charge, the crime of robbery will in my opinion have been made out. In order to constitute robbery in the absence of actual force, it is necessary that the party should be put in actual bodily fear, but I shall not think it the less bodily fear because it was produced by two adequate causes, each of them sufficient in itself to produce the effect. If there was violence enough to produce bodily fear, it will be a robbery; and I do not think it the less a robbery, because in addition to the violence there was a threat to accuse. Then, with respect to the third count, I shall hold that, if menaces were used to obtain money, that count is sustained, although the money was actually obtained.' The jury found the prisoner guilty on the two last counts, but he was afterwards sentenced on the second count only. (k)

(k) *R. v. Norton*, 8 C. & P. 671. The Reporters state in a note that the Recorder mentioned the case to Parke, B., and 'that they were both of opinion that in those cases where money was obtained by any of the threats specified in the statute, the indictment must be upon the statute and not for robbery; but where the money was obtained by threats to accuse, other than those which are specified in the statute, the indictment might be for robbery, if the party was put in fear, and parted with his property in consequence. The finding on the second count was held good. Indeed it seems sustainable on two grounds; first, that there was violence

enough without any threat at all to put the party in fear; and secondly, that the threat to accuse was not one of those mentioned in the Act, and therefore it might properly be taken into consideration as co-operating with the violence in producing the bodily fear, which in the absence of force is necessary to constitute robbery.' This case was before *R. v. Stringer*, *supra*, (j) and the opinions in this note as to the form of indictment are therefore entitled to less weight, in addition to their being merely extrajudicial, as the count for robbery was clearly proved.

## SEC. V.

*Assaults with Intent to Rob.*

Some of the cases upon the former Acts with reference to assaults with intent to rob, may be here properly introduced. Upon the 7 Geo. 2, c. 21, it was decided, that the assault therein described must be made upon the person intended to be robbed. The prisoner was indicted for assaulting one J. Lowe with an offensive weapon with intent to rob him. Mr. Lowe's evidence was, that between ten and eleven o'clock at night he was travelling along the road in a post-chaise, when the chaise suddenly stopped, and he saw a man with his arm extended towards the *post-boy*, and he heard him swear many bitter oaths with great violence, but did not hear him make any demand of money; and the post-boy swore, that the prisoner followed the chaise for some time, and at last presented a pistol *at him*, and bid him stop, using at the same time many violent oaths; that he immediately stopped the chaise, and the prisoner turned towards it, but perceived that he was pursued, and immediately rode away without saying or doing anything to Mr. Lowe, who was in the chaise. The Court held, that this evidence did not support the indictment, which charged an intent to rob Mr. Lowe, the gentleman in the chaise. Another indictment was then preferred against the prisoner, laying the assault with intent to rob the *post-boy*: but the same evidence being again given on the second trial, the Court held that it would not maintain the indictment; that it was clear that the prisoner did not mean to rob the post-boy; for when he presented the pistol to him, and bid him stop, he made no demand upon him, but went towards the person in the chaise. (l)

A case is reported, which would rather lead to the conclusion, that it was at one time considered to be necessary in support of the offence in the 7 Geo. 2, of an assault with an offensive weapon with intent to rob, to show such intention to rob, by proving an *actual demand* of money, &c. to have been made by the prisoner. (m) But this case was doubted; (n) and it was observed upon it, that the words of the 7 Geo. 2, c. 21, were in the *disjunctive*; and that upon proof of the prisoner having assaulted the prosecutor with a felonious intent to rob him (which was a question for the jury) the case was brought expressly within the words, as well as the spirit, of that Act. (o) It has been suggested also, upon this case, that as the prosecutor was a *coachman*, and the indictment charged an intent to rob *him*, it might have appeared to the Court that he was not the party intended to be robbed; (p) and we have seen that it was considered to be necessary

(l) Thomas's case, 1 Leach, 330. 1 East, P. C. c. 8, s. 11, p. 418, where it is observed that perhaps this may be agreeable to the strict construction of the statute, which has the word of reference *such*. And in 1 Hawk. P. C. c. 55, s. 4, Thomas's case is cited, and the expression *such person* relied upon in support of the same construction. The 24 & 25 Vict. c. 96, s. 42, *ante*, p. 77, does not

contain the words 'such person.' This decision, therefore, seems not applicable to that Act. C. S. G.

(m) Parfait's case, 1 Leach, 19. 1 East, P. C. c. 8, s. 11, p. 416, 417. 1 Hawk. P. C. c. 55, s. 3.

(n) 1 East, P. C. c. 8, s. 11, p. 417.

(o) *Id.* *Ibid.*

(p) 1 East, P. C. c. 8, s. 11, p. 418.

that the assault should be made upon the person intended to be robbed. (q) Other cases, however, appear to put the construction of the 7 Geo. 2, in this matter beyond doubt, and shew that an actual demand of money, &c. was not necessary upon the clause of that Act relating to the assault with intent to rob. (r)

Where a person was decoyed into a house, and then chained down to a seat, and compelled to write an order for the payment of money, and an order for the delivery of deeds, the papers on which he wrote not being his property, but remaining in his hands half an hour while he was chained down to the seat, it was held that this was not an assault with intent to rob within the 7 & 8 Geo. 4, c. 29, s. 6. (s)

In a case upon the 7 Geo. 2, c. 21, where the indictment stated the assault to have been made with a wooden stick, with intent, the goods, moneys, &c., of the prosecutor, 'from his person and against his will feloniously to steal, take, and carry away,' it was holden to be bad, as it did not contain a statement of force and violence; but a new indictment was preferred against him, laying the assault as before, but stating the intent to be, the moneys of the prosecutor, 'from his person and against his will, feloniously and violently to steal, take, and carry away:' upon which he was convicted. (t)

By the 14 & 15 Vict. c. 100, s. 9, where the evidence failed to prove a robbery, the jury were empowered to convict of an assault with intent to rob, and so they are by sec. 41 of 24 & 25 Vict. c. 96, which is taken from the former Act, on which the following case was decided.

An indictment stated that the prisoners on T. T. feloniously together made an assault and him in bodily fear together feloniously did put, and certain money from his person together feloniously and violently did steal. The actual robbery of the money was not proved, in consequence of the absence of the prosecutor; but the prisoners were convicted on the clearest evidence of feloniously assaulting the prosecutor with intent to rob him, and the jury found that this felonious assault was committed by the prisoners together; and upon a case reserved on the questions; 1st. Is the 14 & 15 Vict. c. 100, s. 9, to be construed literally, and if so, whether the punishment must not be, under the 6th and 10th secs. of 1 Vict. c. 87, confined to three years' imprisonment? or 2nd. Is the true meaning of the 14 & 15 Vict. that in any indictment for robbery, if the robbery be simple, there is included also a simple felonious assault, with intent to rob; and if the robbery be aggravated, a similar aggravated felonious assault with intent to rob, and then, whether, as the jury have found such an aggravated assault, the punishment may not be, under secs. 3 & 10 of the 1 Vict. c. 87, extended to transportation for life? it was held that the latter was the correct view. Where the robbery is charged as a simple robbery, the jury may find that the prisoner committed a simple assault with intent to rob; but where an aggravated robbery is charged, the jury may find an aggravated assault. If the

(q) Thomas's case, *supra*.

(r) R. v. Trusty, 1 East, P. C. c. 8, s. 11, p. 418, 419. Sharwin's case, 1 East, P. C. c. 8, s. 13, p. 421. Gould, J.

(s) R. v. Edwards, 6 C. & P. 521, Bosanquet and Patteson, JJ.

(t) Monteth's case, 2 Leach, 702. 1 East, P. C. c. 8, s. 12, p. 420, 421. R. v. Remnant, 5 T. R. 169. 2 Leach, 583. 1 Hawk. P. C. c. 55, s. 8.

jury find that the prisoner committed such aggravated assault, then he is liable to transportation. (u)

The prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged. Held, that the prisoners could not, upon this indictment and finding, be convicted of a common assault. (v)

Having thus treated of the facts and circumstances necessary to constitute the crime of robbery, this chapter may be concluded by shortly adverting to some points which have been decided respecting persons aiding and abetting in this offence, and also respecting the indictment.

## SEC. VI.

### *Principals and Accessories.*

The same general rules which prevail in other cases of principals and accessories, apply also in the case of robbery. (w) Thus if several persons come to rob a man, and they are all present, and one only actually takes the money it is robbery in all. (x) So if A., B., & C. come to commit a robbery, and A. stand sentinel at a hedge corner to watch if any person should come, and B. and C. commit the robbery, it will be robbery in A. also, though he was at a distance from them, and not within view. (y) And the principle of several persons engaged in one common design being in the eye of the law present when the fact is committed has been carried to a considerable extent in the case of robbery. For where three men went out to rob, and attacked a man who made his escape, and while two of them were engaged with that man the third robber rode off and robbed another person in the same highway, without the knowledge of the two other robbers, and out of their view, and then returned to them; it appears to have been holden, that all of them were guilty of this robbery, as they came together with an intent to rob, and to assist one another in so doing. (z) But where several men by agreement rode out to commit robbery, and at Hounslow one of them parted from the company, and rode away towards Colnbrook, and the others rode towards Egham, and at the distance of about three miles from Hounslow, committed a robbery; it was holden that the man who parted from the company was not guilty of this robbery, though he rode out with others upon the same design; for he left them at Hounslow, and, as

(u) *R. v. Mitchell*, 2 Den. C. C. 468. This decision renders it quite unnecessary to alter the forms of indictment (as, indeed, the Court said) by alleging an assault with intent to commit the robbery alleged. See the note, *Dears. C. C. 19.*

(v) *R. v. Woodhall*, 12 Cox, C. C. 240. *Denman, J.*

(w) Vol. i. p. 161. As to the punishment of principals in the second degree, and accessories, see vol. i. p. 191.

(x) 1 Hale, 534. 1 Hawk. P. C. c. 34, s. 5.

(y) 1 Hale, 534, 537.

(z) 1 Hawk. P. C. c. 34, s. 5. *Pudsey's case*, 1 Hale, 563, 534.

he did not fall in with them afterwards, possibly he repented of the design, but at least he did not pursue it. (a)

The presumption of a party repenting of his evil design appears to have been admitted to a greater extent in a more modern case. It appeared in evidence that the two prisoners accosted the prosecutor as he was walking along the street, by asking him, in a peremptory manner, what money he had in his pocket. Upon his replying that he had only twopence-halfpenny, one of the prisoners immediately said to the other, 'If he really has no more, do not take that,' and turned, as if with an intention to go away; but the other prisoner stopped the prosecutor, and robbed him of the twopence-halfpenny, which was all the money he had about him. But the prosecutor could not ascertain which of them it was that had used this expression, nor which of them that had taken the halfpence from his pocket. The Court said that the point of law went to the acquittal of both the prisoners; for if two men assault another, with intent to rob him, and one of them, before any demand of money, or offer to take it be made, repent of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion, who afterwards takes the money; for he changed his evil intention before the act which completes the offence was committed. That prisoner, therefore, whichever of the two it was who thus desisted, could not be guilty of the offence charged: one of them was guilty, but which of them was that person did not appear. And, as the prosecutor could not ascertain who it was that took the property, both the prisoners must be acquitted. (b)

## SEC. VII.

### *Of the Indictment, Trial, &c.*

The indictment for robbery must state an assault upon the person; and that such assault was made *feloniously*. And where the indictment charged that the prisoner, 'in and upon I. M., &c., *did make an assault*, and him the said I. M. in corporal fear and danger of his life then and there *feloniously did put*,' it was holden to be defective; and that the omission of the statement of the assault having been feloniously made was not aided by the statement of the prosecutor having been feloniously put in fear and danger of his life. (c) The taking must be charged to be with violence, and against the will of the party: and the statement, in the usual form of an indictment for this offence, is, 'certain goods, &c., of the said A. B., from his person and against his will, then and there feloniously and *violently* did steal, take, &c.' But the word *violently* is not essentially necessary:

(a) *R. v. Hyde*, 1 Hale, 537.

(b) *R. v. Richardson*, 1 Leach, 387, Buller, J. The Court also said that it was like the Ipswich case, where five men were indicted for murder, and it appeared, on a special verdict, that it was murder in one, but not in the other four, but it did not

appear which of the five had given the blow which caused the death; and it was ruled that as the man could not be clearly and positively ascertained, all of them must be discharged.

(c) *R. v. Pelfryman*, 2 Leach, 563.

as in a case where it was objected that the indictment did not shew that the taking was done *violenter*, and that the prisoner was, therefore, entitled to his clergy, and the authority of Lord Hale was cited, (*d*) all the judges, upon the point being reserved, agreed that the word *violenter* was no technical term essentially necessary in the indictment: and that if it appeared, upon the whole, that the fact was committed with violence, it was sufficient to constitute a robbery. (*e*) And with respect to the authority cited, they said that Lord Hale, in the passage referred to, was inaccurate in his expression; that the definition which he gave of robbery was a felonious taking from the person with violence; and that if the fact were so described in the indictment, as to answer the definition, it came up to Lord Hale's own doctrine. (*f*) It is considered as uncertain whether the indictment should charge that the party was put in *fear*; though, as such statement is usual, it will be more safe to insert it. (*g*) But, in general, no technical description of the fact is necessary, if upon the whole it plainly appear to have been committed with violence against the will of the party. (*h*) And where the taking has been by a putting in fear by means of threats to charge the party with sodomitical practices, the indictments appear to have been for robberies in the usual form. (*i*)

An indictment for robbery, which merely alleges that the prisoner, with force and arms, assaulted and robbed the prosecutor is good after verdict; and an indictment for robbery need not conclude *contra formam*, as the punishment is only altered by the statute. (*j*)

Upon an indictment for robbery it appeared that the prisoner committed the act together with others, who were not apprehended, but it was not so charged in the indictment; and the question was, whether, in order to bring him within the higher penalty, it ought not to have been especially averred. Patteson, J., 'Where several are indicted for committing the offence it is not necessary to aver that they were together; but if one be indicted alone, who committed the act with others, it is proper that it should be so averred.' (*k*) But

(*d*) 1 Hale, 534, where it is said that the indictment must run *quod vi et armis apud B. in regia vid ibidem, &c.*, 40s. *in pecuniis numeratis felonice et violenter cepit a personâ*; and, therefore, if the word *violenter* be omitted in the indictment, or not proved upon the evidence, though it were in *allâ vid regis et felonice cepit a personâ*, it is but larceny, and the offender shall have his clergy: and Dy. 244 b. H. 17 Jac. in B. R. 2 Rol. Rep. 154, are cited.

(*e*) Smith's case, 2 East, P. C. c. 16, s. 166, p. 783.

(*f*) Id. Ibid.

(*g*) 2 East, P. C. c. 16, s. 166, p. 783. It is not necessary that the indictment should charge that the party robbed was put in fear if it is stated that the prisoner acted *violenter*, and that the party was robbed *contra voluntatem*. Per Foster, J., 19 St. Tr. 806.

(*h*) 2 East, P. C. c. 16, s. 166, p. 783, s. 127, p. 708.

(*i*) Jones's *alias* Evans's case, 2 East, P. C. c. 16, s. 130, p. 714. 1 Leach, 139,

*ante*, p. 99, and the other cases of a similar nature, cited *ante*, p. 101, *et seq.*

(*j*) R. & M. C. C. R. 403. Lennox's case, 2 Lew. 268. Thrapshaw's case, 1 Leach, 427. There Gould, J., in delivering the opinion of the judges upon the question whether under the words 'rob any dwelling-house,' in the 3 & 4 Wm. & M. c. 9, a breaking and entering the house was necessary, said, 'The word rob in legal construction always includes the idea of force and violence, and although this part of the statute does not expressly signify that breaking and entering the house is necessary to constitute the crime, yet it has always been held upon this statute, as well as upon other Acts of Parliament penned in the same manner, that those ingredients are *ex vi termini* included in, and implied by, the word rob.' See now 14 & 15 Vict. c. 100, s. 24, vol. i. p. 36, as to conclusions of indictments.

(*k*) Raffety's case, 2 Lew. 271. In Doran's case, *ibid.*, note, the same very learned judge ruled the same way. Assum-

where an indictment for robbery against two persons had been found at the Quarter Sessions, and had been transmitted to the Assizes, Maule, J., doubted whether the indictment, in order to exclude the jurisdiction of the Sessions (*i. e.*, by warranting transportation for life under the 1 Vict. c. 87, s. 3), ought not to have had the word 'together' in it, and said, 'I should have thought that was necessary, if it had not been for the dictum of my brother Patteson in *Rafety's* case; (*l*) supposing that to be so, then this would be a good indictment.' (*m*)

It was formerly material to state correctly in the indictment, whether the robbery was committed in or near the *king's highway*. (*n*) But all robberies, whether in a highway, house, or elsewhere, are included in the new enactments, and therefore it is unnecessary to refer to the cases on the former Acts.

In a case of an indictment for a highway robbery on the person of Elizabeth Hudson, it appeared that such was the name of the prosecutrix at the time the robbery was committed, but that after the robbery, and at the time the bill was presented to the grand jury, and found by them, she was married to a person of the name of Heywood; and it was objected that the indictment was erroneous. But it was held that the description of the prosecutrix by her maiden name was sufficient. (*o*) Where a wife found a purse on a road, and was robbed of it shortly afterwards, Parke, B., held that the property was well laid in the husband; for even if the wife could be supposed to have only a special property in the purse, it would be the special property of the husband; (*p*) but since the Married Women's Property Act, the purse would be laid as that of the wife.

Upon an indictment for robbing B. of the money of W., it appeared that B., the servant of W., had received the money of some customers of his master, and was on his return to his master's house, when he was robbed of the money; it was objected that the money could not be laid as the property of W., as it had never reached his hands. Alderson, B., 'I am inclined to think the objection valid: it is difficult to see how such an offence as embezzlement could have been

ing this ruling to be correct, it may admit of doubt whether it be prudent in an indictment against several, merely to allege that they robbed the prosecutor, because, in case only one were convicted, it may well be doubted whether judgment for the more severe punishment could be given against him. The offence is one consisting of number, and in this respect like a riot; and there it has been held that if all but two be acquitted no judgment can be given against them. *R. v. Sadbury*, 1 Lord Raym. 484, *ante*, vol. i. p. 584. Perhaps the safer course would be to allege that A., B., and C., 'together with divers other evil-disposed persons,' committed the robbery (see *R. v. Sadbury*), and then if A. alone were convicted, but it was proved that he was in company with another, or others, he might, it is conceived, receive judgment for the higher punishment. C. S. G.

(*l*) *Supra*.

(*m*) *R. v. Ramsden*, 1 Cox, C. C. 37, Maule, J., added, 'The prisoners are now convicted, and if anything more is to be done upon it, I shall consider what is the best course to take.' The prisoners were then sentenced to fifteen and ten years' transportation respectively, a previous conviction having been proved against the one sentenced to the higher punishment. It does not, therefore, appear to be clear that Maule, J., did hold that the word 'together' was essential in all cases, though the marginal note states that he did. But it is certainly prudent in all cases to insert the word 'together' as it is in the statute, and may import a greater proximity than is necessary to constitute a principal in the second degree. See the cases, *ante*, p. 114. C. S. G.

(*n*) 1 Hale, 535, 536. 2 East, P. C. c. 16, s. 168, p. 784, 785.

(*o*) *Turner's case*, 1 Leach, 536.

(*p*) *R. v. Sallows*, 2 Cox, C. C. 63.



part of our criminal law if the possession of the servant of property, which had never come to the hands of the master, were construed to be the possession of the master. If it were, every servant who converted to his own use property received by him for his master would be guilty of larceny.' (q)

An indictment for robbery alleged that the prisoners assaulted George and Henry Pritchard, and stole from George two shillings, and from Henry one shilling and a hat, and it appeared that the prisoners attacked George and Henry when they were walking together, and robbed them both. Tindal, C. J., held that the prosecutor was not bound to elect on which robbery he would proceed. It was all one act and one transaction. The two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of one and the assaulting and robbing of the other. If there had been the felonies would have been distinct; but that was not so in the present case. (r)

The prisoners were indicted for robbing one W. L., and 'at the time' of the robbery wounding him, and it appeared that the prosecutor was attacked by three or four men, one of whom struck him a blow on the head with a stick, and several other blows on the body, one of which broke a rib; he became insensible, and when he came to himself, he was on the ground, and felt some one tearing his pocket: all his money was taken. Alderson, B., after reading the 1 Vict. c. 87, s. 2, 'This indictment charges that the prisoners wounded "at the time" they committed the robbery; the evidence is that the wound was inflicted before the robbery. The Legislature having made the distinction between "at," "before," and "after," if it be necessary to lay it correctly, the evidence in this case has failed.' For the Crown it was submitted that 'at the time' must be construed to mean the whole period from the beginning to the end of the transaction; from the moment of the assault to the end of the robbery. Alderson, B., 'That would have been the construction I should have put upon the words "at the time," but for the express words used by the Legislature; but as in the statute those different words are used, it is necessary to prove the act in the precise way in which it is laid.' (s)

In robbery from the person, as in other complicated or aggravated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear of violence, and found guilty of stealing from the person or simple larceny. (t)

(q) *R. v. Rudick*, 8 C. & P. 237. The jury were discharged as to this indictment, and a new indictment preferred, laying the property in B. in one count, and in W. in another, and the prisoners were convicted upon it. There seems to be a distinction in such cases where the money is stolen from the servant, and where it is embezzled by him. See *post*, *Larceny, Ownership of Goods*, and *Larceny by Servants*, and the property in this case seems to have been well laid in the master. C. S. G.

(r) *R. v. Giddins*, C. & M. 634.

(s) *R. v. Hammond*, 1 Cox, C. C. 123. Alderson, B., advised that in future there should be three counts laying the offence in each way.

(t) 2 East, P. C. c. 16, a. 167, p. 784. But where a special verdict was found, which stated facts amounting only to a larceny, as the only doubt referred to the Court was whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment; the judges thought that judgment of larceny could not be given upon such finding. They, there-

Upon an indictment for robbery charging a wounding, the jury may, under the 14 & 15 Vict. c. 19, s. 5, convict of unlawfully wounding.

It seems that on an indictment under the 24 & 25 Vict. c. 96, s. 42 (*ante*, p. 77), for an assault with an intent to rob (which is a felony) the prisoner cannot be convicted of a common assault. (*v*)

By the 24 & 25 Vict. c. 96, s. 115, all offences mentioned in this Act which are committed within the jurisdiction of the admiralty of England or Ireland, may be dealt with, inquired of, tried, and determined in any county or place where the offender is apprehended or in custody. (*w*)

fore, remanded the prisoners to be tried upon another indictment. *R. v. Francis, ante*, p. 86.

(*v*) *R. v. Woodhall*, 12 Cox, C. C. 240, Denman, J.

(*w*) See the section, vol. i. p. 15.

## CHAPTER THE TENTH.

### OF LARCENY. (a)<sup>1</sup>

WE may now consider the offence called *larceny*, a word formed by contraction, or rather, as it has been said, by abuse, from *latrocinium*, *latrocinium*, and used to signify the violation of the property of another by theft, where the property is not taken from the house, curtilage, &c., or the person of the owner, under such circumstances of aggravation as have been noticed in the preceding chapters of this book.

The definition of the offence of larceny is thus given by an ancient writer. '*Furtum est, secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur.*' (b) In subsequent definitions, the taking of the property has been stated to be 'felonious;' (c) which expression has been rendered as signifying a taking *animo furandi*, or, as the civil law expresses it, *lucri causa*. (d) In a work of great learning and research, larceny is defined at large to be 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.' (e) And in a case, which was reserved for the consideration

(a) It is stated by an able writer on the Criminal Law that the law of larceny is unintelligible. Many lawyers will agree with this opinion. The cases relating to larceny are conflicting. It is useless to endeavour to reconcile them. Many of them were decided when grand larceny was a capital offence, and in *favorem vitæ*, it may be that sometimes a case was held not to be larceny when if a less severe punishment had been inflicted for the offence, it might have been decided otherwise. In more modern times when larceny was no longer a capital offence, the law may have been strained the other way in order to prevent the prisoner escaping punishment altogether. But hard cases make bad law.

(b) Bract. lib. iii. c. 32, p. 150. So Glanvil, in words nearly similar, says, '*Furtum est tractatio rei alienæ fraudulenta, animo furandi, invito illo cujus res illa*

*fuerit.*' Glanv. lib. x. c. 13. And see Brit. c. 15, p. 22. Flet. lib. i. c. 38, p. 54. 3 Inst. 107.

(c) 3 Inst. 107. 1 Hale, 508. 1 Hawk. P. C. c. 33. 4 Blac. Com. 229.

(d) 4 Blac. Com. 232. 2 East, P. C. c. 16, s. 2, p. 553, citing Just. Inst. lib. iv. tit. 1, s. 1, which, it is observed, seems to go further than the common law in the following definition — *furtum est contractatio fraudulosa lucri faciendi causa vel ipsius rei vel etiam usus ejus possessionisve*.

(e) 2 East, P. C. c. 16, s. 2, p. 553. In *R. v. Holloway*, 1 Den. C. C. 370, Parke, B., said, 'Perhaps this was the more accurate definition; but it needed some addition; the taking should be not only wrongful and fraudulent, but also "without any colour of right."' But it is clear that the 'felonious intent' excludes any colour of right.

#### AMERICAN NOTE.

<sup>1</sup> See *Hit v. S.*, 9 Yerg. 198. *P. v. Inares*, 28 Cal. 380. *Hamilton v. S.*, 35 Miss. 214. *Keely v. S.* 14 Ind. 36. *S. v. Gasell*, 30

*Mo.* 92. *Eckels v. S.*, 20 Ohio St. 508. *S. v. Jones*, 65 N. C. 395.

of the judges, the learned judge who delivered their opinion said, that the true meaning of larceny is, 'the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker.' (*f*)

With respect to a taking *lucri causa*, it is stated that upon the debate in a case which underwent great discussion, one of the learned judges defined larceny as being 'a wrongful taking of goods with intent to spoil the owner of them, *causa lucri*;' but if this motive be a necessary ingredient, it appears that it is not confined to the acquisition of pecuniary advantage, or to the taking of the thing stolen for the sake of its worth.<sup>1</sup>

Formerly there was a distinction of this offence into grand larceny and petit larceny,<sup>2</sup> the offence being grand larceny when the value of the property taken was above twelve-pence, and petit larceny, when the value was only twelve-pence, or under that sum.' (*g*) But by the 24 & 25 Vict. c. 96, s. 2, 'Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the 21st day of June, 1827; and every Court whose power as to the trial of larceny was before that time limited to petty larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny.'

## SEC. I.

### *The taking and carrying away necessary to constitute the offence of Larceny.*

**The actual taking.** — There must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there be no trespass in taking goods, there can be no felony in carrying them away. (*h*) But the taking need not be by the very hand of the party accused: so that if a thief fraudulently procure a person innocent of any felonious intent to take the goods for him, (as if he should procure an infant within the age of discretion to steal the goods) his offence will be the same as if he had taken the goods himself; and it should be so charged. (*i*)

(*f*) By Grose, J., in *Hammond's case*, 2 Leach, 1089.

(*g*) Stat. West. 1 (3 Edw. 1), c. 15.

(*h*) Kel. 24. 1 Hawk. P. C. c. 83, s. 1.

Bac Abr. tit. *Felony* (C). 2 East, P. C. c. 16, s. 3, p. 554.

(*i*) 1 Hale, 514. 2 East, P. C. c. 16, s. 3, p. 555. So in the crime of murder, if

## AMERICAN NOTES.

<sup>1</sup> Mr. Bishop's definition, which seems to be at once clear and full, is "the taking and removing by trespass of personal property which the trespasser knows to belong either generally or specially to another with the felonious intent to deprive him of his ownership therein." He adds, "Perhaps for the sake of some advantage to the trespasser, —

a question on which the decisions are not harmonious." Bishop, ii. s. 758.

<sup>2</sup> In some States in America the distinction between grand and petit larceny still exists. In some petit larceny is made a misdemeanor. In North Carolina all larceny is petit. Bishop, i. s. 679.

Any removal of the goods with the felonious intent, is a sufficient carrying away. — It appears to be well settled that the felony lies in the very first act of removing the property : and, therefore, that the least removing of the thing taken from the place where it was before with an intent to steal it, is a sufficient asportation, though it be not quite carried away. (*j*) Thus, where a guest who had taken the sheets from his bed, with an intent to steal them, and carried them into the hall, was apprehended before he could get out of the house, it was holden that he was guilty of larceny. (*k*) And a like decision was made, when a person who had taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close ; (*l*) and also, where a person intending to steal plate took it out of a trunk wherein it had been deposited, and laid it on the floor, but was surprised before he could carry it away. (*m*) And in a more modern case it was holden by all the judges, that the removal of a parcel from the head to the tail of a waggon, with an intent to steal it, was a sufficient asportation to constitute larceny. (*n*) But where the indictment against the prisoner was for stealing a wrapper and four pieces of linen cloth ; and the facts were that the pieces of linen cloth were packed up in the wrapper in the common form of a long square, and laid lengthways in a waggon ; that the prisoner set the package on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose ; but that he was discovered and apprehended before he had taken anything out of it ; and all the judges agreed, upon a case reserved, that it did not amount to larceny, though the intention of the prisoner to steal was manifest.<sup>1</sup> They held, that some removal of the goods from the place where they were was necessary ; and the party accused must, for the instant at least, have the entire and absolute possession of them. (*o*) But where the prisoner had lifted up a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot ; and it did not appear that the bag was entirely removed from the space which it at first occupied in the boot ; but the raising it from the bottom had completely removed each part of it from the space which that specific part occupied : the judges held, upon a case reserved, that there was a complete asportavit. (*p*) Where

A. procure B., an idiot or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument.

(*j*) 3 Inst. 108. 1 Hawk. P. C. c. 33, s. 25. Bac. Ab. tit. *Felony* (D). 4 Blac. Com. 231. 2 East, P. C. c. 16, s. 4, p. 555.

(*k*) 3 Inst. 108. 1 Hale, 507, 508.

(*l*) 3 Inst. 109.

(*m*) Simson's case, Kel. 31.

(*n*) Coslett's case, 1 Leach, 236.

(*o*) Cherry's case, 2 East, P. C. c. 16, s. 4, p. 556. 1 Leach, 236, note (*a*).

(*p*) R. v. Walsh, MS. Bayley, J., and R. & M. C. C. R. 14. I have transposed the passages in the text so as accurately to correspond with MS. Bayley, J., which they did not in the third edition. C. S. G.

#### AMERICAN NOTE.

<sup>1</sup> To raise a pocket-book three inches from the bottom of the pocket before being interrupted is larceny. *Eckels v. S.* 20 Ohio St. 508. *Harrison v. P.* 50 N. Y. 518, 10 Am. R. 517. *S. v. Chambers*, 46 Am. R. 550. Merely to turn a barrel of turpentine on to its side, it having previously stood on end, is not a sufficient asportavit, probably because although the whole substance has changed position, yet the thief

had not acquired complete control. *S. v. Jones*, 65 N. C. 395 ; *Bishop*, ii. s. 795.

If a person entices an animal by food, &c., and then assumes the control the larceny is complete, but if he is detected after the animal has moved, but before the person has it under complete dominion, there is no larceny. *S. v. Wisdom*, 8 Port (Ala.), 511. *Mooney v. S.*, 8 Ala. 328. *S. v. Martin*, 12 Ire. 157. *S. v. Whyte*, 2 Nott & McC. (S. C.) 174.

the prisoner went into the stable of an inn, and pointing to a mare, said to the ostler, 'That is my horse, saddle him;,' the ostler did so, and the prisoner tried to mount the mare in the inn-yard, but from the noise made by some music the mare would not stand still: the prisoner then directed the ostler to lead the mare out of the yard for him to mount; the ostler led the mare out, but before the prisoner had time to mount her, a person who knew the mare came up, and the prisoner was secured; it was held that if the prisoner caused the mare to be led out of the stable intending to steal her, that was a sufficient taking to constitute a felony. (q)

**Secreting a letter in a pocket.** — Where on an indictment for stealing, embezzling, and secreted a letter, it appeared that the letter was, amongst others, sorted to the prisoner for delivery, and ought to have been delivered by him at its destination between eight and nine in the morning, but was not delivered, and the prisoner returned to the post-office as usual, and reported himself as having finished his delivery: it was his duty in case there were any letters, which for any cause he was unable to deliver, to bring them back to the post-office on his return from the delivery; he brought the pouch which contained four, which he had been so unable to deliver, but the letter in question was not returned, nor did the prisoner give any account of it. The prisoner, on being asked why he had not delivered it, at once produced it from his right-hand trousers pocket; it was unopened and the coin safe within it: upon being asked why he had not delivered it, he said that the house was closed, which was false; he also stated that he was going to deliver it in the afternoon. The jury were told that if they were satisfied that the prisoner put the letter into his pocket with the intention of stealing or secreted it, he might be convicted; and, on a case reserved, it was held that when the prisoner put the letter in his pocket with that intent, the offence was complete. (r)

**Drawing porter from a barrel.** — Where on an indictment for stealing porter, it appeared that the prisoner had made a hole in the barrel through which the porter flowed into a can on the ground; but a person snatched up the can while the porter was running into it in the presence of the prisoner; Coltman, J., held that there was a sufficient *asportavit* of what porter was run out. (s)

**Abstracting gas.**<sup>1</sup> — Upon an indictment for stealing 5,000 cubic feet of carburetted hydrogen gas, it appeared that the prisoner had contracted with a Company for the supply of his house with gas, to be paid for by meter. The meter, which was hired by the prisoner of the Company, was connected with an entrance pipe, through which it received the gas from the Company's main in the street, and an exit pipe through which the gas was conveyed to the burners. The

(q) R. v. Pitman, 2 C. & P. 423, Garrow, B.

(r) R. v. Poynton, L. & C. 247.

(s) R. v. Wallis, 3 Cox, C. C. 67, Coltman, J., said he would reserve the point.

The prisoner was convicted and probably no case was reserved, because Coltman, J., a very sound lawyer in criminal as well as other matters, was clear that there was no doubt upon the point. C. S. G.

#### AMERICAN NOTE.

<sup>1</sup> See C. v. Shaw, 4 Allen, 308. Hutchinson v. C. 82 Pa. 472.

prisoner had the control of the stop-cock at the meter, by which the gas was admitted into it through the entrance pipe, and he only paid the Company, and had only to pay them for such quantity of gas as appeared by the index on the meter to have passed through it. The entrance and exit pipes were the property of the prisoner. The prisoner, to avoid paying for the full quantity of gas consumed, and without the knowledge or consent of the Company, had caused to be inserted a connecting pipe with a stop-cock upon it into the entrance and exit pipes and extending between them; and the entrance pipe, being charged with the gas of the Company, he shut the stop-cock at the meter, so that gas could not pass into it, and opened the stop-cock in the connecting pipe, when a portion of gas ascended through the connecting pipe into the exit pipe, and from thence to the burners, and the gas was consumed there. It was contended that the entrance pipe being the property of the prisoner, he was in lawful possession of the gas by the consent of the Company so soon as it had been let into his entrance pipe out of the main, and that his diverting gas in its course to the meter was not an act of larceny. The jury were told that if they were of opinion that the entrance pipe was used by the Company for the conveyance of their gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed the meter, his property in the pipe was no answer to the charge; that there was nothing in the nature of gas to prevent it being the subject of larceny; and that the stop-cock on the connecting pipe being opened by the prisoner, and a portion of the gas being propelled through it by the necessary action of the atmosphere, and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the entrance pipe to constitute an asportavit, and that if the gas was so abstracted with a fraudulent intent, the prisoner was guilty of larceny; the jury answered these questions in the affirmative and gave a verdict of guilty, and upon a case reserved it was held that this direction was correct. "There may be larceny of gas as well as of wine or oil. The gas was not put into the possession of the prisoner, but was in the possession of the Company, and the prisoner took it away, having an *animus furandi*, and converted it to his own use. It was the gas of the Company, and its being in the prisoner's pipe makes no difference. There is nothing in the nature of gas to make it not the subject of larceny, and by means of the stop-cock it was abstracted." (t)

(t) *R. v. White*, Dears. C. C. 203, 3 C. & K. 363, 22 L. J. M. C. 123. Another, and perhaps better, answer to the objection was, that the prisoner abstracted gas from the main of the Company, and that that gas, as well as the main, was in their possession; for assuming that the entrance pipe was in the possession of the prisoner, he fraudulently caused the gas to flow out of the main into the entrance pipe, that is, out of their possession into his possession. On the argument before the judges, it was also urged that the offence was made a specific offence by the 10 & 11 Vict. c. 15,

s. 18, and therefore was not indictable; the Court held that that section might apply to cases where the act done would not be larceny; as if the prisoner had altered the machinery of his meter, and made it register wrong; but even if the Legislature had made this a distinct offence, it would not be the less a larceny. It was also urged that everything taken went into the possession of the prisoner by the consent of the original owner, and no fraudulent representation was made; the answer to this is, that the owner only consented to that which was measured by the meter going into the prisoner's pos-

In a case where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them towards the door, as far as the string would permit, and was then stopped; this was holden not to be a felony, because there was no severance. (u) And in a more ancient case, where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny, on the ground that as the purse still hung to the pocket of the owner by means of the strings and keys, it was in law still in his possession. (v)

**Returning the goods.**—But where there has once been a sufficient taking of the goods by the thief, the offence is completed, and will not be purged by a return of the goods, as has been already shown in the case of a taking by robbery. (w)

Upon an indictment for larceny by a servant in stealing his master's plate, it appeared that, after the plate was missed, but before complaint made to a magistrate, the prisoner replaced it: the plate had been pawned by the prisoner, who had redeemed it. The prisoner had also on previous occasions pawned plate and redeemed it. Hullock, B., (Holroyd, J., being present) left it to the jury to say, whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time, and then return it; for that in the latter case it was no larceny. (x) But where a servant was indicted for stealing a silver sauce-pan, which has been pledged at a pawnbroker's, and the counsel for the prisoner asked the jury to consider whether he took it feloniously, or intending at the time he pawned it to redeem it as soon as he could; Gurney, B., in summing up, observed, 'You will say whether the prisoner stole this property or not. I confess, I think, that if this doctrine of an intention to redeem property is to prevail, Courts of justice will be of very little use. A more glorious doctrine for thieves, it would be difficult to discover, but a more injurious doctrine

session; and per Martin, B., 'If there was a spout in a stable to get corn from a bin, and the ostler by boring a hole higher up got the corn out and took it away for himself would not that be larceny?' C. S. G.

(u) Anon. 2 East, P. C. c. 16, s. 4, p. 556, Eyre, B. So where the prisoner drew the end of a piece of lace through a hole in a window and shook the card on which the remainder of the lace was wrapped, but not so as to remove it from its place, it was held not to be larceny. Newman's case, Talf. Dick. Q. S. 216.

(v) Wilkinson's case, 1 Hale, 508. And see also as to the possession of the property by the thief, in cases of robbery, Lapier's case, ante, p. 82, and Farrel's case, p. 81.

(w) Ante, p. 82. And see 2 East, P. C. c. 16, s. 5, p. 557.

(x) R. v. Wright, Carr. Supp. 278, 9 C.

& P. 554, note. 'This decision has given rise to much discussion in various cases, and much difficulty has been found in applying the doctrine it lays down to the facts of particular transactions. In some instances, where it has clearly appeared that the party only intended to raise money on the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being able shortly, by the receipt of money, to take it out of pawn, juries, under the advice of the judge, have acted upon the doctrine and acquitted. But in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and convicted.' Reporter's note, 9 C. & P. 554.



for honest men cannot well be imagined.' (y) So where on an indictment for larceny it appeared that the prisoner had taken ready furnished lodgings, and had pawned some of her landlord's property, but she had often pawned and afterwards redeemed portions of the same property; the Recorder consulted Coleridge, J., and Platt, B., and they both agreed with him that there was nothing in the evidence that would justify the jury in acquitting the prisoner, on the ground that she took the property with the intention of redeeming it; and the jury were directed that for such a defence to be at all available, there must not only be the intent to redeem, evidenced by similar previous conduct, but there must be proof also of the power to do so. (z)

One count charged the prisoner under sec. 4 of the 20 & 21 Vict. c. 54, with having, as bailee of plate, fraudulently converted it to his own use. Another count charged him with simple larceny of the same plate. The prosecutrix on going to London deposited with the prisoner, a tradesman at Plymouth, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. When the chest of plate was placed in the prisoner's hands, it was locked (the prosecutrix keeping the key), then covered with a wrapper, sewn together, and sealed in a great number of places, and then tied with a cord. The prisoner was not informed of the contents of the parcel, nor was any key given to him. The prisoner uncorded the chest, broke the seals, took off the wrapper, procured a key, opened the chest, and took out a part of the plate, and offered it to a pawnbroker as a security for an advance of £50; but he, seeing a crest and name on it, declined to advance the money. But another pawnbroker advanced £200 to the prisoner, taking bills for the amount, and the whole chest of plate, worth from £500 to £600. The prisoner had made false statements to both pawnbrokers to account for his possession of the plate, and also to the prosecutrix on her return as to where the plate was. The prisoner refused to tell where the plate was; but it was discovered, and the pawnbroker refused to deliver it up unless upon repayment of the £200, for which it was deposited as a security, and the prisoner could not redeem it. The jury found the prisoner guilty on both counts, but recommended him to mercy, 'believing that he intended ultimately to return the property.' It was then contended that to support either of the counts, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of the property, and that the verdict shewed that was not his intention; but, upon a case reserved, it was held that the conviction was right on the count for larceny. To constitute larceny, there must be an intention on the part of the thief to appropriate the property to his own use, and usurp an entire dominion over it; and, if at the time of the asportation, his intention is to make a mere temporary use of the chattels taken,

(y) *R. v. Phetheon*, 9 C. & P. 552.  
Pawning an article seems as much an assumption of an absolute dominion over it as selling it, and therefore equally criminal.

(z) *R. v. Medland*, 5 Cox, C. C. 292.  
See *R. v. Naylor*, 10 Cox, C. C. 149, 35 L. J. M. C. 61, a case of obtaining money by false pretences.

so that the dominus shall have the use of them afterwards, that is a trespass and not larceny; but that law did not apply to this case. Here there was abundant evidence of a larceny at common law. Assuming that the reason for recommending the prisoner to mercy was to be considered as part of the finding of the jury, all that they said was that he intended ultimately to return the property, not that at the time of the wrongful taking he had any such intention. But the recommendation to mercy was no part of the verdict; it assumed that the verdict of guilty was correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain time, if he could get it again, to restore the plate; and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding. (a)

## SEC. II.

### *The Taking of the Goods must be Invito Domino.*

It is necessary that the taking of the goods should also be without the consent of the owner, *invito domino*. This is of the very essence of the crime of larceny, (b) as it has been already shewn to be essential in robbery. (c)

This material ingredient in the offence of larceny underwent great consideration in a case, where the following circumstances were given in evidence against the prisoners, upon an indictment for a burglary and larceny. The prisoners, intending to rob a manufactory of which Mr. Boulton was the principal proprietor, applied to a man named Phillips, who was employed as servant and watchman to the manufactory, to assist them in the robbery. Phillips assented to their proposal; but immediately afterwards gave information to Mr. Boulton, and told him what was intended, and the manner and time the prisoners were to come: that they were to go into the counting-house, and that he was to open the door into the front yard for them. Mr. Boulton told him to carry on the business, and that he would bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information, Mr. Boulton removed from the counting-house everything but 150 guineas and some silver ingots, which he marked, in order to furnish evidence against the prisoners; and laid in wait to take them, when they should have accomplished their purpose. On the 23rd of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard; and from thence they and Phillips

(a) *R. v. Trebilcock*, D. & B. C. C. 453. The only reference made to the question as to the case coming within the 20 & 21 Vict. c. 54, s. 2, was that Lord Campbell, C. J., told the prisoner's counsel that he 'need not

consider the recent statute. If it is not larceny at common law, the statute will not make it so.'

(b) *Fost.* 123.

(c) *Ante*, p. 87.

went through a door, which was left open, up a staircase in the centre building, leading to the counting-house and rooms where the plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard, where all (except one who escaped) were taken by the persons placed to watch them. It was submitted that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts. (d) The prisoners having been convicted, the case was argued before the twelve judges, a majority of whom held that the prisoners were guilty of the larceny; for that, although Mr. Boulton had permitted, or suffered, the meditated offence to be committed, he had not done anything originally to induce it; that, his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. They thought also that there was no distinguishing between the degrees of facility a thief might have given to him; that Mr. Boulton never meant that the prisoners should take away his property, and the circumstance of the design originating with the prisoners, and Mr. Boulton's taking no step to facilitate or induce the offence, until after it had been thought of, and resolved on by them, formed, in the opinion of some of the judges, a very considerable ingredient in the case, and differed it greatly from what it might have been if he had employed his servant to suggest the perpetration of the offence originally to the prisoners. But Lawrence, J., before whom the prisoners were tried, doubted whether it could be said to be done *invito domino*, when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by the presence of that servant; and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. (e)

Upon an indictment for larceny, it appeared that the prisoner had asked a servant of the prosecutor if he wanted any money 'worked' for him. The servant said he did not want any. The prisoner said it would be a great deal to his interest if he worked any. The servant had heard worked money spoken of by his master before, and communicated to his master what had passed between himself and the prisoner. About six weeks afterwards the servant, by his master's directions, wrote a note to the prisoner, desiring him to call on him, as he had got a little business for him to do. The prisoner accordingly came to the servant, and after several meetings an arrangement was made between the prisoner and the servant that he was to

(d) See *ante*, p. 70; as to another point decided in this case.

(e) *R. v. Egginton*, 2 Leach, 918. 2 East, P. C. c. 16, s. 101, p. 666.

come down that evening, and come in once or twice, and the servant was to give him what he could. He said he was to put down a shilling; the servant was to take it up, make a pretence of putting it into the till, take out two or three more, and place them on the counter, and the prisoner was to take them up; the servant told his master all that had passed. Afterwards some marked money was put in the till. The prisoner came in, and bought a penny-worth of gin, and put down a shilling. The servant gave him four marked shillings, the shilling he had put down, and threepence-halfpenny; directly the servant's hand was off it, the prisoner took it off the counter, and put it in his pocket, and was going off when he was apprehended. The master stated that the servant acted with his knowledge and consent, and by his directions, and that he gave him directions to give the prisoner the money in the way he had done. *Mirehouse, C. S.*, doubted whether there had been a felonious taking; and the prisoner having been found guilty, judgment was respited that the opinion of the judges might be taken, and the conviction was afterwards held right. (*f*)

The prisoner was indicted for stealing a draft, which was unstamped and was written on the same sheet of paper with a letter, directed 'James Mucklow, Saint Martin's Lane, Birmingham,' and was sent by post to Birmingham. No person of that name being found or heard of to be living in Saint Martin's Lane, and the prisoner living in a house, about a dozen yards from Saint Martin's Lane, with his father, the postman called with the letter at their house when they were out, and left a message that there was a letter for them, which they were to send for; and it was in consequence thereof delivered the same day to the father, and afterwards came to the hands of the prisoner his son, who appropriated the draft to his own use, and received payment of it, under circumstances proved by evidence arising from the contents of the letter and otherwise, that satisfied the jury he knew the letter and draft were not intended for him, but for another person. It was objected that this did not amount to larceny, as the possession of the letter and draft had been voluntarily parted with by the drawers, and by the postman, without any fraud on the part of the prisoner; and, upon a case reserved, the judges held the conviction wrong, on the ground that it did not appear that the

(*f*) *R. v. Williams, 1 C. & K. 195.* No ground is stated for this decision; but as the prisoner took the money off the counter himself, this was an actual taking by him, wholly independent of the placing it there by the servant, who did not deliver it to the prisoner, but only placed it where he could take it. In *R. v. Bannen, 1 C. & K. 295*, *Alderson, B.*, said, 'If a person desirous of stealing my horse asks my servant to let him do so, and the servant tells me of it, and I say, "Take out the horse and give it to him," and I, to confirm your evidence, will have you both taken with the horse in your possession, and all this is done, would this be horse-stealing?' And on its being

answered that it would, *Alderson, B.*, said, 'Though the horse was sent by my orders. If the person comes and takes the horse himself, it is a different matter.' *Patteson, J.*, 'The case put by my brother *Alderson* would be no felony, because he voluntarily parts with his horse.' This supports the distinction, that if a servant, by his master's orders, delivers a chattel to a thief with whom he is in communication, this is not larceny; but if he only affords the thief facility for taking the chattel, and the thief takes the chattel himself, it is larceny. See also *R. v. Johnson, C. & M. 218, ante, p. 10*; and *R. v. Lawrance, 4 Cox, C. C. 438, post.*

prisoner had any *animus furandi* when he first received the letter. (g)

So where the prisoner was indicted for stealing a post-office order; and it appeared that a person put a post-office order in a letter into a post-office, directed 'John Davies, Pack Horse Inn, Welshpool.' In Welshpool there were two inns of that name, called the Upper and Lower Pack Horse; and at the Lower the John Davies, to whom the letter was directed, lived: at the Upper, Rush, the prisoner, who had gone by the name of John Davies only in Welshpool, was billeted, and the letter was delivered for him there from the Welshpool post-office. He could not read, and took the letter to William D., who read it to him; John Davies then told him that the letter and order were not intended for him, but William D. advised him to keep them, and get the money, and this he did by applying to the post-office in the usual way. Erle, J., told the jury, that if at the time the prisoner received the order, he knew it was not his property, but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion he had not received it until he had discovered, by opening and reading the letter, whether it belonged to himself or not; but, upon a case reserved after a verdict of guilty, the case was held to be governed by *R. v. Mucklow*, (h) and the conviction wrong. (i)

### SEC. III.

#### *Taking by Persons having only a Bare Charge or Special Use of the Goods, and by Bailees.*

Before the 24 & 25 Vict. c. 96, s. 3, noticed *post*, p. 133, which makes a bailee of goods, &c., fraudulently converting the same, guilty of larceny, nice and intricate questions arose upon this class of cases, namely, those in which the goods were *taken by the delivery or consent of the owner, or of some one having authority to deliver them*. But in consequence of the above enactment, it is thought unnecessary to consider those cases at any length. It may be premised that in the cases in which it was held before the above Act a person might be guilty of larceny, he might be so now.

It may, in the first place, be observed, with respect to these cases, that before the above Act, where the goods were obtained by delivery, if it appeared that, although there was a delivery by the owner in fact, yet there was clearly *no change of property nor of legal*

(g) *R. v. Mucklow*, R. & M., C. C. R. 160. The letter and draft, which was drawn by Lea & Sons, at Kidderminster, were intended for another James Mucklow of New Hall Street, Birmingham, but by mistake the letter was directed to St. Martin's Lane. Two other points were reserved, but no opinion given as to either of them, viz., whether the draft being drawn more than ten miles from Birmingham, and unstamped, was not wholly void, and if so, not the subject of larceny, and whether the draft was of any value in the hands of the drawers, according to the opinion in *Walsh's case*, R. & R. 215.

(h) *Supra*.

(i) *R. v. Davies*, Dears. C. C. 640, but see now *R. v. Ashwell*, 162 B. D. 190, (overruling *R. v. Mucklow*, and *R. v. Davies*), *post*, p. 150.

*possession*, but the legal possession still remained exclusively in the owner, larceny might be committed exactly as if no such delivery had been made.

Thus if a person, to whom goods were delivered, had only the bare charge, or custody, of them, and the legal possession remained in the owner, such person might commit larceny, by a fraudulent conversion of the goods to his own use; (*j*) a doctrine which directly applied, and still applies, to the case of servants entrusted with the care of goods in the possession of their masters, as will be shewn more fully, when larcenies by servants are treated of in a subsequent chapter. And larceny might be committed also in a like manner by a person who had a bare special use of goods. Thus, a man might be guilty of larceny in taking a piece of plate, set before him to drink in a tavern; for he has only a liberty to use, not a possession by delivery. (*k*) So larceny might be committed by a person who was employed for hire to drive cattle to a fair or market, as in such case the owner parts only with the custody and not with the possession. (*l*) So if a weaver, or silk-throwster, delivered yarn, or silk, to be wrought by journeymen, in his house, and they carried it away with intent to steal it, this was felony; the entire property remaining there in the owner, and the possession of the workmen being the possession of the owner. (*m*) But before the above Act, it was not felony if the yarn had been delivered to a weaver out of the house, who, having thus the lawful possession of it, afterwards embezzled it; because by the delivery he had a special property, and not a bare charge; in the same manner as one who is entrusted with the care of a thing for another to keep for his use. (*n*)

So also where, before the above Act, a horse was delivered by the prosecutor to the prisoner to be agisted at a certain sum per week, and in the second week the prisoner sold the horse as his own, it was held, upon a case reserved, that inasmuch as the prosecutor had parted with the possession, it did not amount to larceny. (*o*)

It is stated in the old books that, in general, where the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor. (*p*) The distinction between a bare charge, or special use of goods, and a general bailment of them, seems to be sufficiently intelligible; and it seems consistent with principle that, in the former case, the legal possession should be considered as remaining in the owner; and, in the latter, as having passed to the bailee; and that, therefore, in the former case larceny might be committed of them by the person to whom they were delivered, and that in the latter it might not, unless there were a determination of the privity of contract: but it was in the application of this doctrine to particular cases that the distinctions became obscure.

(*j*) 1 Hale, 505, 506. 1 Hawk. P. C. c. 33, s. 6. 2 East, P. C. c. 16, s. 109, p. 682.

(*k*) 1 Hale, 506.

(*l*) R. v. M'Namee, R. & M. C. C. R. 368. But see R. v. Hey, 1 Den. C. C. 602. R. v. Stanbury, 2 Cox, C. C. 272, *post*, tit. '*Larceny by Servants*.'

(*m*) Anon. Kel. 35. 2 East, P. C. c. 16, s. 109, p. 682.

(*n*) 2 East, P. C. c. 16, s. 109, p. 682, 683. 1 Hawk. P. C. c. 33, s. 2.

(*o*) R. v. Smith, R. & M. C. C. R. 473. R. v. Harvey, 9 C. & P. 353.

(*p*) 1 Hawk. P. C. c. 33, ss. 2, 9, 10. 2 East, P. C. c. 16, s. 113, p. 693.

It was, before the above Act, suggested as worthy of consideration whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, did not extend to all cases where the thing, so delivered for a special purpose, was intended to remain in the presence of the owner. And it was well advanced, in support of the observation, that in cases of this kind the owner cannot be said to give any credit to, or repose confidence in, the party in whose hands it is so, in fact, placed; and that, the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person, to whom it is so delivered, has, at most, no more than a bare limited use, or charge, and not the legal possession of it. (q) And though the case of a person going into a shop, under pretence of buying goods, and, upon their being delivered to him to look at, running away with them; and also that of a person going into a market, and obtaining a horse for the purpose of trying its paces, and then riding away with it, have been considered as felonies, on the ground of a preconcerted design to steal the chattels; (r) yet they appear also to be sustainable on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, *he continuing present*. (s)

Upon the principle, also, of there being but a bare charge or special use, it was before the above Act held, that if the clerk to a banker or merchant have the care of money, or if he have access to it for special and particular purposes, and be sent to the bag or drawer for money, for the purpose of paying a bill, or if he be sent for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings such money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had no care of the money, or access whatsoever to the bag or drawer. (t)

In consequence of the above enactment, which will now be referred to, it is unnecessary further to consider these cases, which are referred to at length in the 4th edition of this work.

**Bailees.**<sup>1</sup> — By the 24 & 25 Vict. c. 96, s. 3, 'Whosoever, being a bailee of any *chattel, money, or valuable security*, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, *and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.*' (u)

(q) 2 East, P. C. c. 16, s. 110, p. 683.

(r) 1 Hawk. P. C. c. 33, s. 14, 15 Kel. 82. 2 East, P. C. c. 16, s. 106, p. 677.

(s) Chisser's case, T. Raym. 275, 276. 2 East, P. C. c. 16, s. 160, p. 683, 684. See R. v. Thompson, L. & C. C. C. 225. R. v. Johnson, 2 Den. C. C. 310.

(t) Murray's case, 1 Hawk. P. C. c. 33, s. 7. 2 East, P. C. c. 16, s. 109, p. 683. 1 Leach, 344.

(u) This clause is taken from the 20 & 21 Vict. c. 54, s. 4, the first words in italics being substituted for 'property.' Although there is no doubt that a person might have

#### AMERICAN NOTE.

<sup>1</sup> In some but not in all of the States in America statutes have been passed having a similar effect to the English section given in the text. Bishop, ii. s. 863.

The object of this clause was simply to make those cases larceny, where the general property in the thing delivered was never intended to be parted with at all, but only the *possession*; where, in fact, the owner delivered the property to another under such circumstances as to deprive himself of the *possession* for some time, whether certain or uncertain, and whether longer or shorter, at the expiration or determination of which time the very same thing that had been so delivered was to be restored to the owner or delivered to some one else. In order, therefore, to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved, 1st, that there was such a delivery of the property as to divest the owner of the *possession*, and vest it in the prisoner for some time; 2ndly, that at the expiration or determination of that time, the identical same property was to be restored to the owner or delivered to some one else. Proof of these facts will be all that is necessary under this clause.

Where a count charged the prisoner with larceny of money as a bailee, and it appeared that the prosecutor had employed him to collect outstanding debts, and in the course of this employment the prisoner received the sums in question; it was held that the count was not proved, because a person who received money on behalf of another did not thereby become a bailee of the money, not being bound to hand over the particular money which he had received. (v) But it was held (w) that a prisoner might be convicted of larceny as a bailee under the following circumstances. The prosecutor left a mare in the prisoner's charge, saying, that he would come and sell it on a certain day. On that day he sent his wife, who saw the prisoner sell the mare and receive some money; but he refused to give it her, and absconded shortly afterwards. (x)

The first count charged the prisoner as a bailee with stealing £18 3s. 9d., the second with simple larceny, and it appeared that the sum of £18 3s. 9d. collected in a church for the benefit of the Church Missionary Society was handed to the vicar, and paid by him into his own bank; but in consequence of a conversation with the prisoner, who was the curate, in which he advised that it should be withdrawn, and placed in the savings' bank, where interest would be obtained, and stated that he would place it in the savings' bank,

been convicted of any offence within this clause on a common indictment for larceny, *R. v. Haigh*, 7 Cox, C. C. 403, as it expressly enacts that the offender 'shall be guilty of larceny,' yet to prevent all doubt, it is provided that the offender may be convicted on an indictment for larceny. In *R. v. Holman*, L. & C. 177, a doubt was raised whether a count for embezzlement and a count for larceny as bailee could be joined; but the prosecutor having elected to proceed on the latter count, the conviction was held right. It is plain there is no objection to the joinder of counts for embezzlement and larceny as a servant, and on the latter count there might be a conviction of larceny as a bailee. The proviso was introduced to prevent the clause applying to the cases of persons employed in the silk, woollen, and

other manufactures, who dispose of goods entrusted to them, and are liable to be summarily convicted under sundry statutes. C. S. G. See *R. v. Daynes*, 12 Cox, C. C. 514.

(v) *R. v. Hoare*, 1 F. & F. 647. *Wightman, J.*, and *Pollock, C. B.* *R. v. Hassall*, 30 L. J. M. C. 175, L. & C. 58, decided by the Court of Appeal.

(w) By Lord Coleridge, C. J., *Grove Field*, and A. L. Smith, JJ., *Stephen, J.*, dissenting.

(x) *R. v. De Banks*, 13 Q. B. D. 29, 15 Cox, C. C. 450. The case turned on peculiar facts which were not very clearly stated. The majority of judges seem to have held that under the circumstances it was the duty of the prisoner to hand over to the prosecutor's wife the identical coins he received, and not merely the amount.



the vicar gave him a cheque for the amount, which the prisoner cashed at the bank; but the money was never paid into the savings' bank. The money was not payable to the Society in London until some time after the prisoner was apprehended. The prisoner acted as secretary and treasurer of a local society in connection with that in London. The vicar had not acted as treasurer. Willes, J., 'The prisoner is charged with larceny as a bailee, but he was the acting treasurer of the society, and as such it was his duty to deposit or invest the moneys received, and he was not required to pay over the specific coins that came into his hands, which is essential to a bailment. Nor could the count for larceny be sustained, because the prisoner was not a servant, and the first possession of the money was a lawful one. He was only civilly liable for his default.' (y)

Where the prisoner, who was a trustee of a friendly society, was appointed by a resolution of the society to receive money from the treasurer, and to carry it to the bank; and he received the money from the treasurer's clerk, but applied it to his own purposes instead of taking it to the bank; it was held that he could not be convicted of larceny of the money as a bailee. (z)

Where the prisoner represented that he was selling horses for another person, and had no authority to sell them for less than £135, and obtained that sum for them, and it appeared that he had bought the horses for £110, though he represented that he was to pay £135 for them, it was contended that if a person by a false statement induces another to entrust him with property to be given to a third person, he was not the less a bailee; for he could not take advantage of his own fraud; it was answered, that to constitute a bailment there must be a delivery of a thing in trust for some special object or purpose, and, upon a contract, express or implied, to conform to the object or purpose of the trust; and that the prisoner was not a bailee for the purchaser, of the excess over the £110; for the purchaser paid away that money, never expecting it to be returned; and the prisoner could not be a bailee of that sum for the vendor; and it was held that there was no bailment in this case. (a)

The prisoner was frequently employed by the prosecutor to fetch coals from C. Before each journey the prosecutor made up to the prisoner £24, out of which he was to pay for the coals, keep 23s. for himself, and if the price of the coal, with the 23s., did not amount to £24, to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal, as he obtained it, with the money received from the prosecutor, and the prosecutor did not know but that he did so; but provided he was supplied with coal, and not required to pay more than the proper

(y) *R. v. Garrett*, 8 Cox, C. C. 368. Willes, J., said that Byles, J., and himself had previously decided in the same way in a similar case. There was no bailment either of the cheque or money in this case; for neither was intended to be returned in specie, and the property in both was parted with at the time of the delivery to the prisoner.

(z) *R. v. Loose*, Bell, C. C. 259. (a) *R. v. Hunt*, 8 Cox, C. C. 495. The Recorder. The indictment was for obtaining the excess over the £110 by false pretences. It is not stated whether the prisoner bought the horses before or after the sale to the prosecutor.

price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th March the prisoner had a balance of £3 in hand, and the prosecutor gave him £21 to make up £24 for the next journey. The prisoner did not then buy any coal, but fraudulently appropriated the money. Held that a conviction of the prisoner for a larceny of the £21, as a bailee was right. (b)

In 1866, in *R. v. Davies*, the following case was stated:—The prisoner was tried at the Quarter Sessions for the city of Manchester. The indictment charged him with stealing two loads of coal, the property of Andrew Dobbie and another. The prisoner was a carter, and was engaged by Dobbie to deliver in his cart a boat's cargo of coals to certain persons named in a list which was handed to the prisoner, and he was not authorised to deliver coals to any person whose name was not contained in that list. Two of the loads of coal he fraudulently sold to persons not in the list, — for one of them he obtained 12s. It did not appear how much he received for the other. Upon these facts it was contended by the counsel for the prisoner that he could not be convicted under 24 & 25 Vict. c. 96, s. 3, as it was clear that the property was never to be restored to the owner, who had entrusted it to the prisoner, and who was therefore not a bailee within the meaning of that Act; and they cited *R. v. Hassall*, (bb) the Recorder directed the jury that if the coals were entrusted to the prisoner for the specific purpose that they should be delivered by him to the persons named in the list, and that he, instead of so delivering, fraudulently converted them to his own use, that the prisoner ought to be found guilty. The jury found the prisoner guilty. The Court of Criminal Appeal affirmed the conviction. (c)

The prosecutor asked the prisoner to bring him half a ton of coals from the railway coal station, and gave the prisoner 8s. 6d. to pay for them. The prisoner bought half a ton of coals at the station in his own name, paying 8s., but having credit for the remaining 6d. He then put the coals into his own cart, and on his way abstracted a hundredweight of the coals, and afterwards delivered the residue to the prosecutor as the coals which he had required. The prisoner was not in the prosecutor's employment. (d) Cockburn, C. J., in delivering the judgment of the Court, said: 'In this case the prisoner was entrusted by the prosecutor with money to go and purchase some coals, and to bring them home to the prosecutor in the prisoner's own cart. The prisoner having purchased the coals, and loaded them into his cart, afterwards abstracted a portion of the coals, with intent to appropriate them to himself, and to deprive the prosecutor of them. We all think that the conviction is good. Some of us are of opinion that even if there had been no evidence of a specific appropriation of the coals to the prosecutor, yet the coals having been purchased with the money of the prosecutor given for the express purpose, the prop-

(b) *R. v. Aden*, 12 Cox, C. C. 512. See *R. v. Wells*, 1 F. & F. 109. *R. v. Tonkinson* 14 Cox, C. C. 608.

(bb) 1 L. & C. 58.

(c) *E. R.*, Mr. West, Q. C. See *R. v. Davies*, 10 Cox, C. C. 239.

(d) *R. v. Bunkall*, 33 L. J. M. C. 75.

erty in the coals, on the purchase, *ipso facto*, vested in the prosecutor, and that there was then a bailment within the terms of the statutory enactment, and that therefore the prisoner is guilty. Other members of the Court think that in order to support the conviction there must have been a specific appropriation of the coals to the prosecutor, and that there was evidence of such specific appropriation from the facts that the prisoner bought the coals with the money of the prosecutor, and put them into his cart, and after taking a portion of them, delivered the rest to the prosecutor, pretending that he had bought the coals which the prosecutor had required. We are all of opinion that there was evidence of such an appropriation, if an appropriation were necessary.'

The owner of a wrecked ship made a contract to recover the wreck, with a person who employed the defendant's father to do the work. The defendant was put in charge of the wreck by his father, and while so engaged corresponded with the person employed by the owner of the wreck, although that person still considered the father responsible. The defendant stole some of the wreck, and the jury found that he did so *animo furandi*; but were not asked whether he was bailee. It was held by the majority of the Court that he was a bailee, and was rightly convicted. (e)

A married woman may be a bailee. The first count charged the prisoner under the 20 & 21 Vict. c. 54, (f) with larceny as a bailee; the second with simple larceny. The prisoner lived with her husband, and they took in lodgers, but she exclusively attended to them, made the contracts with, and received the payments from, them. The prosecutor lodged with them, and had in his bed-room a box, in which he kept a smaller box, in which he had £45; the smaller box was locked, and the key placed in a drawer within the larger box. Going to another part of the country to work, he locked up the larger box, gave the key to the prisoner, who knew that the smaller box containing the £45 was within it, and requested her to take care of the larger box, the smaller box, and the money for him; which she promised to do, and took the whole under her charge and into her possession so far as by law she could. Her husband had nothing to do with the transaction. During the absence of the prosecutor, and whilst she was so in possession, she stole the money, her husband being perfectly innocent; and, on a case reserved after a verdict of guilty, it was contended that a bailment was a contract, that the prisoner, being a married woman, could not contract for herself, that the husband was the bailee, and that she could not be convicted of larceny, on the ground that she broke bulk, for that necessarily imported a bailment. But it was held that either she was a bailee, and guilty on the first count, or she was not a bailee, and then she was guilty on the second count. (g)

(e) R. v. Clegg, 11 Cox, C. C. R. 212 Irish).

(f) See *ante*, p. 133, note (u).

(g) R. v. Robson, L. & C. 93. Martin, B., was of opinion she was a bailee, and said there was a late case, in the Common Pleas, in which it was held that a contract

was not essential to a bailment, and that it was immaterial whether there was a valid contract or not; and Pollock, C. B., was disposed to be of the same opinion. During the argument, Wightman, J., said, 'Suppose she had taken a watch left by a lodger on his table, and had not at the moment

A bailment is a delivery of goods on condition, and not a contract, and therefore an infant can be convicted of larceny as a bailee. So where an infant over fourteen years of age hired furniture, and, after paying some instalments, removed and sold the furniture, it was held that he was rightly convicted. (*h*)

**Bailment by a drunken man.** — Where on an indictment for larceny, the prosecutor proved that being somewhat tipsy, he lay on the ground, partly asleep, and while in that state saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing that the prisoner, with whom he had been acquainted for some time, was acting solely from friendly motives; and the prisoner afterwards offered the watch for sale; it was objected that there was no trespass, and consequently no larceny; Crowder, J., 'This evidence would not support a charge of larceny at common law, but the evidence discloses a bailment sufficient to bring the case within the 20 & 21 Vict. c. 54, s. 4, if the jury are satisfied on the facts.' (*i*)

**Traveller trusted with goods for sale.** — A traveller was entrusted with pieces of silk to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any silk might have been sold. All goods not so accounted for remained in his hands, and were treated by his employers as stock. At the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk. He was paid by a commission. Within six months after four pieces of silk had been delivered to him, the prisoner rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use. It was held that he could be properly convicted of larceny as a bailee, because the silk, until disposed of to customers, was the property of his employers. (*j*)

A. delivered two brooches to the prisoner to sell for him at £200 for one and £115 for the other, and the prisoner was to have them for a week for that special purpose, but two or three days'

the intention of appropriating it, but did appropriate it subsequently; would she not be within the statute?' Some of the Court seem to have thought that, if the prisoner was not a bailee, she was in the same position as a stranger, and as a stranger who had stolen the money would clearly be guilty of larceny, so was the prisoner. See now 45 & 46 Vict. c. 75, s. 1 (2).

(*h*) *R. v. Macdonald*, 15 Q. B. D. 323, per Coleridge, C. J., Pollock and Huddleston, BB., Grove, Denman, Field, Manisty, Hawkins, Mathew, Cave, Day, A. L. Smith, and Wills, JJ. It should seem that there may be a delivery of a chattel upon condition which does not necessarily make a contract; although it would almost in-

variably give rise to one; and therefore speaking generally the term 'contract of bailment' is not inappropriate. In the case of an infant having a chattel delivered to him upon condition to return it, the law does not imply any promise on the part of the infant to return it, and therefore there is no contract and the remedy would be in detinue; but in the case of an adult the receipt by him of the chattel for his own benefit upon condition to return it raises the presumption of an acceptance and consequent promise to return the chattel according to the terms of the condition. See *R. v. Ashwell*, 16 Q. B. D. 190. Judgment of Lord Coleridge, C.J., *post*, p. 165.

(*i*) *R. v. Reeves*, 5 Jurist, 716.

(*j*) *R. v. Richmond*, 12 Cox, C. C. 495.

grace might be allowed. After ten days had elapsed the prisoner sold them with other jewellery for £250, but arranged with the vendee that he might redeem the brooches for £110 before the expiration of two months. It was held that this amounted to larceny by a bailee. (k) Kelly, C. B., in delivering the judgment of the Court, said, 'The effect of the statement of facts in the case is this: the prosecutor delivered two brooches to the prisoner for the purpose of their being sold by him for the prosecutor upon these terms. The prisoner was to sell them for not less than £200 for one and £115 for the other, and the second limitation was, that he was to sell them within a week, or at the most within ten days; if he could sell them for these prices, his duty was to pay over the price he received to the prosecutor; and if he was unable to sell them, his duty was, when the ten days had expired, to return the two brooches *in specie* to the prosecutor. The prisoner having received the brooches on these terms, and the ten days having elapsed, and the brooches being unsold, his duty was simply to return them to the prosecutor; for the property of the prosecutor in the brooches never ceased until the prisoner sold them to another person; the prisoner however proceeded to a pawnbroker's shop and effected a sale to another jeweller. No doubt he raised money upon them *prima facie* as a pledge; but the subsequent words shew that it was really by means of a sale. The act he did was to sell the brooches with other property for £250, and then he stipulated that he might redeem the brooches on payment of £110 before September. The question is whether this transaction was a conversion of the brooches to his own use? He being a bailee of them at common law, it would not amount to a larceny; but I am of opinion that it does amount to a conversion by a bailee to his own use under sec. 3 of the 24 & 25 Vict. c. 96, if it was a fraudulent taking or converting by the prisoner. When the ten days had expired there can be no doubt that the prisoner held the brooches on no other condition than to return them to the prosecutor; and I think that the converting of them to his own use by sale or pledge after that was a fraudulent taking and converting of them to his own use within the meaning of sec. 3. This view is supported by the finding of the jury on the first question put to them, that the transaction was not a contract of sale of the brooches to the prisoner, but a delivery of them to him for a particular purpose, viz., to be sold by him for the prosecutor within ten days. In leaving the second question to the jury the case was put too favourably for the prisoner. The second question left to the jury was, did the prisoner intend at the time of his raising the money on the brooches to resume possession of them so as to fulfil the purpose for which they were entrusted to him — i. e., return them *in specie* to the prosecutor? If he did not, the act was fraudulent. If he did so intend, whether such intention takes the case out of sec. 3, is another question, and does not arise in this case. If he sold the brooches without the

(k) *R. v. Henderson*, 11 Cox, C. C. 593.

intention of repossessing himself of them, so as to fulfil his duty, he was guilty of the larceny charged in the indictment. The jury must be taken to have found that he did not intend to repossess himself of them; the act of sale was therefore in itself a fraudulent applying of the brooches to his own use, and a larceny within the statute. The question reserved for us assumes something which is not the case: that the prisoner was not bound to restore the specific articles, whereas after the ten days had elapsed he was bound to return the specific brooches to the prosecutor.'

On an indictment for larceny as a bailee it appeared that the prisoner borrowed a coat from the prosecutor, with whom he lodged, for a day, and returned it. Three days afterwards he took it without the prosecutor's permission, and was seen wearing it by him, and he again gave him permission to wear it for the day. Some few days afterwards he left the town, and was found wearing the coat on board a ship bound for Australia. Martin, B., stopped the case, stating that in his opinion there was no evidence of a conversion. 'There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute; the determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As, for instance, in the case of a bailment of an article of silver for use, melting it would be evidence of conversion. So when money or a negotiable security is bailed to a person for safe keeping, if he spend the money or convert the security he is guilty of a conversion within this statute. The prosecution ought to find some definite time at which the offence was committed; the taking the coat on board ship was subsequent to the prisoner's going on board himself.' (l)

Where the prisoner was indicted for stealing sheep, and the prosecutor had delivered the sheep to the prisoner to keep, and he had afterwards sold them, and for some time concealed the sale; and the defence was that the prisoner had, or supposed he had, authority from the prosecutor to sell the sheep; Erle, C. J., told the jury that, 'if the prisoner sold the sheep without any authority and without any reason to suppose that he had authority to sell them, then he was guilty; otherwise, not so;' and left it to them to say whether he had any reason to suppose he had such authority. (m)

Where the prosecutor gave the prisoner a bill of exchange, which the prisoner was to deposit by way of security with a third party for purchase money due from the prisoner to the third party, and was not to use for any other purpose, and the prisoner converted it to his own

(l) *R. v. Jackson*, 9 Cox, C. C. 505. If this case is correctly reported, it deserves reconsideration. The words are 'take or convert the same to his own use, &c.' The clause therefore does not require a conversion, but was studiously framed to avoid the necessity of proving one. The evidence was sufficient to go to the jury that the prisoner took the coat on board for his own use with intent permanently to deprive the

owner of it; and such a case seems clearly within the statute. Besides, the case ought to have been left to the jury to say whether he did not return the coat to the prosecutor's house after the end of the last bailment for a day. If so the case was simply one of larceny. C. S. G. See *R. v. Weeks*, 10 Cox, 224.

(m) *R. v. Leppard*, 4 F. & F. 51.

use, it was held by Bramwell, B., that the prisoner was neither a 'bailee' under sec. 3, nor an 'agent' under sec. 75, and could not be convicted. (*n*)

The prisoner, who received a bill of exchange for the purpose of getting it discounted and handing back the proceeds, instead of getting it discounted, endorsed it as his own to a creditor in payment of his account. The jury found that it was the prisoner's intention when he endorsed the bill to pass the property in it absolutely to the creditor. He was held to be rightly convicted of larceny as a bailee of a bill of exchange. (*o*)

## SEC. IV.

### *Taking where Owner parts with the Property in the Goods.*

It is a settled and well established principle, that if the owner part with the *property* in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured. (*p*)

Upon an indictment for horse-stealing it appeared that the prosecutor was at a fair, having a horse there, in the care of a servant, which he intended to sell, when he was met by the prisoner, to whom he was personally known, and who said to him, 'I hear you have a horse to sell; I think he will suit my purpose; and if you will let me have him at a bargain I will buy him.' The prisoner and the prosecutor then walked together into the fair, towards the horse, and, upon a view of him, the prosecutor said to the prisoner, 'You shall have the horse for eight pounds;' and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor, that he would return immediately and pay him. The prosecutor replied, 'Very well.' The prisoner rode away with the horse, and never returned. Upon these facts, the learned judge, by whom the prisoner was tried, directed an acquittal, on the ground that there was a complete contract of sale and delivery, and that the *property*, as well as the possession, was entirely parted with. (*q*)

Upon an indictment for stealing a piece of silk of the value of ten pounds, the goods of T. Wilson, who was a silk manufacturer, it was proved that the prisoner had called at his warehouse, and, after looking at several pieces of silk, had selected the one in

(*n*) *R. v. Cosser*, 13 Cox, C. C. 187. See *post*.

(*o*) *R. v. Oxenham*, 13 Cox, C. C. 349, per Lord Coleridge, C. J., Pollock, B., Mellor, Lush, and Lindley, JJ. The cases of *R. v. Cosser*, and *R. v. Weeks*, *supra*, were distinguished.

(*p*) 2 East, P. C. c. 16, s. 102, p. 668, s. 103, p. 669, s. 113, p. 693. As to the

question whether there can be a felony where property is parted with under a mistake, see *R. v. Ashwell*, *post*, p. 150.

(*q*) Harvey's case, 1 Leach, 467, Gould, J. 2 East, P. C. c. 16, s. 103, p. 669. But with reference to this case and those immediately following, compare the cases collected, *post*, where delivery has been obtained by fraud with intent to steal.

question, agreed for the price of it, and said that his name was John Williams, that he lived at No. 6, Arabella-row, in Pimlico, and that if Mr. Wilson would send it there at six o'clock in the afternoon, with a bill and receipt, he would pay him for it. Mr. Wilson, accordingly, entered the piece of silk in his day-book to the debit of the prisoner, made out a bill of parcels for it in his name, and sent his shopman with it to the place, and at the hour appointed. The shopman met the prisoner near Arabella-row, and accompanied him to No. 6, where he went with him into a room, and delivered to him the bill of parcels, which he examined and after saying it was right, gave the shopman two bills of £10 each, drawn by Frith and Co. at Bradford, on Taylor and Co. in London. The amount of the silk was only £12 10s.; and the shopman stated that he had not sufficient cash about him to pay the difference between that sum and the amount of the two bills; upon which the prisoner said that it was immaterial, that he should want more goods, and that he would call on the ensuing day at his master's, to look out other goods, and take the change. Upon this the shopman left the goods, and returned home with the bills. The prisoner never came again to Mr. Wilson's warehouse; the bills, upon being presented at Taylor and Co.'s turned out to be mere fabrications; and, on inquiry at No. 6, Arabella-row, it appeared that the prisoner had only bargained for the lodgings the same morning, and that he absconded with the goods in a few minutes after Mr. Wilson's shopman had left the house. It was also proved that, within a month after the goods had been so obtained by the prisoner, the entry that had been made in the day-book was copied into the journal, and from thence posted regularly into the ledger, in the usual way where goods were not paid for immediately; and that the prisoner still stood debited in the ledger for the amount. It was objected, for the prisoner, that there was a sale of the goods to him, and such a delivery as would *change the property*. Upon which the learned judge, by whom the prisoner was tried, left it to the jury to consider whether there was not, in the mind of the prisoner, at the very beginning of this transaction, an intention and pre-meditated plan to obtain the goods without paying for them; and also whether this was a sale by Mr. Wilson, and a delivery of the goods, with intent to part with the *property*, he having received bad bills in payment for them, through the medium of his shopman. The jury were of opinion that the prisoner, from first to last, intended to defraud Mr. Wilson; and that it was not Mr. Wilson's intention to give him credit; and they found him guilty. But, upon a case reserved, the judges were of opinion that the conviction was *wrong*; for that Mr. Wilson had *parted with the property* as well as the possession, upon receiving that which was accepted by his servant as payment, although the bills turned out afterwards to be of no value. (r)

Upon an indictment against Nicholson, Jones, and Chappel, for stealing a bank post bill for twenty pounds, another for fifteen pounds, and also seven guineas, the property of W. Cartwright,

(r) *Parke's case*. 2 East, P. C. c. 16, s. 103, p. 671, Macdonald, C. B. 2 Leach, 614. See *R. v. Small*, 8 C. & P. 46, *post*.



it appeared that Nicholson introduced himself to the prosecutor, who was a pensioner in the Charter-house, by coming to his apartments at that place, and pretending to inquire as to the rules of the charity. He had not before that time any sort of acquaintance with the prosecutor, but he succeeded in getting him to enter into conversation, and to produce the rules of the charity from his desk, which gave Nicholson an opportunity of seeing that the prosecutor had some money. Nicholson then proposed to the prosecutor that they should take a walk together, which they did, and went to a public-house, where they were joined by Chappel. Some liquor was called for, when Jones came into the room, and said that he had just come from Coventry, for the purpose of receiving a large legacy, and produced a quantity of papers like bank notes; upon which Chappel said to him, 'Aye, I see it is good, but I imagine you think nobody, in company, has got any money but yourself;' to which Jones answered, 'I will lay ten pounds, that neither of you shew forty pounds in three hours.' Immediately on this bet being proposed, the parties left the room; and Nicholson and Chappel both asked the prosecutor if he could shew forty pounds, to which he answered that he believed he could. Nicholson then accompanied the prosecutor to his room, at the Charter-house, where the prosecutor took out of his desk the two post bills in question, and five guineas, and afterwards took out two more guineas, upon Nicholson advising him to take a guinea or two more: and they then went together to another public-house, called the Spotted Horse, where Chappel had previously said, on their leaving the first public-house, that he should go; and where they found both Jones and Chappel in a back room. Jones put down a paper, apparently a £10 note for each who could shew forty pounds, upon which the prosecutor shewed his forty pounds, in the post bills and guineas, by laying them down on the table, but did not recollect whether he took up the £10 paper, which was given to him upon being allowed to have won his wager. Jones then wrote four letters with chalk on the table; after which he went to the end of the room, turned his back, and said that he would bet them a guinea each that he would name another letter which should be made, and a basin put over it. Another letter was, accordingly, made, and covered with a basin. Jones named a letter, but not the right one; by which the others won a guinea each. Nicholson and Chappel then said, 'He is sure to lose; we may as well make it more, as we are sure to win: we may as well ease him of his money; he has more than he knows what to do with.' The prosecutor was so worked up with the hope of gain, that he at length, after various sums being proposed, staked his two post bills and the seven guineas; after which Jones named a letter, and guessed right; and then went to the table, swept off the bills and money, and went to the door of the room; the other prisoners sitting still, and the prosecutor making no objection, conceiving that he had fairly lost the money to Jones. Just at this time some police officers came to the house, who, upon seeing Jones, ran hastily towards the door, seized him, and brought him back into the room; and, upon perceiving, from the chalks upon the table, what had been going on, took the whole party into custody. Upon

searching the prisoners, about eight guineas in cash were found upon them, and a great number of flash notes, but no real ones: and it was afterwards found that a lump of paper, which was put into the prosecutor's hands by Jones when the officers came in, contained the two post bills belonging to the prosecutor. The prosecutor said, upon his cross-examination, that he did not know whether the paper which was given to him by Jones, on his showing forty pounds, was a real ten pound note or not; that he intended to gamble; that, having won the first wager, he should, if the transaction had ended there, have kept the guinea; that he did not object to Jones taking his forty-two pounds seven shillings when he lost; and that, if Jones had guessed wrong the second time, he expected to receive from him forty-two pounds seven shillings, the amount of the stake. Upon this evidence it was contended, on behalf of the prisoners, that this was a mere gaming transaction, or, at most, only a cheat, and not a felony; and the court left it to the jury to consider, whether this were a gaming transaction, or whether it were a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion, that it was a preconcerted scheme in all the prisoners to get from the prosecutor his post bills and cash; and they found them guilty. But, upon a case reserved, the judges held the conviction wrong; on the ground that *the property* in the post bills and cash was parted with by the prosecutor, under the idea that it had been fairly won. (s)

It appears from another case not to make any difference, where credit may have been obtained by fraudulently using the name of another person, to whom in fact the credit was intended to be given, if the delivery of the goods were made by the owner or any other having the disposing power for that purpose. Thus, where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of silver, and that she would send the half guinea presently, and thereby obtained the silver, it was holden not to be a felony. (t) And it has been observed with respect to this case, that in truth it was a *loan* of the silver upon the faith that the amount would be repaid at another time; that it was money obtained on a false pretence; and that the same determination had been made in similar cases at the Old Bailey. (u)

The prisoner was indicted for stealing a hat, which was stated in one count to be the property of R. Beer, and in another of J. Paul. The substance of the evidence was, that the prisoner bought a hat of Beer, a hat maker, at Ilminster; that soon afterwards he called for it, when he was told it would be got ready for him in half an hour, but that he could not have it without paying for it. While he was

(s) *R. v. Nicholson*, 2 Leach, 610. 2 East, P. C. c. 16, s. 103, p. 669. See *R. v. Riley*, 1 Cox, C. C. 98, where the prosecutor was induced, by a preconcerted fraudulent scheme, to lend money to be used in play on a promise that it would be returned, and it was held not to be larceny. The result

would have been different if the possession only had been parted with. *R. v. Robson*, R. & R. 413 *post*.

(t) *R. v. Coleman*, 2 East, P. C. c. 16, s. 104, p. 672. 1 Leach, 303, note (a).

(u) 2 East, P. C. c. 16, s. 104, p. 673.

in the shop Beer shewed him a hat which he had made for one Paul, upon which the prisoner said, that he lived next door to him; and he then asked when Paul was to come for his hat, and was told he was to come that afternoon in half an hour or an hour. The prisoner then went away, saying, he would send his brother's wife for his own hat. Soon after he went away, he met a boy, whom he asked if he was going to Ilminster; and, upon the boy saying that he was going thither, he asked him if he knew Beer, and said that Paul had sent him to Beer's for his hat, but that as he owed Beer for a hat himself, which he had not money to pay for, he did not like to go. And he then asked the boy (to whom he had promised something for his trouble) to take the message from Paul, and bring Paul's hat to him (the prisoner). He further told the boy not to go into Beer's shop, in case Paul (whom he described by his person and a peculiarity of dress) should happen to be there. The prisoner then accompanied the boy part of the way, after which the boy proceeded alone to Beer's, delivered his message, and received the hat; which, after carrying it part of the way for the prisoner, by his desire, the prisoner received from him, and said he would take it himself to Paul. Upon the fraud being discovered shortly afterwards, the prisoner was apprehended with the hat in his possession. It was objected, on the part of the prisoner, that these facts did not establish a case of larceny: and that the indictment should have been upon the statute for obtaining goods by false pretences. And upon a case reserved it was held that the offence did not amount to a felony; the owner having parted with his property in the hat. (v)

The correct distinction is, that if the owner part with the possession only, retaining the right of property, the offence is larceny; but if the owner part not only with the possession, but the right of property, it is not larceny.<sup>1</sup>

One Davenport was indicted for stealing two silver cream ewers; he had formerly been servant to a gentleman, who dealt with the prosecutor, and after he left his service, he called at the prosecutor's shop, and said his master (meaning the gentleman whose service he had left) wanted a silver cream ewer, desired the prosecutor to give it to him, and to put it down to his master's account: the prosecutor gave him two ewers in order that his master might select that which he liked best; he took both and sold them: the prosecutor stated that he did not charge his customer with these ewers, nor did he intend to charge him with either, until he had ascertained which he

(v) Adams's case, *Chambre, J.*, Taunton Spring Ass. 1812, MS. And it seems that the judges thought the second count out of the question, as Paul never had possession of the hat.

#### AMERICAN NOTE.

<sup>1</sup> The maker of a promissory note took it into his hands to endorse the part payment, and it was clear that the holder did not mean to part with his property in the note. The maker of the note refused to give it back, and converted it to his own use, and was held guilty of larceny. It seems that in this case not even the possession was parted with. *C. v. O'Malley*, 97 Mass. 584. *P. v. Call*, 1 Denio, 120; 48 Am. D. 655. *Dignowitty v. S.*, 17 Tex. 521; 67 Am. D. 670. *S. v. Deal*, 64 N. C. 270. See *S. v. Hall*, 76 Iowa, 85; *Hildebrand v. P.*, 56 N. Y. 394.

would have chosen; it was held that as the prosecutor had parted with the possession only and not the right of property, the offence was larceny; but if he had sent but one ewer, and charged the customer with it, it would have been otherwise. (*w*) So where a prisoner went to a shop and said that Mrs. Downing wanted some shawls to look at, and the prosecutor gave her five shawls, and she pawned two of them the same evening, and the others were found in her lodgings, it was admitted by the learned judge, who tried the case, that as the property in the shawls would continue in the prosecutor until the selection was made, it was larceny if Mrs. Downing did not send for them. (*x*)

There are several cases which have been decided, upon the same ground, to be only obtaining property by false pretences, and which will be found in the chapter devoted to that subject. (*y*)

On an indictment for stealing £10 9s. 4d., it appeared that the prisoner was a gipsy, and had told Mrs. Prior that there was some property left for her that she had been cheated of, and that the prisoner could get it for her; that she could raise spirits and lay them, if Mrs. Prior would put half a crown on a certain spot in a book, which she pointed out. Mrs. Prior said she had heard of such things, and she thought that spirits could be raised, and she was induced to put some money in the book. The prisoner returned the next day, and said she had been working all night, and that her husband's money would not do, and she must have sovereigns; and she then required Mrs. Prior to give her all the money she had got, and promised she would bring it back the next Monday, and also the sum of £170, which she said belonged to her. On these representations the wife gave her all the money she could get, amounting to £10 9s. 4d. When Mrs. Prior gave the prisoner the money, she required a shift to wrap the money in, and also a shawl. These were given on her promise to return them on the Monday. Other articles were also given to the prisoner on her promise to bring them all back on the Monday. The prisoner was to have £5 for her trouble. She never returned. It was held that, if the original intention was only with a view to practise the art of a witch, in which the prisoner might believe, although it was afterwards altered, there would be no larceny. But if it was a mere trick to get the property, with no intention to return it, it was larceny. (*z*)

(*w*) *R. v. Davenport*, Newcastle Spring Assizes, 1826, Bayley, J. Archb. Peel's Acts, 4.

(*x*) *R. v. Savage*, 5 C. & P. 143, and MS. C. S. G. Patteson, J. Mrs. Downing being too ill to attend, the prisoner was acquitted, because it was assumed that Mrs. Downing did send her, and that she received the shawls properly, and that it afterwards entered into her mind to convert them to her own use, and at that time she had the possession of them. Where the prisoner asked to see some guns, and selected two out of those that were shown to him, and being informed of the price, said he wanted to shew them to his master, a country gentle-

man, and would take them to him at an hotel, and if they were approved of he would return and pay for them, or, if not, bring them back; *Shaw*, Recorder of Dublin, is reported to have held that it was not larceny in the prisoner to go away with the guns and never return, as the prosecutor had trusted the prisoner with the guns on the credit of his story. *R. v. Copeland*, 5 Cox, C. C. 299. But this ruling seems open to considerable doubt. C. S. G.

(*y*) *R. v. Adams*, 1 Den. C. C. 38. *R. v. Barnes*, 2 Den. C. C. 59. *R. v. Essex*, D. & B. C. C. 371.

(*z*) *R. v. Bunce*, 1 F. & F. 523, Channell, B., and Crompton, J. This decision is

If a pawnbroker's servant, who has a general authority from his master to act in his business, delivers up a pledge to the pawnor, on receiving a parcel from the pawnor, which he supposes contains valuables, which he has just seen in the pawnor's possession, the obtaining of the pledge by the pawnor is not larceny. Upon an indictment for stealing a diamond brooch and various other articles, one Burgess, who was in the employ of the prosecutor, a pawnbroker, and who had a general authority to manage his business, stated that the prisoner came to his master's shop, and produced duplicates of property previously pledged, to the amount of £34, which was the property laid in the indictment, and desired it to be brought up and a light, as he had some diamonds to seal; he then produced a small packet of diamonds, which he desired Burgess to look at, and to advance the most he could upon them. Burgess looked at them, and agreed to advance £160 on them, and at the request of the prisoner handed them over to him to seal up, which the prisoner did in his presence, and then returned a packet, which Burgess believed to be the one containing the diamonds, it resembling it in every respect. Burgess put it in his pocket, and then handed over to the prisoner the property laid in the indictment, and £124 in money for the diamonds, which he supposed he had got. The packet so deposited when afterwards opened was found to contain coloured stones of the value of £4. Burgess stated also that he had no authority from his master to lend money except upon pledges of an equivalent value; and that when he delivered the money, and also the property stated in the indictment, he supposed he had an equivalent for them in the diamonds in his pocket; and that when he delivered the goods in the indictment he parted with them entirely, thinking the diamonds left with him were of sufficient value to cover the value of them and the cash advanced; and that, before he parted with them, he had received the parcel containing, as he supposed, the diamonds, and that he had before examined the genuine diamonds, and might then have detained them; but as the prisoner said they might go through the hands of a second person and be changed, he handed the genuine diamonds back to the prisoner for the special purpose only of being sealed. Serjt. Arabin was inclined to think, that as the property was parted with by Burgess absolutely under the impression that the prisoner had returned the parcel containing the diamonds, the prisoner's offence did not amount to felony; and, upon a case reserved, the judges were unanimous that the case was not larceny, because the servant, who had a general authority from the master, parted with the property and ownership, not merely with the possession. (a)

Upon an indictment for stealing three chests of tea, the property of S. T. and his partners, it appeared that Messrs. T. & Co. were carriers, and that on the 8th of November, 1825, three chests of tea arrived at their warehouse, directed 'J. Creighton, Tewkesbury.'

right, on the ground that Mrs. Prior merely parted with the possession of the property, and expected it to be returned. It by no means warrants the position that in every case of fortune-telling the offence is larceny; and wherever the prosecutor parts with the

property without expecting it to be returned, the indictment ought to be for false pretences. C. S. G.

(a) *R. v. Jackson, R. & M. C. C.* See *post*, p. 149, note (d).

About a month before this the prisoner, calling himself Langston, had called several times at the office inquiring for teas, and asking if any had arrived for him. The last time he had called was about a week before the time in question, and he desired the porter of Messrs. T. & Co., when any came, to take it to his (prisoner's) house. When the tea in question arrived it was taken by the porter to the prisoner's house, but he was from home, and the tea was taken back to the warehouse. On the Wednesday following the prisoner went to the porter's house and asked him if he had any tea for him; he told him he did not know, that he had three chests marked 'J. Creighton,' and said he did not know whether they were for the prisoner or not, as he did not know a person of the name of Creighton. The prisoner said they were his, and that he had an invoice which specified the same; that they had spelt his name wrong by putting a C. instead of an L., but he did not produce any invoice. The carriage amounted to 18s. 9d., for which, and the portorage, the prisoner paid £1; the porter, by the prisoner's desire, fetched the goods and delivered them to the prisoner at his own house. On the Saturday following, J. Creighton applied to Messrs. T. & Co.'s office for the goods in question, which were afterwards found in the prisoner's possession. The jury found the prisoner guilty, and said they were of opinion that when the prisoner inquired at the waggon office for teas, he intended to obtain property not his own, and when he obtained the goods in question he knew they were not his property, and intended to steal them; and, upon a case reserved, the judges held that the conviction was right, on the ground that the ownership of the goods was not parted with, the carriers' servant having no authority to part with the ownership to the prisoner, and the taking was, therefore, larceny. (b)

Where a carrier delivered goods to a wrong person by mistake, it was held that he did not part with the property in the goods, and that larceny might be committed with respect to such goods by the person receiving them from the carrier. The Recorder said the carrier had a limited authority to deliver to a certain person, and by leaving them with another by mistake the property was not really parted with. (c)

To constitute larceny there must be a taking of the property against the will of the owner. But the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness. Therefore, a cashier, who, deceived by a forged order purporting to be drawn by a customer, pays money to the payee, who presents it knowing it to be forged, thereby parts with the property in the money of the bank to the payee so as to bind his employer; and the payee is therefore not guilty of larceny, but of obtaining money by false pretences. And a conviction of a person who received the money, with a knowledge of the fraud, from the payee who had obtained it in the manner above mentioned, for

(b) *R. v. Longstreeth*, R. & M. C. C. 137.  
See note (d), *infra*.

(c) *R. v. Little*, 10 Cox, C. C. 559.  
Russell Gurney, Q. C., Recorder.

receiving the money knowing it to have been stolen, was held bad. (d)

The prisoner was a depositor in a post-office savings bank, in which a sum of eleven shillings stood to his credit. He gave notice to withdraw ten shillings, stating the number of his depositor's book, the name of the post-office, and the amount to be withdrawn. A warrant for ten shillings was duly issued to the prisoner, and a letter of advice sent to the post-office to pay the prisoner ten shillings. He went to the post-office, and handed in his depositor's book and his warrant to the clerk, who, instead of referring to the proper letter of advice, referred by a mistake to another for £8 16s. 10d., and placed that sum upon the counter. The clerk entered that amount as paid in the prisoner's book, and stamped it, and the prisoner took up the money and went away. When the mistake was discovered, the prisoner was brought back, and then said that he had burnt his depositor's book. The prisoner was charged with larceny of the £8 16s. 10d. The jury found the prisoner had the *animus furandi* at the moment of taking up the money from the counter, and the prisoner was convicted. Held, by a majority of the judges, that the conviction was right. (e)

(d) *R. v. Prince*, 38 L. J. M. C. 8, L. R. 1 C. C. R. 150, *et per* Blackburn, J., 'I lament the state of the law on this subject. The cases deciding that the property must be taken against the consent of the owner were decided when larceny was a capital offence; but this was afterwards qualified where the servant or agent had possession of the goods, and they were taken against the consent of the servant; but this again was confined to such servants as had a general authority to part with the goods. There is a distinction between this case and one where the authority is limited to parting with the possession only, as distinguished from the property. The difficulty in these cases is to decide within which class of cases any particular case comes. I think that the carrier's porter in *R. v. Longstreeth*, (*supra*), had no authority to deal with the property at all, and it is to be observed that the same judges decided that case as decided *R. v. Jackson*, (*ante*, p. 147), to which case it was said to be opposed. There, I think, there was a general authority in the pawnbroker's assistant to part with the pledges, and the other cases came within the same principle. The cashier of a bank has a discretion to see whether a cheque is genuine, and he has, no doubt, an authority to pay money in respect of a genuine cheque, but he has with it a general authority to part with the money as regards third persons.'

(e) *R. v. Middleton*, 42 L. J. M. C. 73, L. R. 2 C. C. R. 38. *R. v. Prince* was distinguished by the majority, but held to be indistinguishable by Martin B., Bramwell, B., Brett, J., and Cleasby, B. Held, by Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., that assuming the clerk to have an authority equal to, and to represent, the Postmaster-General, and to have meant that the prisoner should take up

the money, though he only so meant because of a mistake which he made as to the identity of the prisoner with the person really entitled to the money, the prisoner being aware of the mistake, and taking up the money *animus furandi*, was guilty of taking and stealing the money. And also, that, although the clerk, and therefore the Postmaster-General, intended that the property in the money should belong to the prisoner, yet, as he so intended in consequence of a mistake as to his identity, and the prisoner knew of the mistake, and had the *animus furandi* at the time, the prisoner was guilty of larceny. Held, by Bovill, C. J., Kelly, C. B., and Keating, J., that the clerk had no property in the money or power to part with it to the prisoner, but only possession; that the authority of the clerk was a special authority not pursued, and that on that ground only the conviction should stand. By Pigott, B., that possession of the money was never given by the clerk to the prisoner, who, while it lay on the counter, and before he got manual possession of it, conceived the *animus furandi*, and took it, and therefore it was larceny. Martin, B., Bramwell, B., Brett, J., and Cleasby, B., held that the money was not taken *invito domino*, and that there was no trespass involved in the taking by the prisoner, and therefore there was no larceny. Held, by Bramwell, B., and Brett, J., that the authority of the clerk extended to authorise him to part with the possession and property of the larger sum. This case was not argued for the prisoner. It is submitted that this is a wrong decision upon the ground that (assuming that the clerk had authority from the Postmaster-General to part with the money, which it is submitted he had), the owner of the money voluntarily parted with the possession of it, *intending to part with*

In the case of *R. v. Ashwell*, (f) the prosecutor gave the prisoner a sovereign believing it to be a shilling, and the prisoner believed that he had received a shilling. Some time afterwards the prisoner discovered that he had received a sovereign, and he then determined to convert it to his own use. Seven judges (A. L. Smith, Mathew, Stephen, Day, Wills, Manisty, and Field, JJ.,) held that there was no larceny, as the receipt of the sovereign took place when the supposed shilling was received by the prisoner, and therefore the prisoner had lawful possession of the sovereign; and so according to undoubted law the determination at some time afterwards to convert the sovereign to his own use was no larceny. An equal number of judges (Lord Coleridge, C. J., Grove, Denman, Hawkins, Cave, JJ., Pollock and Huddleston, BB.,) held the contrary because they thought the receipt or acceptance of the sovereign, as and for a sovereign, did not take place and could not take place until the prisoner found out that he had got a sovereign, and that then and there before he had lawful possession of the sovereign, he determined to convert it to his own use. The result was that as the Court was equally divided the conviction for larceny was upheld. (g) This case was followed by *R. v. Flowers*, (h) where the jury found that the prisoner received a certain sum of money at one time, and at a subsequent time fraudulently converted it to his own use, and this was held to be clearly no larceny, and it was expressly stated by the judges that there was no intention in *R. v. Ashwell* to overrule the undoubted law that to justify a conviction for larceny the receipt and the fraudulent appropriation must be contemporaneous. The judgments in *R. v. Ashwell*, of A. L. Smith and Stephen, JJ., upon the one side and of Cave, J., and Lord Coleridge, C. J., were as follows:—

A. L. Smith, J. 'The material facts are as follows:—Keogh handed to the prisoner the sovereign in question, believing it was a shilling and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and he then and there fraudulently appropriated it to his own use. Is this larceny at common law, or by statute?

'To constitute the crime of larceny at common law in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent, there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as among other reasons, trespass will not lie, it is not larceny at common law. In

*the property in it.* It is true the property did not pass, but there was an intention to pass it. The old authorities seem to show that it is the essence of the offence of larceny that the goods be taken *invito domino*.  
(f) 16 Q. B. D. 190.

(g) *R. v. Ashwell*, 16 Q. B. D. 190. The effect of this decision is to overrule *R. v. Mucklow*, 1 Moo. C. C. 160, and *R. v. Davies, Dears. C. C. 640. Supra.*

(h) *R. v. Flowers*, 16 Q. B. D. 643.



Hawkins' Pleas of the Crown, book i. chap. 33, sec. 1, it is stated:—"It is to be observed that all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit* as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away." As I understand the counsel for the Crown did not really dispute the above definition, and indeed if he had, upon further referring to the 3rd Institutes, chap. 47, p. 107, and Hale's Pleas of the Crown, p. 61, it would be found to be fully borne out by those writers. The two cases cited in argument, *R. v. Mucklow*, 1 Moo. C. C. 160, and *R. v. Davies*, Dears. C. C. 640, are good illustrations of what I have enunciated, and if other cases were wanted there are plenty in the books to the same effect.

'In the present case it seems to me in the first place that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to shew that there was no larceny at common law, and, secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this in my judgment is also fatal to the act being larceny at common law.

'As to this last point, the law laid down by Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., in the case of *R. v. Middleton*, L. R. 2 C. C. R., at p. 45, is very pertinent; it is as follows: "We admit that the case is indistinguishable from the one supposed in argument of a person handing to a cabman a sovereign by mistake for a shilling, but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he at the time he took the sovereign was aware of the mistake and had then the guilty intent, the *animus furandi*." I believe the above to be good law. The contention, however, of the Crown was, that although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is, that he has taken and carried away a chattel not believing that it had been abandoned, and at the time of such taking has had the felonious intent. The proper direction to be given to a jury being, as I understand, "Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned, (see *R. v. Thornborn*, 1 Den. C. C. 387, and *R. v. Glyde*, L. R. 1 C. C. R. 139,) if he did he would be guilty of larceny, *aliter* he would not." Then it was argued by the counsel for the Crown, that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support him.

'Keogh, in the present case, intended to deliver the coin to the prisoner and the prisoner to receive it. The chattel, viz. the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his

possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d.* instead of 12*d.* as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that shew that the finder out of a mistake may also be guilty of such a crime?—a mistake is not a chattel. The chattel (*viz.* the coin) in this case never was lost, then how could it be found? In my judgment the argument upon this point for the Crown is wholly fallacious and fails. It was further urged for the Crown, that the present case was covered by authority, and the cases of *Cartwright v. Green*, 8 Ves. 405, and *Merry v. Green*, 7 M. & W. 623, were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the Crown. In the first of these cases, the question arose upon demurrer to a bill in Chancery as to whether a felony was disclosed upon the face of the bill. Lord Eldon, as he states in his judgment, decided the case upon the ground that inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of it, which it was not necessary to touch for the purpose of repair, with the intention of taking and appropriating to his own use whatever he should find therein, this was larceny. I conceive this to be distinctly within the principle I have above stated,—there was the taking against the will of the owner with the felonious intent at the time of taking.

‘The other case, *viz.* *Merry v. Green*, which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Baron Parke, who delivered the judgment of the Court, upon the principles applicable to a case of finding. The learned Baron says:—“It seems to us that though there was a delivery of the secretary and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence, and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies to this.” I understand the learned Baron when he says, “The law applicable to all cases of finding applies,” to mean the law applicable to the cases of finding a chattel, for there are no cases extant as to finding out a mistake to which his remark could apply. That too is the distinction between the present case and that before Baron Parke. No intention to deliver the chattel (namely, the purse and money) at all ever existed; whereas, in the present case, there was every intention to deliver the chattel (namely, the coin), and it was delivered and honestly received. In my judgment, a man who honestly receives a chattel by delivery thereof to him by its true owner cannot be found guilty of larceny at common law, and in my opinion the prisoner in this case is not guilty of that offence.

‘The second point has now to be considered, namely, was he guilty

of larceny as a bailee within the true intent of sec. 3 of 24 & 25 Vict. c. 96? To constitute a person bailee of a chattel there must be a bailment and not a mere delivery of the chattel. There must be a delivery of a chattel upon contract express or implied to return it or obey the mandate with which the delivery is clogged, or, in other words, a delivery upon condition.

'The question, as it seems to me, is this: Is the law in the present case to imply a condition, when we know perfectly well that at the time of the delivery of the coin no condition at all was in the contemplation of the parties, excepting that a coin of like value should be returned to Keogh when the prisoner had drawn his wages. No condition to return the coin delivered to the prisoner was ever thought of, and in my judgment such a condition cannot be implied. Should, however, any condition be implied as to what was to be done, if or when any mistake not then contemplated should be discovered, my opinion is that the only condition, if any, which could be implied would be that the prisoner would not spend or use for his own purposes, 19s. out of the 20s., and I am of opinion that if the prisoner had upon the finding out the mistake taken to Keogh 19s. he would have been strictly within his rights.

'The case of *R. v. Hassall*, L. & C. 58, is an express authority to the effect that a person is not a bailee within the statute unless he is under obligation to return the identical chattel deposited with him. In my judgment, the prisoner was not a bailee of the sovereign, for the reasons above given.

'I am fully alive to the remark which has been made that if the present case is not one of larceny it should be. Whether this remark is well founded or not I do not pause to inquire, but it seems to me that the observations of Bramwell, B., in *R. v. Middleton*, on this head are well worthy of consideration. Believing, however, as I do, that according to the law of England as administered from the earliest times the present case is not a case of larceny at common law, I cannot hold otherwise than I do; and as, for the reasons given above, the prisoner is not in my opinion guilty of larceny as a bailee, my judgment is that the conviction should be quashed.'

Cave, J. — 'The question we have to decide is whether, under the circumstances stated in the case, the prisoner was rightly convicted of larceny, either at common law or as a bailee.

'It is undoubtedly a correct proposition that there can be no larceny at common law unless there is also a trespass, and that there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to have been stolen, or, in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny. Applying that principle to this case, if the prisoner acquired lawful possession of the sovereign when the coin was actually handed to him by the prosecutor, there is no larceny, for at that time the prisoner did not steal the coin; but if he only acquired possession when he discovered the coin to be a sovereign, then he is guilty of larceny, for at that time he knew that he had not the consent of the owner to his taking possession of the sovereign as his own,

and the taking under those circumstances was a trespass. It is contended that as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without his consent; but to my mind it is impossible to come to the conclusion that at the time when the sovereign was handed to him the prisoner, who was then under a *bona fide* mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign instead of a shilling. The only point which can be made in favour of the prosecution, so far as I can see, is that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property, there was a taking possession simultaneously with the formation of that intention. Had the coin been a shilling, it is obvious that the prisoner would have gained the property in and possession of the coin when it was handed to him by the prosecutor; as there was a mistake as to the identity of the coin, no property passed and the question is whether the possession passed when the coin was handed to the prisoner, or when the prisoner first knew that he had got a sovereign and not a shilling.

'There are four cases which it is important to consider. The first is *Cartwright v. Green*, 8 Ves. 485, the which, however, differs slightly from the present, because in that case there was no intention to give the defendant, Green, either the property in or the possession of the guineas, but only the possession of the bureau, the bailor being unaware of the existence of the guineas. If the bailee in that case had, before discovering the guineas in the secret drawer, negligently lost the bureau with its contents, it is difficult to see how he could have been made responsible for the loss of the guineas.

'In *Merry v. Green*, 7 M. & W. 63, the facts were similar to *Cartwright v. Green*, except that the bureau had been sold to the defendant. In that case Parke, B., says, that though there was a delivery of the bureau to the defendant, there was no delivery so as to give a lawful possession of the purse and money in the secret drawer.

'If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has without his knowledge been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it. A case much urged upon us on behalf of the prisoner was *R. v. Mucklow*, 1 Moo. C. C. 160. In that case a letter containing a draft for £10 11s. 6d., had been delivered to the prisoner, although really meant for another person of the same name, and the prisoner appropriated the draft, and was tried

and convicted of larceny. The conviction, however, was held wrong on the ground that he had no *animus furandi* when he first received the letter. Here, as in the two previous cases, the prisoner was not at first aware of the existence of the draft, and when he became aware of it, he must have known that it was not meant for him; yet the judges seem to have held that he got possession of the draft at the time when the letter was handed to him. In *R. v. Davies*, Dears. C. C. 640, the facts were similar to those in the last mentioned case, and Erle, C. J., who tried the case, directed the jury that if at the time the prisoner received the order, he knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion the prisoner had not received it until he had discovered, by opening and reading the letter, whether it belonged to him or not. "I considered," says the judge, "that the law of larceny laid down in respect of articles found was applicable to the article here in question." The Court, however, quashed the conviction on the authority of *R. v. Mucklow*. In *R. v. Middleton*, L. R. R. 2 C. C. 38, in which it was held by eleven judges against four that where there was a delivery of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, there occurs a passage in the judgment of some judges who formed the majority which is as follows:—"We admit that the case is indistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but, after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he at the time he took the sovereign was aware of the mistake and had then the guilty intent, the *animus furandi*."

'For my part I am quite unable to reconcile the cases of *R. v. Mucklow* and *R. v. Davies*, and the passage I have cited from *R. v. Middleton*, with those of *Cartwright v. Green* and *Merry v. Green*, and being compelled to choose between them I am of opinion, that the law is correctly laid down in *Merry v. Green*, for the following reasons: The acceptance by the receiver of a pure benefit, unmixed with responsibility, may fairly be and is in fact presumed in law until the contrary is shewn; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession, unaccompanied by ownership, is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment, a man cannot be presumed to assent to the possession of a chattel; actual consent must be shewn. Now a man does not consent to that of which he is wholly ignorant, and I think, therefore, it was rightly decided that the defendant in *Merry v. Green* was not in possession of the purse and money until he knew of their existence, moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think therefore that Ashwell did not consent to the possession of the sovereign until he knew that it

was a sovereign. Suppose that while still ignorant that the coin was a sovereign, he had given it away to a third person, who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20s.? In my judgment he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling, and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents, whatever they may happen to be; and moreover a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice: *Batson v. Donovan*, 4 B. & A. 21. In this case Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As therefore he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was, I think, bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor, but at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use, and I am therefore of opinion that he falls within the principle of *R. v. Middleton*, and was guilty of larceny at common law.

‘For these reasons I am of opinion that the conviction was right.’

Stephen, J. — ‘The facts of this case are as follows: — Keogh, intending to lend Ashwell a shilling, gave him a coin which he supposed to be a shilling, but which in fact was a sovereign. At the time when he received it Ashwell supposed it to be a shilling, but after about an hour he discovered that it was a sovereign, and fraudulently applied it to his own use. The question whether this was larceny was argued, first before five judges, who differed in opinion, and afterwards before fourteen. The arguments used to shew that it was not larceny were as follows: — From the earliest times it has always been held that a felonious taking is essential to larceny, and that a fraudulent conversion of property after an innocent taking, though in some particular cases criminal by statute, does not amount to larceny at common law. It was further urged that there was in this case no such bailment of the sovereign as would make the prisoner guilty of larceny as a bailee under the 3rd section of the Larceny Act of 1861. I think that these arguments are well founded and ought to prevail; but as a difference of opinion exists on the subject, I will give my reasons fully, noticing as I give them what I understand to be the arguments put forward in support of

the opposite view. The history of the law relating to theft from the earliest times to the present day shews that from the very first notices of the law of theft, it was always considered that the crime involved a taking against the will of the owner. Glanville says (book x. c. 13), that a person who does not return what is lent (*commodatum*) to him "*a furto omnimodo excusatur, per hoc quod initium habuerit suæ detentionis per dominum illius rei.*" Bracton defines theft as "*contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit.*" This in itself is ambiguous, as the word "*contractatio*" might refer, as it certainly did in Roman law (Digest, xlvii. tit. 2, 48, § 4, xlvii. tit. 2, 52, § 19, and xlvii. tit. 2, 54, § 1) to a fraudulent dealing with the thing after a delivery by the owner; but other ancient authorities make it probable that this was not Bracton's meaning. It will be sufficient for this purpose to quote two cases from the Year Books, each of which lays down the same doctrine at a considerable interval of time. The first is in 2 Edw. 3, p. 1, No. 3: A man was indicted in the sheriff's tourn because he "*felonice abduzit unum equum rubrum.*" The indictment was removed to the King's Bench, and it was said that it was insufficient, because it did not say that the person indicted had taken the horse feloniously (*pur ceo que il ne dit pas que vous le emblastes felonice*). This was in 1328. In 1474 (13 Edw. 4, p. 9, No. 5) was decided the famous case of the carrier who, having received goods to be carried to Southampton carried them elsewhere, opened the bales and stole the contents. This case has been generally understood to decide that a bailee who steals the whole of the goods bailed to him commits no offence at common law; but that if he breaks bulk and steals part of them, he is guilty of theft. Although this view has been generally entertained, and is embodied in 20 & 21 Vict. c. 54, now represented by the 3rd section of the Larceny Act of 1861, it is not specifically put forward as the reason of the decision in the report in the Year Books, and two judges give a different reason for their decision, namely, that the original taking was felonious, as the carrier meant not to carry the goods according to the contract, but to steal them. The case undoubtedly established the rule, whether or not it established the exception. The case was argued twice,—first, in the Star Chamber before the Privy Council, and afterwards before the judges in the Exchequer Chamber. The Chancellor stated in the Star Chamber that the suit was brought by an alien merchant who had come into England with a safe conduct, and who, he said, "is not bound to sue according to the law of the land, and to abide the trial by twelve men and other solemnities of the law of the land, but he ought to sue here, and it must be determined according to the law of nature in Chancery." He added that the law merchant was "*ley universal par tout le monde,*" and was the law applicable to the case, and said that a misappropriation of goods in the possession of the offender was as felonious as if they were not in his possession.

'This reasoning appears to confound the criminal liability of the carrier, which must have depended on the law of England, with the civil remedy of the owner of the goods, and admits that by the law of England a felonious taking was essential to larceny; but it must

be observed that the Chancellor in 1474 was Booth, then Bishop of Durham, of whom Lord Campbell says, "His appointment turned out a great failure; he was equally inefficient in the Court of Chancery and in Parliament. Except that he did not take bribes, he had every bad quality of a judge." He was, in a few months after this case, dismissed from his office of Chancellor on account of his incompetency. When the matter was discussed in the Exchequer Chamber, it was held by all the judges, except Nedham, that if goods are bailed to a man he cannot take them feloniously. The judges reported to the Chancellor and the council that the majority of them thought a felony had been committed. Their reasons are not given in the report. It thus appears that whatever may be the exact effect of the case, all the judges except one considered that a felonious taking was essential to larceny, and that if the original taking was innocent no subsequent fraudulent dealing with the thing taken would amount to larceny. If the effect of the case is that a fraudulent breaking of bulk by a carrier amounts to a felonious taking, it established at most a special anomalous and highly technical exception to a rule which the exception itself emphatically recognises. There are other cases on the subject in the Year Books, but it is not necessary to go through them. The rule that in every theft there must be a felonious taking, or in other words a trespass, and that a fraudulent conversion after an innocent taking is not theft, is laid down by every text writer who has dealt with the subject, Coke (3rd Institutes, 107), Hale (Hale's Pleas of the Crown, 504), Hawkins (book i. chap. 19), Foster (Criminal Law, 123), and others down to our time, and has been recognised by many statutes which make exceptions to it in the case of embezzlement by servants, misappropriation by agents, and especially in the case of larceny by bailees. Indeed, my only reason for going so fully into the matter is to shew how characteristic and well established a part of the law the proposition in question is.

'The application of this principle to the present case appears to me direct and obvious. Ashwell received the sovereign innocently, though he dealt with it fraudulently an hour afterwards when he became aware of its value. The inference that he committed no felony at common law appears to me to follow of necessity.

'There are two ways in which it is sought to avoid this inference. It is said, first, that the delivery, being made under a mistake, passed neither the property in the sovereign nor the right to a possession of it, and that the prisoner must be regarded as having taken it, not when he accepted it under a mistake as to its value, but when, knowing its value, he determined to appropriate it to himself, or when he did so appropriate it by getting it changed and keeping the change. It is also said that even if no offence at common law was committed, the prisoner was guilty of larceny as a bailee under the 3rd section of the Larceny Act. I am unable to concur with either of these views.

'The first view is, I think, contrary to principle because it evades by a legal fiction the principle that a fraudulent appropriation consequent upon an innocent taking is not larceny. The guilt of the prisoner would follow easily and immediately from the principle that such a taking is larceny, and this second principle is, in effect, substituted for



the first by an artificial interpretation either of the word "possession" or of the word "taking." If the word "possession" is chosen to be interpreted, this is done by explaining it to mean something beyond actual control over the thing possessed, namely, control coupled with knowledge which may or may not exist. If the word "taking" is chosen to be interpreted, it is in this case interpreted to mean not an actual physical taking, but a subsequent change of mind relating back to such physical taking. I know of no authority for either of these fictions. The word "possession" is indeed used in many senses, some of them highly artificial, but this is a bad reason for adding a new artificial meaning to it. Its plain meaning in this case is the reception of the coin by Ashwell from Keogh. The interpretation suggested appears to me to be one against which there is express authority, which I now proceed to examine.

'The cases which set the matter in the clearest light are those which relate to the finding of lost property, particularly those which had been decided in modern times. The earlier authorities laid down in general terms that to take lost goods fraudulently was not felony. Coke says (3rd Institutes, 108), "If one lose his goods and another find them, though he convert them *animo furandi* to his own use, yet it is no larceny, for the first taking is lawful." Hale (1st Pleas of the Crown, 506), says, "If A. finds the purse of B. in the highway, and takes it and carries it away, and hath all the circumstances that may prove it to be done *animo furandi* as denying it or secreting it, yet it is not felony."

'The generality of these expressions was long afterwards qualified by cases which decided that if the owner was known to the finder at the time when he took the goods, the offence was larceny, and various distinctions and refinements were added to this general doctrine by five modern cases. These are *R. v. Thurborn*, 1 Den. C. C. 387, decided in 1849; *R. v. Preston*, 2 Den. C. C. 353, decided in 1851; *R. v. Christopher*, Bell, C. C. 27, decided in 1858; *R. v. Moore*, L. & C. 1, decided in 1861; and *R. v. Glyde*, L. R. 1 C. C. R. 139, decided in 1868. These cases taken together appear to me to establish, with the utmost possible clearness, the proposition that in order to justify a conviction for larceny the original taking in the ordinary sense of the word must be felonious, that a fraudulent misappropriation after an innocent taking is not theft, and that a change of mind after an innocent taking does not relate back to the innocent taking and make it felonious.

'In *R. v. Thurborn* the prisoner found a bank note and took it, intending to usurp the entire dominion over it, but at the time there was nothing to shew him to whom the note belonged, nor had he any reason to suppose the owner knew where to find it. Next day he heard and believed the note belonged to the prosecutor, and after this he changed it and appropriated the money to himself. It was unanimously held by seven judges that this was not larceny though the first taking was "not innocent in one sense." The effect of the judgment is summed up as follows:—"If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a

trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not."

'If this case is good law, and if the present case is to be decided against the prisoner, we shall have the following result: If A. finds a sovereign in the road, not knowing to whom it belongs, and appropriates it to himself after discovering the owner, he is not guilty of theft; but if A. innocently receives a sovereign from the owner, believing it to be a shilling, and appropriates it to himself after discovering its value, he is guilty of theft. This can hardly be the law.

'When Ashwell received the coin and put it in his pocket, and for an hour afterwards, he did not know that Keogh was the owner of it in any sense whatever. He believed it to be his own, and that on the reasonable ground that Keogh had lent it to him, thereby passing to him an absolute property in the coin itself. When he discovered its value, he had the lawful possession of it, at all events as against every one except Keogh; and if his subsequent conversion of it to his own use amounted to a felonious taking, *R. v. Thurborn* was wrongly decided.

'In one or two of the later cases some dissatisfaction has been expressed at *R. v. Thurborn* (see the observation of Martin, B., and Blackburn, J., in *R. v. Glyde*); but this I apprehend refers not to that part of the decision which held that a fraudulent conversion after an innocent taking was not larceny, but to that part which held the same as to a fraudulent conversion after a taking which was in itself not innocent. The judges, however, in *R. v. Glyde* said that they were bound by *R. v. Thurborn*, and it is recognised in several other cases as well.

'The next case is *R. v. Preston*, decided in 1851, which appears to me to affirm the doctrine as to the necessity for an unlawful taking in the first instance in the most explicit manner. In this case a £50 note had been lost by Collis. It had on it the name of Collis. The prisoner Preston changed the note two days afterwards, having in the meantime had a notice that such a note had been lost by Collis. It does not appear how Preston became possessed of the note, whether by finding or otherwise. Mr. M. D. Hill, Recorder of Birmingham, directed the jury that the important question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found, at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. This was held by the Court to be a misdirection, as, consistently with it, the jury might have convicted the prisoner, thinking that he had taken the note innocently, and determined afterwards to misappropriate it. The judgments in this case appear to me to apply to the present case so closely that they must, if accepted as good law, be regarded as decisive of it.

"Lord Campbell, C. J.:—I am of opinion that this conviction

cannot be supported. Larceny necessarily supposes a taking *animo furandi*. The rule as to taking is somewhat technical, but it is not likely to be departed from. In the case before us, the direction to the jury is consistent with an honest possession on the part of the prisoner. The Recorder says that the question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. When then was the taking? It is supposed to be a thought which passed through the prisoner's own mind; but I do not think that can amount to a taking when nothing was in fact done, and when it may be that the prisoner was lying in bed at a distance from the article. There is no taking *animo furandi* in this case, consequently there is no larceny. It is unnecessary for us now to enter further into the question after the elaborate judgment of my Brother Parke on the subject of larceny in *R. v. Thurborn*." "Alderson, B.:— If there must be both a taking and the *animus furandi* to constitute larceny, the difficulty is, how the changing a man's mind *ex post facto* can render an honest taking larceny. According to the summing-up of the Recorder to the jury, if a man gets a note honestly, keeps it for a week with an intention of restoring it to the owner, and then changes his mind, and resolves to appropriate it to his own use, it may be, as the Lord Chief Justice remarks, while he is in bed, that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law." "Talfourd, J.:— A mere movement of the mind cannot amount in law to a taking." "Platt, B.:— The case where there has been a bailment stands on a different principle — that of breaking bulk; but to constitute larceny in every other case, something must be taken *animo furandi* and *invito domino*." "Martin, B.:— It is of great importance that the rules of the criminal law should be plain and intelligible, and considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny." This case seems to me to be in all essential particulars identical with the present. The argument urged in support of the conviction of Preston was substantially the same as the view now under consideration. Lord Campbell states it thus (page 359): "Your position is that the finder, whilst he holds the property honestly, holds it for the right owner, and that, when he resolves to appropriate it to his own use, there is a new taking, and that he then takes it *animo furandi*." This was the view from which the Court dissented. The only difference between the cases lies in the fact that in *R. v. Preston* it did not appear how the prisoner got the note; whereas in the present case it appears that the prisoner got the coin from the prosecutor himself, and reasonably believed at the time that the prosecutor meant to give it to him for his own. This difference was surely in favour of Ashwell. In the one case nothing was proved as to the actual taking; in the other, it was proved to have been altogether innocent. The judgments are also remarkable because they shew that in the opinion of the Court the felonious taking must be an actual physical taking, and that a change of mind as to the disposition of the property previously taken is not enough to constitute an unlawful taking. In 1858, *R. v. Christopher* was decided.

It is very like *R. v. Preston*. The prisoner found a purse and money, and there was evidence that he heard soon afterwards that it was cried in the street. The prisoner afterwards converted the money. It was held that on this evidence he could not be convicted, as there was nothing to shew that at the time of finding the purse the prisoner knew whose it was, or that the owner could be found, though soon after taking it he learned who the owner was.

'The next case is *R. v. Moore*, decided in 1861. In this case the prisoner picked up a bank note in his shop, intending, when he picked it up, to take it to his own use, and deprive the owner of it, whoever he might be, and believing at the time when he picked up the note that the owner could be found. After picking up the note, and before appropriating it, the prisoner discovered the owner. It was held that this was larceny, because when the prisoner picked up the note he had a felonious intention; and the authority of *R. v. Thurborn* was relied upon.

'The last case as to finding is *R. v. Glyde*, decided in 1868. In this case the prisoner picked up a sovereign, and determined to appropriate it; but there was no evidence to shew that at the time he had reason to believe that the true owner could be found, though he discovered her shortly afterwards, and this was held not to be larceny.

'These cases no doubt differ from the present in the circumstances that in all of them the prisoner got possession of the property by finding. Their bearing upon the present case is this:— They all proceed upon the principle that in all larceny the actual physical taking must be felonious; and they decide the question whether this was so in particular cases of finding by reference to the state of the prisoner's mind at the time of finding. They will be found to establish the following proposition:— If at the time of taking the lost property the finder intends to appropriate it to himself, and either knows or has the means of knowing the owner, or of knowing that he can be found, and subsequently appropriates the property, he is guilty of larceny; but if at the time of finding he either does not intend to appropriate the property, or does so intend without the knowledge or means of knowledge aforesaid, he is not guilty of larceny, because his original taking is not felonious. The question, therefore, reduces itself to this: What difference was there between the taking by a finder, and the reception by Ashwell of the coin given him by Keogh? What difference there was appears to me both in law and in common sense to be in Ashwell's favour. A finder must know that the property he finds is not his, whoever may be the owner of it. Ashwell, for an hour after he received it, reasonably believed that the coin which he received was his own. I cannot see how any taking could be more innocent, and to say that for the first hour his possession was Keogh's possession, and that when he determined to convert it he was guilty of a felonious taking, is expressly to contradict *R. v. Preston*, and is I think, inconsistent with the reasons for all the other decisions referred to.

'There is, however, one short reason which appears to shew that it is impossible to regard Ashwell's conduct as felonious at common law. It is argued that he was a bailee of the sovereign. I do not think he

was; but assuming that he was, for the sake of argument, he could not be guilty at common law of larceny of the thing bailed. Assuming then that he was not a bailee, could he be guilty of larceny at common law? It seems to me that if a bailee who appropriated the thing bailed was not at common law guilty of larceny, Ashwell was not guilty *à fortiori*. A bailee knows what is bailed to him; he is under a direct obligation to deal with it in a particular way; he knows also who, as against him, is the owner of the goods. Ashwell took the coin under a reasonable belief that it was intended to become his own property, and that he incurred no other obligation to the man who gave it to him than that of paying back its equivalent. His taking was as innocent as a bailee's taking, and it involved no such responsibility as is incumbent on a bailee.

'I may here notice one point which was raised in argument. It was said that the actual time of taking could not be the point at which the guilt or innocence of a finder must be determined, because in most cases a short time must elapse between the actual taking of a note or coin, and the discovery of its nature or value and the determination consequent upon that discovery to appropriate it; and this, it was said, shews that the time to be considered is the time of acquiring knowledge of the property taken, and not the time of taking. If a man picks up a purse containing money, some seconds must usually pass before he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking, the prisoner intended to keep what he had found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of taking the goods, he had the means of knowing the owner.

'Suppose, for instance, a man found a bank note bearing the owner's name endorsed on it, suppose he put it in his pocket without examination, and ten minutes afterwards examined it, and after that kept it, it might be a fair inference that when he took it up he meant to examine it, and keep it if it was worth keeping. If by any means he could convince the jury that he took it up only to look at it, and changed his mind ten minutes afterwards, he would I think be entitled to be acquitted; but a jury would be likely to require strong evidence to induce them to believe in such a change of mind. In the present case it is admitted that the reception of the coin was quite innocent, and that the dishonest change of mind occurred upon the discovery by Ashwell of the mistake which was common to himself and Keogh. The case is not destitute of authority bearing directly on its peculiar circumstances. In *R. v. Middleton* a depositor in a post-office savings' bank went to withdraw ten shillings from the bank. The clerk, by mistake, put down before him £8 16s. 10d., which he, though at the time fully aware of the mistake, carried off.

This was held to be larceny by eleven judges to four. The four judges who held that the case was not one of larceny, did so on the ground that the taking was with the consent of the owner, a ground which certainly covers the present case. Of the eleven judges who confirmed the conviction, seven said: "In the present case the jury have found that the prisoner had *animus furandi* at the moment of taking the money from the counter," and they added, "the case is indistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*." Kelly, C. B., and Pigott, B., who delivered separate judgments proceeded on the same principle. It appears to me, therefore, that according to the doctrine of all the fourteen judges in *R. v. Middleton*, the conviction in the present case cannot be sustained at common law. *R. v. Middleton* appears to me a highly important case, because the judges who decided it seem to have agreed in thinking that it marked the extreme point to which the law could be carried. Lord Bramwell, the present Master of the Rolls, Barons Martin and Cleasby, were of opinion that it was in that case carried too far. The majority decided on the same principle as the minority, but applied it somewhat differently. In *R. v. Mucklow*, decided in 1827, and *R. v. Davies*, decided 1856, it was held that it is not larceny to appropriate a security enclosed in a letter which is received by a person for whom it was not intended, but to whom it was accidentally addressed. These are stronger cases than the present one because the sovereign was intentionally delivered to Ashwell. The only other case to be mentioned is that of *Merry v. Green*. In that case a person purchased a bureau, and found in it a secret drawer containing a purse and money, which he appropriated. It was held that unless he had notice that the bureau was sold with its contents, he was guilty of larceny. This was put upon the ground that, though there was a delivery of the bureau, there was no delivery of the notes in it, a view which hardly seems consistent with the case of *R. v. Mucklow*, as it is difficult to say why the delivery of a letter should operate as a delivery of notes enclosed in it, whereas the delivery of a bureau does not operate as delivery of its contents. The case of *Merry v. Green* seems to suggest the possibility of a kind of double finding; for instance, a man finds a pocket-book one day, and some days afterwards examines it, and finds in it a bank note with the owner's name. The case of *Merry v. Green* seems to suggest that the finding of the bank note would take place when the pocket-book was opened, not when it was found; and though the possession of the pocket-book might be innocent, the appropriation of the note might be felonious. However this may be, it has no application to the present case. There is, however, in *Merry v. Green* a dictum ascribed to Baron Parke, which is referred to and explained by him in *R. v. Thurborn*. The result of the dictum and the explanation, taken together, is, I think, that if a man finds property and takes it to look

at it, and afterwards finds marks on it shewing who the owner is, the trespass essential to larceny is committed when he discovers the owner, and not when he takes up the property. If this dictum refers to a continuous act, it is in agreement with the whole course of authority. If it is meant to express that a man innocently takes found property, and afterwards discovers who is the owner, and then converts it, he is guilty of larceny, it is opposed to the cases already noticed, and especially to the judgment in *R. v. Thurborn* itself. Such as it is, this dictum is the only authority I have found in favour of the view under consideration.

‘For all these reasons I think that in this case there was no larceny at common law, because the original taking was innocent, and with the consent of the owner, under a mistake made by himself only, and in no way produced by Ashwell.

‘As to the point about bailment, I agree with the judgments which have been already read, which I had not seen at the time I wrote my judgment. I think this conviction should be quashed.’

Lord Coleridge, C. J. — ‘I have had the advantage of reading the judgment prepared in this case by my Brother Cave, and in so much of his judgment as relates to the question of larceny at common law, I entirely concur. I think it very doubtful indeed if this conviction could be supported on the ground that there was any bailment of the sovereign to the prisoner. I much doubt if there was in this case any bailment at all. I was one of a considerable minority of judges on the second argument of *R. v. Macdonald*, 15 Q. B. D. 323, and my opinion was and is, that bailment is not a mere delivery on a contract, but is a contract itself. Sir William Jones speaks of it as “that contract which the lawyers call bailment” (Sir William Jones on Bailment, p. 1). “Bailment or delivery of goods to another person for a particular use,” says Sir William Blackstone (2 Blac. Com. 396), “Bailment is a compendious expression to signify a contract resulting from delivery” (Story on Bailments, p. 1). Twice over in Story on Contracts, secs. 680–681, the author speaks of bailment as itself a contract. “Deposition (that is bailment) is a contract,” says Grotius, in his Introduction to Roman-Dutch Law, Deposition, sec. 2. The contract of bailment is not a mere loose and common phrase, but is the accurate expression of a legal idea; and I must confess it appears to me it would be doing some violence to the plain facts of this case to hold that there was any implied contract (there certainly was no express contract) of bailment between the prisoner and Keogh.

‘On the question as to larceny at common law, I desire to add only a few words, and to call attention to a case to which my attention has been called by a gentleman at the bar, which was not mentioned in argument, possibly because it was one which did not exactly suit the views of either party to that argument. I assume it to be now established law that where there has been no trespass, there can at common law be no larceny; I assume it also to be settled law that where there has been a delivery — in the sense in which I will explain in one moment — of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, — except by statute, with which I am not now concerned. But then it seems to

me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law, any more than in sense, a delivery and receipt unless the giver and receiver intend to give and to receive, respectively, what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose if I say that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing, and did not intend to do, to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my Brother Stephen, that fictions are objectionable, and I desire not to add to them; but it seems to me with diffidence that he creates the fiction who holds that a man does what he does not know he does, and does not mean to do, not he who says that an act done by an intelligent being, for which he is to be responsible, is not an act of that being, unless it is an act of his intelligence. If it had been so decided by authority which binds me, of course I should submit; but if it has not been so decided, I take the freedom to say that it is not law — at least yet. In this case therefore it seems to me, there was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered. Applying the same principles of reasoning, it appears to me that the sovereign was received by the prisoner, and misappropriated by him at one and the same instant of time. In good sense it seems to me he did not take it till he knew what he had got, and that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate, and does misappropriate it, he is guilty of larceny. I think for the reasons I have given, and in the sense I have defined, the prisoner did so here; and this seems to me, with great deference to my Brother Smith, to be the answer to the exceedingly able and ingenious passage in his judgment in which he says, that it is a fallacy to confound two things so utterly different as the discovery of a mistake and the stealing of a chattel. I do not shrink from the conclusion, which seems to me good sense, that sometimes the discovery of a mistake and the stealing of a chattel may be the same, or rather may be two forms of words equally descriptive of the same facts, if, as here, the chattel is really discovered and stolen at one and the same instant of time.

‘This would be my view if the case were bare of authority and the matter was *res integra*. But it is not *res integra*, and there is abundant authority. On this part of the case I concur with my Brother Cave. I think we cannot reverse this conviction without practically overruling Lord Eldon in *Cartwright v. Green*, the Court of Exchequer, in *Merry v. Green*, and the dicta cited by my Brother Cave from the judgment of the majority of the judges in *R. v. Middleton*. I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money or a purse, and the delivery of a piece of metal not known to contain in it 20s.; and the passage in the judgment of Sir A. Cockburn which



was assented to by the majority of the judges in *R. v. Middleton* appears to me, as it does to my Brother Cave, to be decisive of this case. It remains only for me to call attention to *R. v. Riley*, Dears. C. C. 149, the case which I mentioned at the beginning of my judgment. In that case a man had, without intending it, and innocently, driven off a lamb belonging to another man with a flock belonging to himself. Some time afterwards he discovered the mistake, and sold his own flock and the lamb that was not his own to a purchaser. It was held that he was guilty of larceny of the lamb. The case was tried in 1852, when the law of the replication *de injuria*, decided in *Croqute's Case*, 8 Rep. 66 B., and the distinction between case and trespass decided in *Scott v. Shepherd*, 2 W. Bl. 892, still commanded the assent, indeed the veneration, of Westminster Hall. And the ground on which the conviction was supported was that there had been a trespass in driving off the lamb, however innocently; that by the sale the trespass became felonious, and I suppose felonious *ab initio*, to bring it within the definitions given in *R. v. Thurborn*. The Court there upheld the conviction on a ground extremely technical. If the owner of the lamb had been present when it was driven off, and believed it to be one of the prisoner's flock, according to the present argument, the conviction in *R. v. Riley* must have been quashed. I cannot think it would have made any difference, and the case as it stands is an authority under circumstances hardly different from those in the present case for upholding the conviction. I am therefore of opinion that the conviction was right.

'In the judgment I have pronounced, I am desired to say that my learned Brothers Grove, Pollock, and Huddleston concur. There are, therefore, seven for affirming the conviction, and seven for quashing the conviction, and by the well known rule of this Court *præsumitur pro negante* the conviction stands.'

Where a prisoner by a series of tricks commonly known as 'ringing the changes' fraudulently induced a barmaid to pay to him money belonging to her master, which she had no intention of parting with, and had no authority to part with, except in return for the proper change, it was held (i) that the prisoner could be properly convicted of larceny. (j)

If a servant carries off his master's box by direction of his master's wife, and takes it away with her, and the servant and wife go off together with the property, with the intention of carrying on an adulterous intercourse, the servant is liable to be indicted for stealing the box. (k)

The prisoner was indicted for stealing two bank notes, the property of W. Dunn. The prisoner employed one Dale to carry a letter to the prosecutor, and told him to say to the prosecutor that he had brought the letter from Mr. Broad. He also told Dale to bring the answer to him in the next street, where he would wait for him: Dale carried the letter to the prosecutor, to whom it was directed. It was written in the name of a Mr. Broad, who

(i) By Lord Coleridge, C. J., Denman, Hawkins, Watkin Williams, and Mathew, JJ.

(j) *R. v. Hollis*, 12 Q. B. D. 25.

(k) *R. v. Mutters*, 34 L. J. M. C. 54, vol. i. p. 157, where the cases as to larceny by an adulterer are collected.

was a friend of the prosecutor's, solicited the loan of three pounds for a few days, and desired that the money might be enclosed back in the letter, immediately. The prosecutor, upon the receipt of this letter, sent the bank notes in question, enclosed in a letter directed to Broad, which he delivered to Dale, who delivered it to the prisoner as he was first ordered. The letter sent by the prisoner to the prosecutor was altogether an imposition. It was objected on behalf of the prisoner at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though he was induced thereto by means of a false and fraudulent pretence. And the prisoner having been convicted, it was held upon a case reserved that it was no felony, as it appeared that the property was intended to pass by the delivery of the owner. (1)

## SEC. V.

### *Taking where Possession obtained by Fraud, animo furandi.*

But if the owner had not parted with the *property* in the goods, but only with the *possession* of them, the question of larceny formerly remained open, and depended upon the fact, whether at the time of the alleged felonious taking, the owner had parted with the possession of the goods in such a manner, and to such an extent, as to exclude the idea of trespass. For formerly, if the owner of the goods parted with the possession of them without fraud practised by the taker, and if, after the owner had so parted with the possession of them, nothing was done to determine the privity of contract, under which the taker had the possession of them delivered to him, no trespass, and therefore no larceny, could be committed by their conversion. But the law in this respect is altered by the 24 & 25 Vict. c. 96, s. 3, as noticed *ante*, p. 133.

The following cases show that where the possession of the goods is fraudulently obtained *animo furandi*, and the property is not parted with, the person taking them may be guilty of larceny. In considering such of these cases as were decided before the above Act, it must be remembered that since that Act a bailee of goods, &c., may be guilty of larceny.

Greatrix and Sharpless were indicted for stealing six pair of silk stockings, the property of O. Hudson. Greatrix, in the character of servant to Sharpless, left a note at the shop of Mr. Hudson, who was a hosier in Bridge-street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings at the Red-lamp, in Queen-square. Mr. Hudson in consequence took a variety of silk stockings according to the direction. Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing-gown, his hair just dressed, and an unusual quantity of powder all over his face.

(1) *R. v. Atkinson*, 2 East, P. C. c. 16, on this case in *R. v. Middleton*, 167. L. R. c. 104, p. 678, *Le Blanc*, J. See remarks 2 C. C. R. 38.

Mr. Hudson unfolded his wares, and Sharpless looked out six pair of silk stockings, the price of which Mr. Hudson told him was fourteen shillings a pair; and he then desired Mr. Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Mr. Hudson hung the six pair of stockings, which Sharpless had looked out, on the back of a chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Mr. Hudson's absence, Sharpless and Greatrix decamped with the six pair of stockings, which were proved to have been afterwards pawned by Sharpless. The jury convicted the prisoners, and upon a case reserved, the judges were of opinion, that the conviction was right, for the whole of the prisoners' conduct manifested an original and preconcerted design to obtain a tortious possession of the property; and the verdict of the jury imported, that in their belief the evil intention preceded the leaving of the goods. The judges thought also that, even independently of the preconcerted design and evil intention, there did not appear to be a sufficient delivery to change the possession of the property. (*m*)

Prevailing upon a tradesman to take goods, proposed to be bought, to a given place under pretence that the price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then getting them from that third person without paying the price, is larceny, if *ab initio* the intention was to get the goods from the tradesman, and not to pay for them. Upon an indictment for stealing trinkets and fancy articles, the property of A. Berens, it appeared that the prisoner called at the shop of Berens, to whom he was a perfect stranger, and said to him, 'I am come to take a choice of fancy articles; I am going into the country; I will pay you cash if you will deliver the goods, and you must serve me as low as you can.' He then wrote on a card his name, and the address, 'Coach Office, Swan Inn, Lad Lane;' and another card falsely describing where he lodged. He then selected the articles in the indictment, and desired that they should be taken the next day at five in the afternoon to the coach office. An invoice of the goods was made out by Berens in the presence of the prisoner; and the next day, at five, Berens carried the goods, packed in a case, to the Swan. The prisoner met him there, and said, 'I am surprised that my friend, who promised to be here, is not come.' In a quarter of an hour a letter was brought by the twopenny

(*m*) *R. v. Sharpless*. 1 Leach, 92. 2 East, P. C. c. 16, s. 105, p. 675. In the debate on Semple's case (2 East, P. C. c. 16, s. 112, pp. 692, 693), a case mentioned was as having been determined very recently by the judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels by a servant; and the prisoner contriving to send the servant back, under some pretence, kept the goods; and it was ruled to be felony, although they were delivered with the bill of parcels; such

delivery being made under an expectation by the owner of being paid the money; for the jury found that it was a pretence to purchase with intent to steal. Mr. East, however, remarks upon this case, that it must be understood that the prisoner ran away with the goods, or did some other act to denote an intention of withdrawing himself from any account of them; and that no credit was intended to be given him, but that it was meant as a sale for ready money only. 2 East, P. C. *ibid.* note (*a*).

post to the prisoner, who, after appearing to read it, said, 'This is my very good friend, who will give me £200, at Tom's Coffee-house, at half-past seven.' He desired Berens to meet him there at that time, and then desired the book-keeper to reserve a place for him by the Manchester coach next day, when he said he would take the case with him. Some doubt was expressed whether it was not too large for the coach; both Berens and the prisoner desired it might be taken care of; and Berens swore on his cross-examination that he considered the goods to be sold, if he got his cash, but not before. Both left the coach office. Berens went to Tom's, at the time appointed, but saw no friend of the prisoner's, nor the prisoner. Half an hour after they had left the office, the prisoner returned to it, telling the book-keeper he had altered his mind, and would take the case away then. He offered him a sovereign for his trouble, hired a porter to carry the case into the street, and there hired a cart, in which he had it conveyed to a house on the other side of the river. He was found in that house in two hours, with the case unpacked, and the goods all about the room. The prisoner's counsel contended that he was entitled to a verdict of acquittal, as a complete sale of the goods had taken place. But the jury were directed to consider whether they were satisfied by the evidence that the prisoner, when he first called upon Berens, had no intention of buying and paying for the goods, but gave the order for the purpose of getting them out of Berens' possession, and afterwards clandestinely removing and converting them to his own use; and, if they were so satisfied to find the prisoner guilty, which they did. And, upon a case reserved, the judges were clearly of opinion that there was a felonious taking, the jury having found that the prisoner's intention, *ab initio*, was to get the goods out of Berens' possession, and then clandestinely remove and convert them to his own use, and that the conviction was right. (n)

The plaintiff dealt in slippers; one Fuller, who likewise dealt in them, came to him and asked for fifteen dozen of slippers, saying he had an order for them; the plaintiff refused to trust him with the goods, but went with him to the place of sale, which was the warehouse of the defendants, wholesale shoe manufacturers; on arriving there, Fuller said to the plaintiff, 'You must not go in, or you will spoil my custom;' the plaintiff remained on the outside a quarter of an hour, when Fuller came out, having sold and delivered the slippers to the defendants in the warehouse, and, being asked by the plaintiff for the money, made an excuse, and soon afterwards ran away. The plaintiff indicted Fuller for stealing the slippers, and he was convicted. (o)

Upon an indictment for stealing four oxen, the property of the Marquis of Tavistock, it appeared that R. Baker was employed by the bailiff of the Marquis to sell the oxen at Ampthill fair for ready money. The prisoner inquired the price, and agreed for £48 10s. Baker asked him to mark them (which is done by clipping off some hair); he said, 'No, I'll mark them by-and-by, and if you go down to the King's Arms I'll pay you for them.' Baker soon went to the

(n) *R. v. Campbell*, R. & M. C. C. R. 179, cited in *Stephenson v. Hart*, 4 Bing. R. 476.

(o) *Lyons v. De Pass*, 11 A. & E. 326.

King's Arms, but did not find the prisoner; having dined there, Baker returned into the fair to the place where he had left the beasts, but they were gone. Two witnesses severally proved that they purchased two of the oxen in the fair from the prisoner. Search was afterwards made for him in the fair and at the different inns, without success. Baker said, that the custom was to mark the beasts when they were sold; that they are not delivered until they are paid for, which is generally about dinner-time, and if the prisoner had applied to him for leave to drive them away, he would have refused till he had received the price. The prisoner told him his name was Gilby, but did not mention where he lived. Garrow, B., left it to the jury to say, whether the prisoner, at the time he made the bargain, intended to pay for the oxen, or merely to get them into his possession to sell them and convert the money to his own use. The jury found the prisoner guilty, and said they thought he never at any time intended to pay for the beasts. And, upon a case reserved, the conviction was affirmed, the jury having found that the prisoner never meant to pay for the oxen. (p)

So where Cohen and Collins called at the prosecutor's shop, and Cohen asked the price of two waistcoats which were in the shop-window, and the prosecutor replied 'fifteen shillings,' Cohen said, 'You must go to the lowest price, as it will be for ready money;' the prosecutor said, 'Then you shall have them for twelve shillings,' which was agreed to by Cohen, who said he would put the waistcoats into a gig standing at the door, in which Collins was; to which the prosecutor replied, 'Very well.' Cohen had no money, but Collins had, and when Cohen went out to the gig, the prosecutor thought he went out to get the money from Collins. Immediately after the waistcoats had been placed in the gig, Cohen got in, and they drove off full gallop, and for two years the prosecutor had been unable to apprehend them. The jury found, that, in their opinion, the waistcoats were parted with conditionally that the money was to be paid at the time, and that Cohen took them with a felonious intent; and, upon a case reserved, the judges were unanimously of opinion that upon this finding Cohen was guilty of larceny; for it was an express finding that the prosecutor only parted with *the possession* of the goods. (q)

The prisoner was indicted for stealing a great many pairs of stockings, the property of W. Wayte. Mr. Wayte, who was a hosier near the Haymarket, delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to the house of Mr. Heath, a hosier, in Milk-street, Cheapside. As the apprentice was going up Ludgate-hill, with the parcels under his arm, he was met by the prisoner at the bar, who asked him where he was going? To which the apprentice answered, 'To Mr. Heath's.' The prisoner, producing a small parcel, replied, 'I know your master, and I owe him for those parcels; I was going for them to your shop, therefore do you give me your parcels, and take this back to your master; there is a letter inside, and it must be immediately forwarded to Mr. Brown.' The apprentice accordingly consented to the pro-

(p) R. v. Gilbert, R. &amp; M. C. C. R. 185.

(q) R. v. Cohen, 2 Den. C. C. 249. See R. v. Slowley, 12 Cox, C. C. 269.

posed exchange, and delivered the two parcels to the prisoner, and the prisoner delivered his parcel to the apprentice. The prisoner, having effected this exchange, endeavoured to separate himself from the apprentice; but his manner created a slight degree of suspicion in the apprentice's mind, who, to satisfy his doubts, ran after the prisoner, and asked him if he was the Mr. Heath to whose house he was conveying the parcels? The prisoner replied, that he was Mr. Heath, and desired the apprentice to make haste home with the other parcel. The parcel which was delivered by the prisoner contained a collection of old rags of no value, and he was not the Mr. Heath he pretended to be. The jury were of opinion that the prisoner, by falsely pretending that he was going to the house of the prosecutor for Mr. Heath's parcels, had contrived to make this exchange of parcels with an intent wrongfully to obtain and convert to his own use the goods mentioned in the indictment, and therefore they found him guilty. And upon a case reserved, the judges were unanimously of opinion that the conviction was right. Gould, J., who delivered their opinion, said, that it appeared to him that the prisoner's having obtained these goods fraudulently from the apprentice was just the same as if he had obtained them from the actual possession of the master. (*r*)

The prisoner was indicted for stealing bristles, and it appeared that the prisoner went to the counting-house of the prosecutor and represented that he lived at No. 40, Crispin-street, Spitalfields, and proposed to buy four casks of bristles, and pay ready money on delivery, and was told by the prosecutor's clerk that as he was a stranger he could not have them on any other terms. The prisoner said, he wanted to send two of the casks immediately to Birmingham. The invoice and the weighing order were given to the prisoner, and the delivery order was sent by a clerk of the prosecutor's to the wharf, where the bristles were then lying, which he brought back, the prisoner not having paid the money. On Monday following the prisoner came again to the counting-house between twelve and one, and the delivery order was then on the prosecutor's desk. The prisoner said he would pay the money, but had not got a cheque; he was told by the clerk, that if he wished to pay the money, he had no objection to give him the delivery order. The prisoner went away with the order, and the clerk followed him almost immediately to the wharf, and found the prisoner busy loading the bristles into a cart. The clerk stopped the delivery at the wharf about one o'clock; but in consequence of what was said by the prisoner, and the wharf-clerk having said that he knew the prisoner, and he had had goods delivered to him in the regular way before, no further opposition was made. The clerk told the prisoner that the reason why he would not suffer him to take the goods from the wharf was, that the reference the prisoner had given was one he could not trust; and he consented to the bristles being taken away, upon the express condition, and the engagement of the prisoner, that they should be paid for at his door in Crispin-street, before they were lodged in the house. Nobody was sent to accompany the cart, but another clerk of the prosecutor's was directed to be at the prisoner's

(*r*) Wilkins's case, 1 Leach, 520. 2 East, P. C. c. 16, s. 104, p. 673. See R. v. Longstreeth, R. & M., 137, *ante*, p. 149.

door a little before two o'clock, which would be the time the cart would arrive, for the purpose of receiving payment before the goods were taken from the cart. That clerk went to the prisoner's house, No. 40, Crispin-street, and after waiting till half-past three, he came back without seeing the prisoner, the cart, or the goods. The carman, who drove the goods from the wharf, was directed by the prisoner to drive to Spitalfields, and when he had got part of the way he was directed by the prisoner to turn down another street, and wait at the corner of a street, where, notwithstanding the remonstrances of the carman, the bristles were put by the prisoner's directions into another cart, and driven away in a direction contrary to Spitalfields, and lodged in an empty warehouse, and the next morning the prisoner offered the bristles for sale, representing that he had taken them for a bad debt. It was objected that the clerk having permitted the prisoner to take possession of the delivery order, there was a complete transfer of the property, and that the subsequent conversion was a mere breach of contract : but the Recorder thought that it was a mere permission to enable him to remove them to his door in Spitalfields, with a full engagement on the part of the prisoner that the order was not to operate to enable him to put them within his own premises till the money was paid ; and he told the jury that, if they believed there never was any *bonâ fide* intention to buy, but an intention to get the goods by fraud from the owner, they should find the prisoner guilty : which they did, and said that they thought the prisoner had no intention to buy, but to get them by fraud from the owner ; and, upon a case reserved, the judges held that the conviction was right, the jury having found that the prisoner never meant to buy, but to defraud the owner. (s)

So where, upon an indictment for stealing three pounds weight of cheese and 2s. 2d., it appeared that the prisoner went to the shop of a cheesemonger and ordered about three pounds of cheese to go to No. 46, Regent-square, to one Edmonds, and the prosecutor's boy was to take it directly with change for a crown piece. When the lad got near Regent-square with the cheese, the prisoner met him and said, 'Oh, you have got the cheese, I forgot to order sixpenceworth of eggs ; if you will give me the change and the cheese I will pay you.' The lad then gave him the cheese and 2s. 2d. ; he then gave the lad a crown, which turned out to be a bad one, though the lad believed it to be a good one at the time he took it ; the lad went back for the eggs ; the lad said, that if he had gone to Edmonds's he should have left the things there, but not the change without the money, and that he had no authority to part with these goods unless he received the crown piece. The master said, that his intention was to sell the goods, and if he received the crown he should be obliged to furnish the difference ; he never expected the goods back again, and the boy had no authority to part with the change or the goods without payment. Mr. Serjt. Arabin (after consulting Parke, B., and Patteson, J.) told the jury that if they thought that it was a preconcerted scheme to get possession of the property without giving anything for it, and

that the boy had the limited authority only, they should find the prisoner guilty. (*t*)

The prisoners were indicted for larceny. Having taken a house they went to the prosecutor's shop, selected the goods in question, and ordered them to be sent home. The prosecutor sent them by one D., and gave him strict injunctions not to part with them without receiving the price. D., on arriving at the house, told the prisoners that he was instructed not to leave the goods without the money or an equivalent. After a vain attempt to induce D. to let them have the goods on the promise of payment on the morrow, one of the prisoners wrote a cheque for the amount of the bill, and gave it to D., requesting him not to present it till the next day. D. left the goods, and returned the cheque to his employers. The cheque was presented the next morning and dishonoured, the prisoner's account having been some time before overdrawn. It was contended that D. had parted not only with the possession of the goods, but also with the property in them, and *R. v. Parker* (*u*) was cited. Alderson, B.: 'It is for you to shew that the prisoner had reasonable ground for believing that the cheque would be paid. The case appears to me to approach more nearly to *R. v. Small*. (*v*) If the owner of goods parts with the possession, meaning also to part with the property, in consequence of a fraudulent representation of the party obtaining them, it is not larceny, but a mere cheat. But if the owner does not mean to part even with the possession, except in a certain event, which does not happen, and the prisoner causes him to part with them by means of fraud, the owner still not meaning to part with the property, then the case is one of larceny. Here, if the owner had himself carried the goods and parted with them as the servant did, no doubt it would have been a case of false pretences; or if the servants had had a general authority to act, it would have been the same as if the master acted. But in this instance he had a limited authority, which he chose to exceed. I am of opinion, as at present advised, that if the prisoner intended to get possession of these goods by giving a piece of waste paper, which he had no reasonable ground to believe would be of use to anybody, and that the servant had received positive instructions not to leave the goods without cash payment, the charge of larceny is made out.' (*w*)

The prisoner, acting with others, went to an automatic box on which was inscribed the words: 'To obtain a cigarette place a penny in the box and push the knob.' One of the party dropped into the slit of the box a brass disc, about the size and weight of a penny, and obtained a cigarette. It was held that the prisoner was guilty of larceny. (*x*)

(*t*) *R. v. Small*, 1 C. & P. 46. *R. v. Webb*, 5 Cox, C. C. 154, where two counterfeit half crowns were paid for a pair of boots to a servant, who was directed not to part with them without payment, the Recorder acted on the preceding case. *Vide Parkes's case*, *ante*, p. 142, and *R. v. Jackson*, *ante*, p. 147, *et quare*, whether the property was not parted with. C. S. G.

(*u*) 2 Moo. C. C. post, tit. *False Pretences*.

(*v*) *Supra*.

(*w*) *R. v. Stewart*, 1 Cox, C. C. 174. As the prosecutor received the cheque and presented it, it might have well been contended that he ratified the servant's act in taking it; and consequently that the case was not larceny. See *Parkes's case*, 2 Leach, 614, *ante*, p. 142. C. S. G.

(*x*) *R. v. Hands*, 16 Cox, C. C. R. 188. The judgment of the Court turned principally



So where, upon an indictment for stealing a mare, it appeared that the prosecutor intending to sell his mare at a fair, sent her thither by a servant, to whom he gave no authority to sell the mare, or to deal with her in any way till he had himself arrived there. At the fair the prisoner asked the servant the price of the mare, and he told him £25; the prisoner then desired him to trot her out; the prisoner then went and talked to a man on horseback and a man on foot, and then walked away. These two men then went up to the servant, and the man on foot offered the man on horseback £24 for the horse he was riding, which the latter refused, saying, he would not sell him at any price; upon which the man on foot stepped aside to the servant, and said, if he would chop the mare for the horse the man was riding, he would give him £24 for the chop, and 5s. to put in his own pocket, at the same time taking from his pocket what appeared to be bank notes. The servant declined, saying, the mare was not his; but being persuaded by the man on foot, the servant accompanied the two men for about half a mile, and then agreed to the exchange of horses on the terms proposed, and as soon as the saddles were changed the man, who had been on horseback, rode away, and on the servant looking round for the man on foot, he perceived that he had gone away while the saddles were changing. The horse left in exchange was worth about £4. The prisoner had afterwards sold the mare for £14, saying that he had got it in a chop at the fair. It was submitted, on behalf of the prisoner, that as the servant meant to part with the entire property in the mare, and not with the possession only, it was no larceny; but it was held that there was no parting with the property in the mare, as the servant had the mere charge of her, and had no right to deal with the property in her in any way whatever. And if the prisoner was in league with the two other men, and they three, by a fraud, in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare, the prisoner ought to be found guilty. (y)

Upon an indictment against Morgan and Mackeowan for stealing the money of J. Jones, it appeared that Morgan, who represented himself to be a Frenchman and unable to speak English, offered the prosecutrix a dress for sale, and signified, through Mackeowan, that the price was twenty-five shillings, and if she would give that sum for it, he would give her another dress worth twelve shillings, which he produced. The prosecutrix agreed, and having one sovereign and one shilling in her pocket, she took it out, and whilst holding it in her hand, Morgan opened her hand, and took the guinea out of it; he did not take it forcibly, nor would she say that 'it was against her will:' 'nor was it by her consent;' 'he took her by surprise.' She then borrowed four shillings of a fellow-servant, but Morgan refused to take it, for she had borrowed it, and he said she

upon two obvious misdirections of the Chairman of Quarter Sessions; but the Court seemed to have no doubt that the facts disclosed a larceny.

(y) *R. v. Sheppard*, 9 C. & P. 121, Coleman of Quarter Sessions, but the Court ridge, J.

was a bad woman, and had told a lie, and he would not produce the other dress; he then laid down the first dress and packed up the other. The dress left was of much less value than twenty-five shillings. It was contended that this was a mere breach of contract, and not a felony: but the jury having found the prisoners guilty, it was held, upon a case reserved on the question whether the above facts warranted the finding of the jury, that in point of law they did warrant the finding of the jury. The jury having found the prisoners guilty, the Court was bound to assume that the jury had been properly directed, and that they found that it was part of the scheme of the prisoners that the property was to be obtained by a pretended sale. In that case there was no contract, but only a fraud, by means of which the felony was committed. (z)

The prosecutrix entered a sale-room where a mock auction was being held. The prisoner was auctioneer and knocked down a piece of cloth to the prosecutrix for twenty-six shillings for which she had not bid, as he knew. The prosecutrix denied that she had bid; the prisoner asserted that she had, and must pay for it before she could leave. The prosecutrix tried to go out of the room when a confederate, standing between her and the door, also said that she had bid, and prevented her leaving. She then in fear paid the money, and took away the cloth, which was given to her. It was held that these facts constituted a larceny, as they sufficiently shewed that the money was obtained from the prosecutrix against her will. (a)

The prosecutor met a man and walked with him. During the walk the man picked up a purse, which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner, who opened it, and there appeared to be about £40 in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public-house and had some drink. Prisoner then shewed some money and said, if the man would let him have £10 and let him go out of his sight he would not say what he would give him. The man handed what seemed to be £10 in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the £10 back and £5 more. The prisoner then said he would do the same for the prosecutor, and by that means obtained three pounds in gold and the prosecutor's watch and chain from him. The prisoner and the man then left the public-house and made off with the £3 and the watch and chain. At the trial the prosecutor said that he handed the £3 and the watch and chain to the men in terror, being afraid that they would do something to him, and not expecting that they would give him £5. Held, that the prisoner was properly convicted of larceny upon this evidence. (b)

The prisoner was indicted for stealing a chest and fifty-nine pounds

(z) *R. v. Morgan*, Dears. C. C. 395.  
The direction to the jury was not stated in the case.

(a) *R. v. Magrath*, L. R. 1 C. C. R. 205.  
*R. v. Lovell*, 8 Q. B. D. 185.

(b) *R. v. Hazell*, 11 Cox, C. C. R. 597.

weight of tea, which, in one count of the indictment, were stated as the property of J. Layton and W. J. Thompson; and, in another count, as the property of the East India Company. The facts were, that Messrs. Layton & Co., who were tea brokers, had purchased the chest of tea in question, No. 7,100, at the East India House, but had not taken it away, when the prisoner, who was in no way employed by them, went thither, and, going up to the place where the request papers were kept, selected one of them, and then proceeded, with the paper in his hand, as if to look for a chest of tea corresponding with the number on the paper. The servant in the India House who had the care of the request papers, seeing him so engaged, went up to him, took the paper which was in his hand, and, seeing the number 7,100 upon it, pointed to a chest with a corresponding number, and said, that was the chest he wanted, and then returned the paper to him, in order that he might go to the permit office and get a permit. The prisoner then went to the permit office, and shortly afterwards returned with a permit to the India House, where the same servant who had the care of the request papers received the permit from him, and asked him whose partner he was, and, upon his answering 'Noton's,' returned the permit to him again, and entered the name of Noton in the book. The prisoner then took away the chest of tea. Upon this evidence the jury found the prisoner guilty, when an objection was taken by his counsel, that, as the possession of the property was obtained by a regular request note and permit, the offence could only be considered as a misdemeanour; but, upon a case reserved, the judges were clearly of opinion, that the offence amounted to felony. (c)

Upon an indictment for stealing wheat, the property of Swaine and others, it appeared that the wheat was not their property, but was deposited in one of their storehouses, which was in the care of Eastwick, one of their servants, who had authority to deliver the wheat only on the orders of the prosecutors or of Callow, their managing clerk. The prisoner, a servant also of the prosecutor's, came with a man and cart, and obtained the key of the storehouse from Eastwick, by representing that he had been sent by Callow for five quarters of wheat, which he was to take to the Brighton Railway; Eastwick, believing his statement, allowed the wheat to be removed, the prisoner assisting to put it into the cart, in which it was conveyed from the prosecutor's premises, the prisoner going with it. The wheat was disposed of by the prisoner's associates with his privity. The prisoner's statement was entirely false. It was contended that the wheat was obtained by false pretences, but the jury were directed that, if they believed the facts, the offence amounted to larceny; and, upon a case reserved after a verdict of guilty, it was held that the conviction was right; for the wheat was delivered to the prisoner for a special purpose, namely, to be taken to the Brighton Railway, and the property remained in the prosecutors throughout as bailees. (d)

(c) *Hench's case*, O. B. Oct. 1810, Hil. T. 1811, MS.

(d) *R. v. Robins*, Dears. C. C. 418. An indictment for false pretences cannot be

supported, unless the property in the goods would pass if the statements were true; and consequently such an indictment can never be supported where goods are obtained from

Upon an indictment for stealing a watch, the property of T. Jones, it appeared that T. Jones had bought the watch in London, which, requiring some regulating, he had sent to the seller. A letter was written by some one in his name and without his authority, requesting the seller to return the watch to T. Jones, in a letter directed to the care of the postmaster at Brymbo. Afterwards the prisoner and a person who falsely represented himself to be T. Jones came to the post office, and asked for the watch. It had not arrived, and the man personating T. Jones requested that, when it did, it might be delivered to the prisoner. This was accordingly done by a clerk at the post office on the arrival of the watch. The writing the letter, personating T. Jones and applying for the watch were parts of the same scheme, and the watch was sent by the seller in pursuance of the letter; it was objected that the offence was obtaining the watch by false pretences, and not larceny; but it was held, on a case reserved, that the prisoner was guilty of a larceny of the watch of T. Jones: for, assuming that the seller had more than a bare charge, and was the bailee of it, yet his special property as such did not put an end to the general property of the true owner; and when he sent the watch away to a third person, addressed to the true owner, intending such person to deliver it to the true owner, and that third person, the postmaster, received it for that purpose, the seller's possession and special property ceased, and the general property of the true owner became entirely unincumbered, and drew to it the possession, unless the postmaster became the bailee; but this he did not, for he had only a charge, and he became the servant of the true owner for the purpose of delivering it to him; and his possession was the possession of the true owner, and could not be divested by the tortious acts of the prisoner. (e)

Upon an indictment for stealing coal, it appeared that the prosecutor had a colliery, and both coal and small coal or slack were sold by retail there, but none (except to private customers) was allowed to be taken away until it had been paid for; and when the carts were loaded, they were taken to a weighing machine in the colliery yard, where the weight and price of the coals having been ascertained, the coals were paid for to the clerk in charge of the weighing machine, which is at the entrance of the yard, so that carts entering and passing out of the yard have to pass the machine. The prisoner was acquainted with the regulations, and knew that he would not be permitted to take coals out of the yard until they had been weighed and paid for as above mentioned. The price of soft coal was about double that of slack. The prisoner brought his cart to the colliery and said, 'I want a load of the best soft coal,' and the cart was loaded

a person who has no authority to part with the property in them, such as a bailee for safe custody and the like. C. S. G.

(e) *R. v. Kay*, D. & B. C. C. 231. The simple and true answer to the objection was that the property in the watch was not parted with either by the seller or the post-

master; for they neither had the power nor the intention to part with anything more than the possession of the watch. See *R. v. Vincent*, 1 Den. C. C. 464, *post*, sec. x. *R. v. Middleton*, *ante*, p. 149, note (e), *per* Bovill, C. J., and Bramwell, B. R. v. Ashwell, *ante*, p. 150.

with the best soft coal by a servant of the prosecutor, assisted by the prisoner. The servant then went away, and then the prisoner placed a quantity of slack from a heap of slack on the top of the load of soft coal, thereby covering it over, and making the cart appear to be loaded with slack only. The prisoner then took the cart to the weighing machine, and the clerk said to him, 'What have you got?' He said, 'Slack.' The clerk, seeing slack only in the cart, weighed it, and charged the prisoner for the load as slack, and the prisoner paid such charge and went away with his cart. The sum paid by the prisoner was considerably less than the real price of the load. It was submitted that if there was any offence committed, it was obtaining property by false pretences; the Court overruled the objection, and told the jury that if they were of opinion that the prisoner at the time he went to the colliery for the coal intended fraudulently to take the same away, and appropriate it to his own use, on paying for the soft coal the price of slack only, and that he actually carried out his intention by fraudulently placing slack over the soft coal, and making the false representation to the weighing clerk, they might convict the prisoner of larceny; and they did so, and, upon a case reserved, it was held that the conviction was right. The jury had found that there was a preconceived plan on the part of the prisoner to get the coal, and appropriate it to his own use on paying for it the price of slack only, and the prisoner carried out the plan by covering the coal with slack, and pretending to the clerk at the weighing machine that the cart contained slack only. Under these circumstances the prisoner obtained the possession of the coal only, and not the property in it. He paid some money, but it was for the slack, not for the soft coal. The case was therefore one of larceny. (*f*)

Where the prisoner, with the assent of the prosecutor, had pawned the coat of the prosecutor for a loaf of bread, and the next day proposed to go and redeem the coat, and the prosecutor expressed no dissent; but at the trial said that he thought, from the prisoner's manner, that he was in joke; and the prisoner went, paid the sixpence for the bread, received back the coat, and carried it away to a place ten or twelve miles distant; Parke, B., told the jury that if they thought that the prisoner, at the time when he paid the money and received back the coat, intended to deprive the owner entirely of the use of it, and to appropriate it to his own use, it would be their duty to convict him of larceny. (*g*)

Upon an indictment for stealing a horse, it appeared that the horse was impounded, and the prisoner, pretending that he had been sent by the owner of the horse to procure its release, paid the pound-keeper's demand, received the horse, and made off with it; and it was held that the poundkeeper was in the possession of the horse as servant to the owner, and had no right to transfer the property, and therefore the offence was larceny. (*h*)

On an indictment for stealing a quantity of gravel from certain

(*f*) *R. v. Bramley, L. & C. C. C. 21.*

(*g*) *R. v. Sparrow, 2 Cox, C. C. 287.*

(*h*) *R. v. Simpson, 2 Cox, C. C. 235, Williams, J.*

trustees, it appeared that the prisoner, as surveyor of the highways, had unlimited authority to order any quantity of materials that he considered necessary for the repair of the roads, and he was in the habit of obtaining them from a quarry. He used to send an order for a certain quantity, and the account was sent in at regular periods to the trustees of the roads, and he had ordered larger quantities of the materials than were necessary for the purposes of the roads, pointing out at the quarry those he required, but not stating for what purpose, and he sold the excess to other parties on his private account and retained the money, the trustees having to pay for the whole amount supplied. In one instance the prisoner had been employed by an individual to procure materials, and had sent in a bill in his own name, and been paid, and the trustees were afterwards charged for these materials in their account: but in many instances the excess of materials had been charged to the prisoner as being for his private use. He had admitted to the clerk of the trustees that all the stone that he had ordered had not been used for the roads, and that he had told falsehoods in not accounting for a portion of the gravel, and that the amount was about £150, and he considered that he was indebted to the trustees for that sum. He had paid £53 odd on account of the supposed deficiency, and the clerk gave him a receipt for it on account. Wightman, J., assumed that the property in the gravel passed to the trustees when pointed out by the prisoner, and left it to the jury to say whether, at the time he had it carted away, he intended fraudulently to deprive the trustees of the property in the gravel. (i)

On an indictment for stealing two orders for the delivery of certain tallow, it appeared that the prisoner was a member of a firm of brokers, and had entered into a contract for the purchase of 343 casks of tallow that were to arrive in this country. The tallow arrived, and in due course the transaction ought to have been completed within fourteen days, and the prisoner was called upon to complete the bargain. He delayed, and the completion was insisted upon, and the prisoner at last said he would pay for the tallow the next day; accordingly he sent his clerk to the prosecutor's counting-house, and obtained delivery orders for the tallow, and he then handed to the prosecutor a crossed cheque for £8,781, the amount of the price of the tallow. He immediately sent the orders to the docks, and transferred the property into fresh warrants, and when the cheque was presented it was found that there was less than £10 standing to his credit; and it was held that the charge of larceny could not be supported; the prosecutors chose to take a crossed cheque instead of insisting on payment in cash, and that act was tantamount to giving the prisoner two days' credit. It was just the same as if the prosecutors had taken a bill at two days' sight. The answer to the charge was, that the prosecutors had agreed to postpone the payment for the goods, and the prisoner had the entire control over the property. (j)

(i) *R. v. Richardson*, 1 F. & F. 488. The jury acquitted, or the question whether the gravel vested in the trustees would have been reserved.

(j) *R. v. North*, 8 Cox, C. C. 433. Pollock, C. B., and Channell, B. According to the statement of the case the orders

were delivered before the cheque was given to the prosecutors; if so, the orders were not obtained by means of the cheque. If they had been, then the true question would have been whether they were obtained by false pretences, and the property in them parted with by the prosecutors.

The prisoner was indicted for stealing a bill of exchange of the value of five hundred pounds, the property of S. Edwards. Mr. Edwards, wishing to get his own note of hand discounted, had made application to several persons in the discounting line of business for that purpose. A few days afterwards the prisoner, a total stranger to Mr. Edwards, left an address at his lodgings whilst he was from home, 'Mr. H., No. 21, Great Pulteney-street, from six to seven in the evening, or from eleven till twelve in the morning.' In consequence of this address, Mr. Edwards the next morning called upon the prisoner in Pulteney-street, and a conversation upon the subject of money transactions took place between them, when the prisoner told Mr. Edwards that he was in the discounting line, and would, whenever he chose, discount a bill for him at the usual premium of two and a half per cent. agency, provided it was drawn upon and accepted by a person of known credit and responsibility. About three weeks after this interview, Mr. Edwards again called upon the prisoner, but not finding him at home, he sent his clerk the next day to inquire whether he would discount a bill of one hundred pounds, accepted by Mr. Wells, of Cornhill, and to request that he would call in the city, that he might be fully satisfied of its validity. The prisoner returned with the clerk to the house of Mr. Wells, in Cornhill, where he was shewn into a room to Mr. Edwards, who asked him the terms upon which he would discount a bill for one hundred pounds, provided he approved of it. The prisoner answered, that he would do it for two and a half per cent. agency, exclusive of the legal interest for two months. Mr. Edwards immediately delivered the bill described in the indictment into the hands of the prisoner, and referred him to Mr. Wells, the acceptor of it, who was then present, to satisfy himself that it was a genuine acceptance. Mr. Wells said, that the acceptance was his handwriting. The prisoner then told Mr. Edwards, that if he would go with him to Pulteney-street, he would give him the cash, to which Mr. Edwards replied, that he could not conveniently go himself, but that his clerk should attend him, and pay him the twenty-five shillings agency, and the discount, on receiving the hundred pounds. As the prisoner and the clerk departed, Mr. Edwards whispered the clerk not to leave the prisoner without receiving the money, nor to lose sight of him, and promised to follow them in half an hour. The prisoner and the clerk accordingly proceeded together to the prisoner's lodgings in Pulteney-street. When they arrived, the prisoner shewed the clerk into the parlour, and desired him to wait while he fetched the money, saying, that it was only about three streets off, and that he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney-street, but, having lost sight of him as he turned the corner of another street, walked backwards and forwards in the street for a length of time, in hope of seeing him return. The prisoner did not come back again, and the clerk, being joined by Mr. Edwards, went again to the prisoner's lodgings, and both of them waited there three nights, in the vain expectation of the prisoner's return. It was objected by the prisoner's counsel, that these facts did not amount to felony. But the Court left the case with the jury to consider, first, Whether the prisoner had a preconcerted design to get the note into his possession with an intent to steal it; and, secondly,

Whether the prosecutor intended to part with the note to the prisoner without having the money paid before he parted with it. The jury found the affirmative of the first, and the negative of the second question, and concluded that the prisoner was therefore guilty. And this conviction was holden right upon reference to all the judges. (k)

The prisoner was indicted for stealing bank notes to the amount of thirty-five pounds, the property of W. Smith. The prisoner, being in possession of a quantity of gold coin, went into a room in a public-house, when the prosecutor, who was a gentleman's servant, and who had about him notes belonging to his master, to a considerable amount, happened to come into the same room. Soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between him and the prosecutor; the prosecutor expressing a wish that the prisoner would oblige him by letting him have some gold in exchange for notes and silver, not at an advanced price, but at its legal currency. The prisoner stated, that if it would be any accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold for his notes and silver; and the exchange took place to a small amount. The prisoner then observed, that if it would be any material service to the prosecutor, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount. Upon this the prosecutor put down thirty-five pounds, in bank notes, for the purpose of receiving back their amount in gold; and the prisoner took them up, and went out of the house with them, promising to return immediately with the gold. The prisoner did not return. Upon these facts, Wood, B., held, that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes, and never to return with the gold: and that whether the prisoner had, at the time, the *animus furandi*, was the sole point upon which the question turned; for if the prisoner had, at the time, the *animus furandi*, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned judge further said, that a parting with the property in goods could only be effected by contract, which required the assent of two minds: but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return; and the prisoner never meaning to barter, but to steal. (l)

Upon an indictment for larceny, it appeared that the prosecutor owed some money to Mr. Staines, and that he said to his servant, in the hearing of the prisoner, 'George, you must go to Mr. Staines, and pay him this money;' and thereupon the prisoner said, 'I will take it for you, I live only six doors from Mr. Staines.' Induced by the offer of the prisoner, the prosecutor gave him £1 12s. to carry to Mr. Staines in discharge of the debt. The prisoner's statement was alto-

(k) Aickles's case, 1 Leach, 294. 2 East, P. C. c. 16, s. 106, p. 675.

(l) Oliver's case, cor. Wood, B., cited in Walsh's case. 4 Taunt. 274. 2 Leach, 274.



gether false, and he converted the money to his own use. The jury were told that the prisoner was guilty of larceny if they were of opinion that he obtained the money by a trick, and meant at the time to appropriate it to himself; but that if he took it from the prosecutor *bona fide*, and afterwards converted it to his own use, it was not larceny. (*m*) The jury found that the prisoner had obtained the money by a trick, intending at the time to appropriate it to his own use, and convicted him; and, upon a case reserved, it was held that the case could not be distinguished from *R. v. Semple*, (*n*) and that the conviction was right. (*o*)

So where on an indictment for stealing a half-crown, two shillings, and six penny pieces, it appeared that the prisoner went to the shop of the prosecutor, and asked his son to give him change for a half-crown, and the boy gave him two shillings and six penny pieces, and the prisoner held out the half-crown, of which the boy caught hold by the edge, but never got it into his possession, and then the prisoner ran away, having drawn the half-crown out of the boy's hand, and taking it and the change with him; J. A. Park, J., said, 'If the prisoner had only been charged with stealing the half-crown I should have had great doubt, as the half-crown was his own, but he is also indicted for stealing the two shillings and the copper. He falsely pretends that he wants change for the half-crown, gets the change and runs off; I think that is a larceny.' (*p*)

**Ring the changes.** — A. and B. went into a shop, and A. bought a pennyworth of sweets, and gave a florin in payment. The prosecutrix put the florin into the till, and took out of the till one shilling and sixpence in silver, and fivepence in copper, and put the change on the counter. A. took up the change; B. said to A. that he need not have changed, and threw down a penny. A. took up the penny, and then put down sixpence in silver and sixpence in copper, and asked the prosecutrix to give him a shilling in change. She took a shilling from the till and put it on the counter beside the sixpence in silver and sixpence in copper. A. then said to the prosecutrix that she might as well give him the florin and take it all. She took the florin from the till and put that on the counter, expecting she was to receive two shillings of the prisoner's money. The prisoner went away with the florin. The prosecutrix did not discover her mistake till she was putting the change into the till, but at the same moment B. distracted her attention by asking the price of some sweets. Held, that the transaction was inchoate when the prosecutrix discovered her mistake, and that she never intended finally to part with her property in the florin till she received two shillings of the prisoner's money, and that the offence was larceny, and not obtaining money by false pretences, and that the conviction was right. (*q*)

(*m*) This latter position seems erroneous, for the prisoner had only the custody and not the possession of the money, and was therefore guilty of larceny in disposing of it. See *R. v. Thompson*, L. & C. 225, *ante*, p. 133.

(*n*) *Post*, p. 194.

(*o*) *R. v. Brown*, 1 Dears. C. C. 616. Pollock, C. B., said there was a case in which a banker's clerk persuaded customers at the bank where he was employed to allow

him to place money of his to their accounts, and thereby, and by other devices, managed to obtain money belonging to the bank; and Lord Ellenborough held that he was guilty of stealing, saying that the machinery by which a man gets the property of another out of his possession makes no difference in the offence. Dears. C. C. 618, note (*a*).

(*p*) *R. v. Williams*, MS. C. S. G., and 6 C. & P. 390.

(*q*) *R. v. M'Kale*, L. R. 1 C. C. R. 125;

But where upon an indictment for stealing a shilling, it appeared that the prisoner went into a shop, and asked for half an ounce of tobacco, and pitched down half a crown on the counter for it; the shopman put down two shillings on the counter, and, whilst he was counting the halfpence out of the drawer, which was partly open, the prisoner picked up the two shillings off the counter, and appeared to throw them into the till, and asked four sixpences instead of them; though suspecting that there was something wrong, the shopman gave the prisoner one shilling, two sixpences, and fourpence-halfpenny. On examining the drawer, it was found that the prisoner had only thrown in one shilling and pocketed the other: it was held that this was not larceny, but obtaining the money by false pretences. (r)

37 L. J. M. C. 97; *et per* Kelly, C. B., 'This case has been very ably argued on both sides. The question is whether a larceny has been committed by the prisoner. The distinction is well settled between obtaining a chattel by means of a fraud and stealing it. If the property in the chattel is parted with by the prosecutor, though the possession is obtained by a fraud, that would not be a larceny, but then the transaction must be complete. Then the question is, had the prosecutrix parted with the property in the florin when the prisoner carried it off? I think not. Mrs. Pickering kept a shop for the sale of sweets; the prisoner came in; the florin is taken out; the money is put on the counter; the shilling belonging to Mrs. Pickering is also there. The prisoner says, "You may as well give me the two shilling piece and take it all." Mrs. Pickering then took the same two shilling piece and put that on the counter, expecting she was to receive two shillings of the prisoner's money. The prisoner wishes to have the two shilling piece, and he is to give a shilling and sixpence in silver and sixpence in copper for it. Did the prosecutrix part with the property in the two shilling piece at the moment she put it on the counter? Clearly not. She expected to receive two shillings of the prisoner's money, and if her attention had not been distracted, she would have stopped the prisoner before he left the shop. The placing of the money on the counter was only one step in the transaction. The taking up of the two shilling piece by the prisoner could not affect the question, whether the prosecutrix intended to part with the property in the money, and would not make the transaction complete. Nor again, would the taking up of the other money by the prosecutrix affect that question or complete the transaction. She is putting it into the drawer when she discovers her mistake; the transaction is not then completed, and she has not received the change which she expected to receive when her attention is taken off and the prisoner quits the shop. I think her property in the florin continued until she received what she expected to receive. It appears to me to be the same case as if the

prisoner, with 18s. in his hand, had asked her to give him a sovereign in change, and she lays the sovereign on the counter and he the silver. He takes up the sovereign and leaves the shop before she has counted the silver; and then she counts the silver, and discovers that she has only 18s. instead of 20s. I think that would be larceny. The cases cited by the counsel for the prosecution bear out this view of the case. Then, as to *R. v. Jackson* (*ante*, p. 147), referred to by my Brother Pigott, that was a case of a pawnbroker's servant who delivers a chattel to the prisoner, receiving in exchange what he believes to be a parcel of diamonds, does not open the parcel at the time, and does not discover that they are not diamonds; then the accused leaves the shop, and the parcel is put away. There the transaction is complete; all took place and was done before the chattel was delivered over, with the knowledge that the prisoner was about to depart with it. But no such distinction as that between larceny and obtaining property by means of false pretences exists in this case. The putting of the money on the counter was no final delivery to the prisoner of the coin. I think, therefore, the conviction should be sustained.' See *R. v. Twist*, 12 Cox, C. C. 509.

(r) *R. v. Williams*, 7 Cox, C. C. 355. Martin, B., said, 'The case against the prisoner here is that he pretended that he had returned the whole when he had only returned one shilling.' This might apply to the last shilling given to the prisoner, and he might have been indicted for obtaining that by false pretences; but as to the shilling pocketed, the case is otherwise; that was put down on the counter in change for the good half-crown, and, until then taken into the hands of the prisoner, remained in the possession of the prosecutor, the counter being in his possession. In *Chambers v. Miller*, 13 C. B. (N. S.), 125, where a banker, on a cheque being presented, placed the amount on the counter, and the presenter of the cheque drew the money towards him, counted it over once, and was in the act of counting it a second time, it was held that the property in the money had passed. But Byles, J., said, 'I should be

And where, upon an indictment for stealing a sovereign, it appeared that the prosecutor and the prisoner having entered a beer shop, were drinking together, and that the prosecutor, who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying, and offered it to the landlady to change. She declared her inability to do so, and placed it on the table, and the prisoner said, 'I'll go and get change.' The prosecutor said, 'You won't come back with the change,' to which the prisoner replied, 'Never fear,' and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor, that he was not aware of the last remark of the prisoner, nor at first that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer. For the prisoner it was submitted that the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny. Coleridge, J. (having conferred with Gurney, B.), said, 'It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think, that there was not a sufficient trespass to constitute a larceny.' (s)

The prisoner was the daughter of the proprietor of a 'merry-go-round,' and was in charge thereof. The price of a ride in this machine was one penny for each person. The prosecutrix got into it and handed to the prisoner a sovereign in payment of the ride, asking for the change. The prisoner gave her elevenpence, and the merry-go-round being about to start, she said she would give her the rest of the change when the ride was over. The prosecutrix assented to this, and about ten minutes after, when the ride was over, found the prisoner attending to a shooting gallery, and asked her for the change, when she replied that she had only received a shilling, and declined to give any more change. The indictment charged the prisoner with stealing nineteen shillings in money of the moneys of the prosecutrix. The prisoner was convicted of stealing the nineteen shillings: held, by a majority of the judges, that the conviction was wrong and must be quashed. (t)

**Stealing receipts.** — Upon an indictment for stealing a receipt, the prosecutor proved that the prisoner rented some premises of him for £25 a year, and that on the day on which he quitted there being half a

inclined to hold, as a matter of law, that so soon as the money was laid upon the counter for the holder of the cheque to take, it became the money of the latter.' No other judge intimated any such opinion, but all relied on the taking possession of the money by the presenter of the cheque; and, with all deference, money on the counter of a banker is just as much in his possession as if it were in his pocket. It is therefore submitted that the prisoner in this case was guilty of stealing the shilling he put in his pocket. C. S. G.

(s) *R. v. Thomas*, 9 C. & P. 741. In *R. v. Reynolds*, MSS. C. S. G., S. C. 2 Cox, C. C. 170, Maule, J., ruled in accordance with this decision on precisely similar facts. See *Moore's case*, *post*, p. 191.

(t) *R. v. Bird*, 42 L. J. M. C. 44, *et per Cockburn, C. J.*, the majority of the judges desire it to be understood that they do not mean to say that if the issues had been properly left to the jury she could not have been convicted on an indictment properly framed. *R. v. Gumble*, L. R. 2 C. C. R. 1; 42 L. J. M. C. 7.

year's rent due, he took a stamped receipt ready written and signed to the premises, off which the prisoner had removed all his goods. The prosecutor at the desire of the prisoner went into a room in his house, where the prisoner pulled out a bag of money, and asked the prosecutor whether he had brought a receipt, and the prosecutor said that he had, and the prisoner asked to look at it; the prosecutor gave him the receipt, which the prisoner took, and put two sovereigns into the prosecutor's hand and immediately went away; and upon the prosecutor afterwards asking him for the remainder of the money, he said he had got his receipt and he should not pay it. The prosecutor stated that at the time he gave the prisoner the receipt he thought the prisoner was going to pay him the rent; that he should not have parted with the receipt unless he had been paid all the rent; but that when he put it in the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt back again, but wanted his rent to be paid. For the prisoner it was submitted that this was not a larceny. For the prosecution *Oliver's case* (u) was cited as in point; and it was contended that it was clear the prosecutor never intended to part with the receipt unless he was paid all the rent: the prisoner, on the contrary, never intended to pay the rent, and obtained the receipt by means of fraud; the property in the receipt, therefore, was not changed, and the case amounted to larceny. Coleridge, J., 'I think it is a larceny. The prisoner had removed his goods off the premises, so that the prosecutor could not distrain; and then the prisoner induces the prosecutor to part with the receipt by asking to look at it, and it is delivered to him for that purpose. It is quite clear also, that the prosecutor never intended to give the prisoner the receipt till he was paid all the rent, and I think the payment of the two sovereigns makes no difference.' (v)

Upon an indictment for stealing a piece of paper, whereon was impressed a two-shilling-and-sixpenny receipt stamp, and a piece of paper, it appeared that the prisoner managed his father's business, and that he employed Harries as a mason to build some farm-buildings, and paid him various sums as the work was going on by cheques drawn by his father. When the work was completed, Harries had it measured and valued, and sent an account to the prisoner's father, shewing a balance of £49 3s. 4d. due to Harries, which Harries pressed the prisoner to pay: and he said if Harries and one Williams, who had assisted Harries in the work, would come to his father's house and bring a stamped receipt with them, he would settle with them; they accordingly went, Williams having previously purchased a two-and-sixpenny receipt stamp with money given him by Harries. On their arrival they found the prisoner sitting at a desk, with papers before him, and his father sitting in another part of the room. The prisoner said, 'By this account, there appears to be still due to you a balance of £49 3s. 4d., beyond the £125 which you have had. Have you brought a stamped receipt?' Williams replied that he had, and, taking the blank stamp out of his pocket, handed it to the prisoner. The prisoner then said, 'You have not written it.' Williams asked

(u) *Supra*, note (i), p. 182.

(v) *R. v. Rodway*, 9 C. & P. 784, and *MS. C. S. G.*

the prisoner to write it. The prisoner then wrote on the stamp, and read it aloud as a receipt for £174 3s. 4d., namely, for £125 previously paid, and £49 3s. 4d. the balance. The prisoner did not give the stamp back either to Harries or Williams, but asked Harries to come to the desk and put his name to it, which he did without removing it from the desk.

The prisoner then asked Williams to witness it, which he did by signing his name on the stamp, the prisoner keeping one of his fingers on it all the time. The prisoner then took up the stamp, and asked his father if he had brought down his cheque-book. He replied he had not. The prisoner said, 'Why have you not?' and left the room, both Harries and Williams believing that he was going for the cheque-book; but he came back in about two minutes, returned to his desk, took up his papers, and after saying that the mason's charges were very exorbitant, and that they had already been over-paid, and that the matter was now all settled, went out of the room, leaving his father, Harries, and Williams there. Neither Harries nor Williams ever demanded the return of the receipt; but they went away threatening to make the prisoner suffer for what he had done. Harries would not have signed, nor Williams witnessed the receipt, had they not expected immediately to have received a cheque for the £49 3s. 4d. Wightman, J., 'I think this case is distinguishable from *R. v. Rodway*.<sup>(w)</sup> There when the landlord handed the receipt to the tenant, it was complete, and nothing remained but to pay the money. Here the receipt stamp was given by the creditor to the debtor for a special purpose, namely, to prepare the receipt; and it never was in the prosecutor's possession after the receipt was in a complete state. In *R. v. Rodway* there does not appear to have been any one present but the parties: here the thing was done publicly, and in the presence of an attesting witness, who by proving that no money actually passed, could render the receipt of no value to any one. The prisoner must be acquitted.'<sup>(x)</sup>

Upon an indictment for stealing a piece of stamped paper, it appeared that the prosecutor, having been employed by one Powell, had frequently applied to him for the wages due to him, and afterwards saw Powell, the prisoner, at a public-house. The prosecutor asked Powell if he was going to settle with him? Powell answered, 'Yes.' Powell then left the house, and the prisoner followed him. The prisoner returned, and beckoned the prosecutor to come to him into the front parlour; the prosecutor went there. They were alone, and then made up between them the balance of wages due to the prosecutor, which they fixed at £4 11s. 1½d. The prisoner then took out of his pocket a sixpenny stamp, and put it on the table. Prosecutor took the stamp, and asked prisoner whether he should write a receipt for the full sum, or for the balance? Prisoner said, for the balance. While prosecutor was writing, he observed the prisoner pull out a fist-full of silver, and turn it over in his hand. When prosecutor had written out the receipt, prisoner took it up and went out of the room. Prosecutor followed him and said, 'You have not given me the money.'

<sup>(w)</sup> *Supra*.

<sup>(x)</sup> *R. v. Frampton*, 2 C. & K. 47.

Prisoner said, 'It's all right.' Prosecutor repeatedly asked prisoner for the money, but in vain. The jury were directed that the stamped receipt was the property and in the possession of the prosecutor at and after the time of his writing the receipt, and that, if they were of opinion that the prisoner took the receipt out of such possession with a fraudulent intent, they might convict him of larceny; which they did. But, on a case reserved, the judges were unanimously of opinion that the prosecutor had not such a possession of the paper as would enable him to maintain trespass. It was never intended that he should retain it, but it was merely handed over for him to write upon it; and therefore the offence was not larceny. (y)

**Wagering, &c.**—Where it appeared that the prisoners decoyed the prosecutor into a public-house, and there introduced the play of cutting cards: and that one of them prevailed upon the prosecutor (who did not play on his own account) to cut the cards for him; and then, under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table and went away with it: it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and which would be felony, in case they should find that the money was obtained upon a preconcerted plan to steal it. (z)

The prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of a halfpenny by another of the prisoners under a pot: he put the notes in the hands of one of the prisoners, and then the other guessing right, the notes were handed over. The question was left to the jury whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept, under the false colour of winning a bet; and the jury so found. Upon a case reserved, the judges held that the conviction was right, because at the time of the taking the prosecutor parted with the possession only. (a)

The prisoner at a race meeting made a bet with the prosecutor, laying odds against a particular horse. The money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won; but the pris-

(y) *R. v. Smith*, 2 Den. C. C. 449.

(z) *R. v. Horner*, 1 Leach, 270. Cald. 295, S. C. The case was one of an application to the Court of King's Bench to bail the prisoners on the ground that the charge against them amounted only to a *misdemeanor*. Probably it would have been considered as making an essential difference if the prose-

cutor had been playing himself at the time, and had parted with his money under the idea that it had been fairly won. See *R. v. Nicholson*, *ante*, p. 144.

(a) *R. v. Robson*, MS. Bayley, J., R. & R. 413. This distinguished the case from *R. v. Nicholson*, *ante*, p. 144. See *R. v. Hudson*, Bell, C. C. 263, vol. i. p. 506.

#### AMERICAN NOTE.

<sup>1</sup> So in America where the prosecutor was induced by three conspirators to make a wager with one of them, and he deposited his stake with another of them, and then discovered that the other stake deposited was

waste paper, and upon his demanding a return of his stake it was refused, it was held that the three conspirators had committed larceny. *Stinson v. P.*, 43 Ill. 397.

oner denied ever having made the bet, and went away with the money. It was held that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass, and therefore, that there was evidence of larceny by a trick. (b)

The prisoner agreed at a fair to sell a horse to the prosecutor for £23, of which £8 was to be paid at once, and the remainder upon delivery of the horse. The prosecutor handed £8 to the prisoner, who signed a receipt for the money, by which it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse, and the jury found that he never intended to do so. It was held that he was rightly convicted of larceny by a trick. (c) But where the prisoner induced the prosecutor to give him a shilling for a purse into which he had dropped three coins, after first shewing the prosecutor three shillings, and appearing to drop them into the purse, it was held that he could not be convicted of larceny; but it was suggested that he might have been convicted on an indictment for false pretences. (d)

**Ring dropping.**—The prisoner was indicted for stealing a silver watch, steel chain, &c., two pieces of foreign coin, and seven shillings in money, the property of J. Bunstead. The prosecutor proved that the prisoner and two other persons, who made their escape, had joined him in the street; and that, after walking a short space with him, one of them stooped down and picked up a purse, which, upon inspection, was found to contain a ring, and a receipt for £147 purporting to be the receipt of a jeweller for 'a rich brilliant diamond ring.' The prisoner proposed that they should go into some public-house to consider in what manner their respective portions of this prize should be divided, and they went accordingly. Various modes of distribution were then suggested; and at length the prisoner asked the prosecutor if he would take the ring, and deposit his money and his watch as a security to return it upon receiving his portion of its value. The prosecutor assented to this proposal; and signed a written agreement dictated by the prisoner, to the effect that when the prisoner, or either of the other two men, returned the watch and money and seventy pounds, he would re-deliver to them the purse and the ring. The prosecutor then laid the watch and money mentioned in the indictment upon the table, and received the ring. After which the prisoner beckoned the prosecutor out of the room, upon a pretence of speaking to him in private; and during this interval the other two men went off with the property. The abrupt manner in which they went away made the prosecutor conceive that he had been defrauded; but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he

(b) *R. v. Buckmaster*, 20 Q. B. D. 182,  
(Lord Coleridge, C. J., Pollock, B., Manisty,  
Hawkins, and A. L. Smith, JJ.).

(c) *R. v. Russell*, (1892) 2 Q. B. 312 (Lord

Coleridge, C. J., Pollock, B., Hawkins,  
A. L. Smith, and Wills, JJ.).

(d) *R. v. Solomons*, 17 Cox C. C. 93.

should have his money and watch again. The prosecutor, however, secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings. It was objected, on behalf of the prisoner, that, as the prosecutor had parted voluntarily with his property, it was a fraud only, and not a felony. But the Court referred it to the jury to consider whether the whole transaction was not an artful and preconcerted scheme, in the three men, feloniously to obtain the prosecutor's watch and money; and whether the prisoner and the other two men were not all in concert together to procure, by such a pretext, any man's money whom they might meet, and to embezzle it; or, in other words, to steal it. And the jury found the prisoner guilty. (c)

The prisoner was indicted for stealing twenty guineas and four doubloons, the property of J. Field. The prosecutor was walking along the street, when a stranger joined company with him; and, after walking a little way in conversation together, the stranger suddenly stopped, and picked up a purse which was lying at a door. After they had proceeded about forty yards, the stranger proposed that they should go and drink a pot of porter, and see what they had picked up. The prosecutor was persuaded to comply; and they accordingly went into a private room, in an adjacent public-house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed W. Smith, for £210, 'for one brilliant diamond cluster ring,' and from the other end he pulled out the ring itself. A conversation then ensued upon the subject of their good fortune, during which the prisoner entered the room: when the ring was shewn to him; and, after praising the beauty of its lustre, he offered to settle the division of its value. The stranger lamented that he had no money about him, upon which the prisoner asked the prosecutor if he had any. The prosecutor replied that he had forty or fifty pounds at home, and the prisoner said that such a sum would just do. They all three then went to the prosecutor's lodgings at Chelsea, where the prosecutor got the money; and they then went to a public-house in the neighbourhood, where the prosecutor put down twenty guineas and four doubloons, which the stranger, in the presence of the prisoner, took up, and in return gave the prosecutor the ring; desiring that he would meet him at the same place, on the next morning at nine o'clock, and promising that he would then return to him the twenty guineas and the four doubloons, and also give him one hundred guineas for his share of the ring. It was also appointed that the prisoner should be there, and agreed that the prosecutor and the stranger should give him a guinea each for his trouble. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appoint-

(c) Patch's case, 1 Leach, 238. Gould, J., Perryn, B., and Buller, J., 2 East, P. C. c. 16, s. 107, p. 678. It appears that the Court proceeded upon the authority of Pear's case (*post*, p. 193). And it is stated that their opinion was founded on this, that the possession was obtained by fraud, and the property not altered; for the prosecutor was

to have it again; and that, therefore, it was not like the case of goods sold on credit, where the buyer means immediately to convert them into money, and is not able, nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner. 2 East, P. C. c. 16, s. 107, p. 679.



ment, but neither of the other parties came. The ring was of a very trifling value. It was left with the jury to consider, upon these facts, whether the prisoner and the stranger were not confederated together, for the purpose of obtaining money, on pretence of sharing the value of the ring, and whether he had not aided and assisted the stranger to obtain the money by the means which were used for that purpose. And the jury being of opinion he was so confederated with the stranger, and aiding and assisting him, found the prisoner guilty; and, upon a case reserved, nine of the eleven judges present were of opinion that the guineas and the doubloons were deposited in the nature of a pledge, and not as a loan; so that, though the *possession* was parted with, the *property* was not; (more especially as to the doubloons, which the prosecutor clearly understood were to be returned the next day in specie,) and therefore as the prisoner had obtained them with a fraudulent intent to apply them to his own use, the offence became a felony, from the intention with which he gained the possession. And they also held that, as the prisoner and his companion were acting in concert together, they were equally guilty. The other two judges thought that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced upon it, and that therefore he had voluntarily parted with the property, as well as the possession. And they said that when money was delivered by a man on such an occasion, it was not in his contemplation to have the same identical money back again. (*f*)

The prisoner was indicted for stealing several bank notes of the value of £100, the property of J. Smith. M. Smith, the prosecutor's wife, stated, that as she was going along the street the prisoner stooped down, picked up a small parcel, and said that he had got a prize: upon which she cried, 'Halves,' and said it was usual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the presence of another man, (who appeared to be an accomplice of the prisoner's) and found in it a locket with a large stone, and a paper purporting to be the receipt of a jeweller for £250 for a diamond locket. The prisoner said his name was Smith, that he was the captain of a ship, and that he would go to a friend's house, where his cargo was, and bring £100 towards paying the witness her share. He went accordingly, was absent about fifteen minutes, and when he returned he said that his friend was not at home. After some further proposals respecting the disposal of the locket, it was at length agreed between them that the locket should be left in the custody of the witness, and that she should deposit £100 in the prisoner's hands as a security to return him the locket the next morning; at which time she was to receive from him half the value of the locket, as mentioned in the receipt found; and she was to have the £100 deposited in the prisoner's hands, as such security as aforesaid, returned back. They then went to the witness's house, where she procured bank notes

(*f*) Moore's case, 1 Leach, 314, 2 East, P. C. c. 16, s. 107, p. 679. Marsh's case, 1 Leach, 345, S. P.

to the amount of £100 and laid them on the table, and the prisoner took up the bank notes, said that they were right, and that he would call the next morning and settle the whole. He then delivered up the locket, went off with the notes, and never returned again. The locket was only of the value of five shillings and sixpence. Upon this evidence the prisoner was convicted of the simple felony, in stealing the notes: and upon a case reserved upon the objection that this was only a fraud, and not a felony, all the judges held the conviction proper. (g)

But where on an indictment against Wilson and Martin for stealing a £5 note and two sovereigns, the prosecutor said, 'I saw Wilson on a road. Wilson pointed to the ground and said, "There is a purse." He picked it up. I said, "We had better have it cried, as some one may own it." He replied, "Some one to whom it does not belong may say it is his, and get it from us." We walked on, and I said, "We had better see what the purse contains." He replied, "Not here, as there are men at work who will see us." We went about twenty yards further, and Wilson opened the purse and took out what appeared to me to be a gold watch chain and two seals. He said he did not know the value of them, but there was a gentleman on the other side of the road who could probably tell us. This was the prisoner Martin. The things were shewn to him, and he said he was in the trade, and asked how we came by the articles. I said we had found them. Martin then said, it was a very prime article, and worth £14, and that we should divide it between us; and he added, that as we found it on the road it belonged to us, and no one else. Wilson said he would take the things to his master, but the other prisoner said he had no right to do so; and he also said, that if I would buy the other man's share he would give me £18 for the articles, and get a good profit for himself besides. He added that he was the brother of Mr. Dutton, the watchmaker, whom I knew. Wilson had gone on a little way, when he was called back by the other prisoner, who asked him if he would take £7 for his share. This he agreed to do. I gave him a £5 note and two sovereigns, and took the chain and seals: which were proved to be worth only a few shillings.' For the prosecution, *Moore's case*, (h) and *R. v. Robson* (i) were cited. Coleridge, J., 'In *Moore's case*, nine of the judges thought that the money charged to have been stolen was given as a pledge, so that the possession of it only was parted with by the prosecutor and the property not. In this case the prosecutor intended to part with the money for good and all, and to have the articles. If the party meant to part with the property in the money, as well as the possession of it, I am of opinion that it is no larceny. Here the prosecutor meant to part with his money for ever. In *R. v. Robson* the party had only the possession of the money given to him as a stakeholder. When this prosecutor parted with his £7 he never intended to have it back again, but meant to sell the chain and seals for himself. The prisoners must be acquitted.' (j)

(g) *Watson's case*, 2 Leach, 640. 2 East, P. C. c. 16, s. 107, p. 680.

(h) *Ante*, p. 191.

(i) *Ante*, p. 188.

(j) *R. v. Wilson*, 8 C. & P. 111. The prisoners were afterwards tried and convicted for a conspiracy.

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods away, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all. Standley, Jones, and Webster conspired to get some money from M'Laughlin, and they pretended that he could not produce £100, upon which he produced it in notes, which Jones took to count and afterwards handed to Standley, and Standley and Webster pretended to gamble for them, Jones then beckoned M'Laughlin out of the room, and Standley and Webster immediately decamped with the money, and all the three afterwards shared it. Upon a case reserved, the judges were unanimous that this was larceny in all the three. (*k*) In another case County and Donovan planned to rob the prosecutrix of some coats, and County got her to go with him that he might get some money to buy them of her, and she left the coats with Donovan, who immediately absconded with them; and, upon a case reserved, the judges held the receipt by Donovan to be a felonious taking of the coats by both. (*l*)

The prisoner was indicted for stealing a gelding, the property of J. Houseman. The prosecutor was a livery stable keeper in Crown-street, Soho; and on the 4th October 1785, the prisoner, who was a post-boy, applied to him for a horse, in the name of a Mr. Eley, saying, that there was a chaise going to Barnet, and that Mr. Eley wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse; and, on going out of the stable yard, and meeting a friend of his, who asked him where he was going, he said that he was going no further than Barnet. He accordingly proceeded towards Tottenham-court Road, which leads to Barnet, and also, though in some degree circuitously, to Mr. Eley's house. This transaction took place about nine o'clock in the morning; and between three and four o'clock in the afternoon of the same day the prisoner sold the gelding in Goodman's Fields for a guinea and a half, including the bridle and saddle. The horse appeared to have been ridden very hard, and his knees were broken very badly. The purchaser almost immediately disposed of his bargain for fifteen shillings. On putting this case to the jury, it was stated by the Court that the judges in *Pear's case*, (*m*) under circumstances similar to the present, had determined, that if a jury be satisfied, by the facts proved, that a person, at the time he obtained another's property, meant to convert it to his own use, it is felony. But that there was, a distinction to be observed in the present case, though so nice a one as possibly not to be obvious to common understandings. It was this; that if it appeared to them that the prisoner, at the time he hired the horse for the purpose of going to Barnet, really intended to go there, but that, finding himself in

(*k*) *R. v. Standley*, MS. Bayley, J., R. & R. 305.

(*l*) *R. v. County*, East. T. 1816. MS. Bayley, J.

(*m*) *Pear's case*, 1 Leach, 212. 2 East, P. C. c. 16, s. 112, p. 685.

possession of the horse, he afterwards formed the intention of converting it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. The jury found the prisoner guilty, on the ground that he intended to steal the horse at the time he hired it; and he was afterwards executed. (n)

In one case it was held, that to constitute a larceny by a party, to whom goods have been delivered on hire, there must not only be an original intention to convert them to his own use, but a subsequent actual conversion. Upon an indictment for stealing a horse and gig it appeared that the prisoner, about half-past ten in the morning, hired the horse and gig of a livery stable keeper in London, stating that he wanted them for two days for the purpose of going down to Windsor. Instead of going to Windsor he immediately drove in a contrary direction to Romford, in Essex, where he arrived at about twelve o'clock, and offered the horse and gig for sale to Mr. Orbell, the landlord at the King's Head Inn at that place, for £25. Mr. Orbell offered him £15, which the prisoner at first refused to accept, but half an hour afterwards, the gig being then in the yard, and the horse in the stable, he told Mr. Orbell that he must let him have them for the sum offered, as he had been desired by his father to sell them before his return home. Mr. Orbell stated that the value of the horse and gig was at least £45, in consequence of which his suspicions were excited, and he did not intend to purchase them, unless the prisoner gave him a satisfactory account of how he became possessed of them; that after the prisoner agreed to accept the £15 those suspicions were increased, and he asked further questions of the prisoner, and then, under pretence of going to fetch the money to pay the amount offered, he procured a constable and gave the prisoner into custody. It was objected that the indictment for the felony could not be sustained, as there had been no conversion. Conceding the hiring was only a pretence made use of to obtain the horse and gig, for the purpose of afterwards disposing of them, the possession in law still continued in the owner, and was not determined without a subsequent conversion, either actually proved, as in *Pear's case* and *Charlewood's case*, or to be presumed from the circumstances, as in *Sample's case*; and in the present case the subsequent conversion was incomplete, as the contract for the purchase was not concluded on the part of Mr. Orbell. Tindal, C. J., 'This case comes near to many of those which have decided that the appropriation of property under circumstances in some degree similar to the present amounted to larceny. However, here there has been no actual conversion of the property, and only an offer to sell. I am of opinion, therefore, that the prisoner must be acquitted.' (o)

(n) *Charlewood's case*, 1 Leach, 409. 2 East, P. C. c. 16, s. 112, p. 689. There are many cases to the same effect. See *Spence's case*, 1 Lew. 197. *R. v. Cole*, 2 Cox, C. C. 340. *Patteson, J.*, S. P.; *Armstrong's case*, 1 Lew. 199. *Vicar's case*, 1 Lew. 199. *Sample's case*, 1 Leach, 420. These cases shew that there must have been an intention to steal at the time of hiring.

(o) *R. v. Brooks*, 8 C. & P. 295. Assuming that this case is accurately reported, the correctness of the decision seems liable to great doubt. The question for the jury in such cases is, what was the intention of the prisoner at the time when he obtained possession of the chattel? Now the acts of the prisoner subsequent to that time are only material, for the purpose of enabling the jury

In *R. v. Selby* (p) the facts were precisely similar to those in the preceding case, and Patteson, J., after reading that case and the note to it, (q) said that, in his opinion, the note was correct, and directed the jury accordingly; but, out of deference to the opinion of the Chief Justice, the point would have been reserved had not the jury acquitted. And where, on an indictment for stealing a horse and a gig, it appeared that the prisoner had hired them on pretence of going to Sheffield, but took them in a contrary direction to Manchester, and there offered them for sale; but no sale took place, and *R. v. Brooks* (r) was referred to; Coleridge, J., consulted Parke, B., and then said, 'My Brother Parke agrees with me that the facts proved are sufficient to support the charge of larceny. If *R. v. Brooks* is correctly reported, we cannot assent to the doctrine there laid down.' (s)

A delivery of goods obtained by a fraudulent abuse of legal process is amongst the most aggravated of those cases of larceny where the taking is effected by procuring a delivery of the goods from the owner, or other person authorised to dispose of them. It will generally be a matter of some difficulty to give satisfactory proof of a felonious intent in such a transaction; but if the offence be proved, the severest punishment which it can receive may well be inflicted, for it has been justly observed that such an offence converts the process of the law, which is the best security for property, into an instrument of rapine and plunder. (u)

The books do not furnish many instances of larcenies of this description. But it is laid down that if a person, intending to steal a horse, take out a *replevin*, and having thereby procured the horse to be delivered to him by the sheriff, ride him away; or if a man intending to steal the goods of another, fraudulently deliver an ejectment, and by obtaining judgment against the casual ejector, get possession of his house, and take his goods; in both these cases the taking will amount to larceny. (v) So if, under pretext or colour of a *capias*

to decide what his intention was at the time of the taking. An actual conversion is undoubtedly cogent evidence that the chattel was originally obtained for that purpose; but it is only evidence; and it is easy to suggest cases equally strongly indicative of a felonious intent at the time of the taking; thus, suppose a prisoner had hired a horse from A. for a day, and had taken it into a distant part of the country, and there used it for his own purposes for a long period, and being apprehended had confessed that he obtained the horse fraudulently with intent to keep it for his own use, and wholly to deprive the owner of it; and that he had made false representations for that purpose; could it be contended that there was no evidence to go to the jury of an intent to steal at the time of the taking? So in the principal case it is submitted that although no actual conversion took place, still there was evidence for the jury that the horse and gig were obtained with intent to convert them to the prisoner's use. It seems difficult, also, to see how the fact that Mr. Orbell did not

intend to complete the contract could vary the effect of the prisoner's acts; the prisoner had done all on his part to complete the contract, and as against him it might well have been held that the conversion was complete; in the same way as it has been held that the offence of bribery is complete where A. gives money to B. to induce him to vote for a candidate, and B. agrees so to do, although he never intends so to vote. *Henslow v. Fawcett*, 3 Ad. & E. 51. *Harding v. Stokes*, 2 M. & W. 233. See also *Spence's case*, *ante*, p. 194, where there seems to have been no sale. C. S. G.

(p) Gloucester Sum. Ass. 1845, MSS. C. S. G.

(q) Note (o), *supra*.

(r) *Supra*.

(s) *R. v. Janson*, 4 Cox. C. C. 82.

(u) 1 Hawk. P. C. c. 33, s. 12. 2 East, P. C. c. 16, s. 96, p. 660.

(v) 3 Inst. 108. 1 Hale, 507. Kel. 48. 1 Hawk. P. C. c. 33, s. 12. 2 East, P. C. c. 16, s. 96, p. 660.

*utlagatum* sued out after an outlawry clandestinely obtained against a visible man, his goods be taken with a felonious intent, it will be felony. (w)

In a case of this description, where the prisoners were indicted for breaking the house of R. Stanyer, putting his wife in fear, and stealing goods, the prisoners, intending to rifle a house in which a Mrs. Stanyer lived, apart from her husband, went to an attorney, and pretending that Mrs. Stanyer was tenant to one of them, and in arrear for rent, obtained possession of the house by means of a fraudulent ejectment; and at the same time arrested Mrs. Stanyer, by virtue of a writ of *latitat*, and caused her to be carried to prison. The prisoners then rifled the house, and took away the goods, some of which they hid, altered the marks of others, and sold the rest. When they were questioned concerning these acts, and asked what colour of title they had to the house or goods, they could pretend none. The real landlord had received the rent of the house for many years and no rent was in arrear. Neither could the prisoners pretend to any cause of action against Mrs. Stanyer. The jury were directed, that if they believed that the prisoners had done all this with an attempt to rob, they ought to find them guilty, which they accordingly did, and both prisoners were executed. (x)

## SEC. VI.

*The Taking by Finding.*<sup>1</sup>

It is laid down in the old books, that if one lose his goods, and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny, for the first taking was lawful. (y) And that if A. find the purse of B. in the highway, and take it and carry it away, with all the circumstances that usually prove the *animus furandi* yet it is not felony. (z) But this doctrine of a taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner. (a)

(w) 2 East, P. C. c. 16, s. 96, p. 660. And see cases of a breaking and entering in burglary, effected by fraud, *ante*, p. 8.

(x) R. v. Farre, Kel. 43, 44. 2 East, P. C. c. 16, s. 96, p. 660. 2 Leach, 1064, note (a).

(y) 3 Inst. 108. 1 Hawk. P. C. c. 33, s. 2. Bac. Ab. tit. *Felony* (C).

(z) 1 Hale, 506.

(a) 1 Hale, 506. 2 East, P. C. c. 16, s. 99, p. 664. See Buckley v. Cross, 3 B. & S. 566.

## AMERICAN NOTE.

<sup>1</sup> See Lawrence v. S., 1 Humph. 228. S. v. Conway, 18 Mo. 321. Ransom v. S., 22 Conn. 153. Hunt v. C., 13 Gratt. 757. P. v. Swan, 1 Parker, C. R. 9. Pyland v. S., 4 Sneed. 357. C. v. Titus, 116 Mass. 42; Reed v. S., 8 Tex. App. 40; Baker v. S., 29 Ohio S. 184. In general in America the rule as to finding of lost goods (viz. that larceny can be committed of them provided the finder knew or had reasonable means of ascertaining whose goods they were) obtains as in England; but in Ten-

nessee larceny cannot be committed at all of goods lost; and in some States it must be shewn that the finder actually knew whose goods they were. See Bishop, ii. s. 880-882. P. v. Cogdell, 1 Hill, N. Y. 94, 37 Am. D. 297. S. v. Dean, 49 Iowa, 73, 31 Am. R. 143. Where a person had lost a carpet-bag in a street, and employed another person to find it, who found it and converted it to his own use, this was held no larceny. S. v. England, 3 Jones, N. C. 399, 80 Am. D. 334.

The rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

The following case, called *Thurborn's case*, is a leading authority upon this subject:—

The prisoner was indicted for stealing a bank note. He found the note, which had been accidentally dropped in the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note; Parke, B., directed a verdict of guilty, but on conferring with Maule, J., he was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and he therefore reserved the question for the consideration of the judges. The case was not argued, but the judges gave it much consideration on account of its importance, and the frequency of the occurrence of cases in some degree similar, and the somewhat obscure state of the authorities upon it; and Parke, B., afterwards delivered the following judgment:—‘In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose. By the term *animus furandi* is to be understood the intention to take not a particular (b) temporary but an entire dominion over the chattel, without a colour of right. As the rule of law, founded on justice and reason, is that, *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him, and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.’ And after elaborately reviewing the old authorities, the learned Baron continued: ‘The result of these authorities is, that the rule of law on this subject seems to be, that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or

(b) Quære ‘partial and.’

reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may rise; but it will generally be ascertained whether the accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent; in others, appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case: the first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, or that he might be found, and therefore the original taking was not felonious; and if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after he was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without the knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so, knowing who was the owner; for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was punishable, as we have already decided: and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than others, and consequently no larceny.' (c)

The prisoner must have a felonious intent at the time of the finding. Evidence of what occurred subsequently to the finding is admissible to prove a felonious intention at the time of the finding; but the question of the intent at the time of the finding must be left to the jury. (d)

The finder of a sovereign in the high road who, at the time of find-

(c) *R. v. Thurborn*, 1 Den. C. C. 387, 18 L. J. M. C. 140; reported erroneously as *R. v. Wood*, elsewhere. Mr. Greaves doubts the correctness of this decision. See 4th ed. of this work, vol. ii., p. 180, note (t). But it has been recognised in several subsequent cases though some of the reasons given for it have been disapproved of. *R. v. Christopher, Bell*, C. C. 27, *infra*, Williams, J. *R. v. Moore*, L. & C. 1, *post*, p. 188, Williams, J. *R. v. Preston*, 2 Den. C. C. 353.

(d) *R. v. Christopher, Bell*, C. C. 27. A.D. 1858. The Court said they were bound by *R. v. Thurborn*, *supra*; and

Williams, J., said, 'Agreeing with the decision in that case, I must confess I have never been able to agree with some of the principles there laid down.' And Hill, J., said, 'Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First it must be shewn that at the time of finding he had the felonious intent to appropriate the thing to his own use.' 'The other ingredient necessary is that, at the time of the finding, he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge, or may arise from the



ing, had no reasonable means of knowing who the owner was, but who at that time intended to appropriate it even if the owner should afterwards become known, and to whom the owner was speedily made known, when he refused to give it up, was held not guilty of larceny upon the authority of *R. v. Thurborn*, (*supra*). (*e*)

In cases of this nature, where the taking was by *finding*, some of the strongest circumstances to rebut the implication, that such taking was felonious, will be those which shew that the party made it known that he had found the property, so as to make himself responsible for the value, in case he should be called upon by the owner; or those which shew that he endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that the true owner could not be found. (*f*)

In the old books it is stated that if a man's horse be going in his ground, or upon his common, and a person takes it *animo furandi*, it is no finding, but felony. (*g*) And that if the horse stray into a neighbour's ground or common or highway, (*h*) it is felony in him that so takes the horse. (*i*) If a man should hide a purse of money in a corn-mow, and his servant finding it should take part of it, the taking will be felony, if it appear by circumstances that the servant knew that his master laid it there. (*j*)

nature of the chattel found, or from there being some mark upon it; but it is not sufficient that the finder may think that by taking pains the owner may be found; there must be the *immediate* means of finding him.'

(*e*) *R. v. Glyde*, 37 L. J. M. C. 107, L. R. 1 C. C. R. 139, *et per* Martin, B., 'If there were no authority on the point I should have said that this was a felony. There was a taking, and the circumstances shew that the sovereign was not abandoned. Then, I think, there was evidence of a taking, and evidence that the taking was felonious, upon the authority of *R. v. Christopher*, *ante*, p. 198. I think *Thurborn's* case was rightly decided, but the reasons given for that decision have not been acquiesced in. The second point there decided is, that to justify a conviction for larceny the finder must have reasonable means at the time of the finding of knowing who the owner is, but I doubt whether that is right. But the present case is concluded by authority; *et per* Blackburn, J., 'I might wish the law to be as my Brother Martin does, but *Thurborn's* case is in point. And I am inclined to think we should have to adhere to it, if it were to be reconsidered. And I do not think that, without the interference of the Legislature, where the original taking is innocent and the conversion only unlawful, we could hold the crime of larceny to be completed. Then we are bound to act on *Thurborn's* case, and here it is clear that

there was no evidence that the prisoner had any means of finding the owner at the time of picking up the sovereign, and the jury were not asked that question. Therefore I think the conviction should be quashed.' See *R. v. Dixon*, Dears. C. C. 580. A.D. 1855, where the prisoner was indicted for stealing some bank notes. And *per* Parke, B. 'If the prisoner had seen the notes drop from the prosecutor, or if the notes had had the owner's name upon them, or there had been any marks, which enabled the prisoner to know at the moment when he found the notes who the owner was, or that he could be discovered, it might have been within the principles laid down in *R. v. Thurborn*.' *Jervis*, C. J., 'The finding of the jury was that the notes were lost; that the prisoner did not know the owner; but that it was probable he could have traced them. He was not bound to do that.'

(*f*) 2 East, P. C. c. 16, s. 99, p. 665.

(*g*) 1 Hale, 506.

(*h*) *Hutchinson's case*, 1 Lewin, 195. *R. v. Cook*, Gloucester Spring Ass. 1842, MS. C. S. G. If sheep of A. stray from the flock of A. into the flock of B., and B. drives them along with his flock, or by pure mistake shears them, this is not a felony; but if he know them to be another's, and mark them with his marks, this is evidence of a felony.' 1 Hale, 507.

(*i*) 1 Hale, 506. 2 East, P. C. c. 16, s. 99, pp. 664.<sup>1</sup>

(*j*) 1 Hale, 507.

#### AMERICAN NOTE.

<sup>1</sup> In some States of America there are statutes which relate to stray cattle, and these statutes differ in language, and there-

fore in interpretation. See *Bishop*, vol. ii. s. 876.

**Property left in a coach.** — A gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use. This was holden to be felony, on the ground that the coachman must have known where he took up the gentleman and his trunk, and where he set him down; and that he ought therefore to have restored it to him. (*k*)

**Property left in a railway carriage.** — So where on an indictment for larceny, it appeared that a dressing-case had been lost out of a railway carriage during a journey, and the prisoner, a servant of the Company, had said that he had found it in a first-class carriage on the arrival of the train at one of the stations on the line; Williams, J., told the jury that there was no pretence for treating this as a case of lost property. It was the duty of the prisoner, if he found such an article left by a passenger, to take it to the station-house, or some office of the line. It was absurd to say that this case was analogous to that of the finder of lost property. It was nothing like lost property. (*l*)

**Purse left on a stall in a market.** — Upon an indictment for larceny of a purse and money, it appeared that the prosecutor, in making a purchase, left his purse on the prisoner's stall in a market, unperceived by either of them. A stranger pointed it out to the prisoner, and (supposing it to be her own) reproved her carelessness. She put the purse into her pocket, and said, 'Yes, it is a wonder it was not gone before this.' She took an early opportunity to conceal the purse, and on the prosecutor returning to search for it, denied all knowledge of it. The jury were asked: First, Did the prisoner take up the purse, knowing that it was not her own, and intend at that time to appropriate it to her own use? Secondly, Did the prisoner know who was the owner of the purse at the time she took it? The jury answered the former question in the affirmative, and the latter in the negative, and thereupon a verdict of guilty was recorded, and upon a case reserved, it was held that the conviction was right. Jervis, C. J., 'If there had been any evidence that the purse and its contents were lost property, properly so speaking, and the jury had so found, the jury ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found; but there is in this case no reason for supposing that the property was lost at all, or that the prisoner thought it was lost. On the contrary, the owner having left it at the stall, would naturally return for it when he missed it. There is a clear distinction between property lost and property merely mislaid, put down and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding, therefore, does not arise.' (*m*)

(*k*) Lamb's case, 2 East, P. C. c. 16, s. 99, p. 664. Wynne's case, 1 Leach, 418. 2 East, P. C. c. 16, s. 99, p. 664. Eyre, B. Sear's case, 1 Leach, 415, note (*b*), Ashurst, J.

(*l*) R. v. Pierce, 6 Cox, C. C. 117.

(*m*) R. v. West, Dears. C. C. 402, A. D. 1854. 'In this case all the Court decided was, that the property was not lost property,'

per Parke, B., in R. v. Dixon, *infra*. There seems to be some confusion in the cases upon the question whether the property is lost or mislaid. It is sometimes stated that if the property is only mislaid, larceny can be committed of it, as of goods in possession. But sometimes the law is more correctly stated to be that if goods appear to be abandoned, and the finder reasonably believes

**Money left in a shop.** — The prisoner was charged in one count with stealing, and in another with receiving, a £10 Bank of England note. The prosecutor went to the prisoner's shop to have his hair cut, which was done by the prisoner, and the prosecutor, before leaving the shop, bought some hair oil. When he went to the shop he had, in a clasped purse in the pocket of his great coat which he carried on his arm, two £10 notes (one of them the subject of this indictment), and some gold. He folded his great coat, and laid it on a chair whilst his hair was being cut; and he paid for the hair oil from the purse in which the money was. Next morning he missed the £10 note, returned to the prisoner's shop, stated to the prisoner his belief that he had lost it in the shop, and offered him a reward of £3 if he would restore it. The prisoner told him he knew nothing of the note; but in his statement before the magistrate, he explained that he had given gold for the note the same day that the prosecutor lost it, but was afraid to explain this to the prosecutor, lest he should be obliged to give up the note to him. Evidence was given to shew that the prisoner had given gold for a £10 note, about the time of the loss by the prosecutor, to a man in the shop of the prisoner, and that the prisoner, on the same day the prosecutor inquired after the note, parted with it. The jury found, (1) That the note was dropped by the prosecutor in the shop, and that the prisoner found it there. (2) That the prisoner at the time he picked up the note did not know, nor had he reasonable means of knowing, who the owner was. (3) That he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use. (4) That he intended, when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever the owner might be. (5) That the prisoner believed, at the time he picked up the note, that the owner could be found. And upon a case reserved, it was held that the prisoner was guilty of larceny. The findings of the jury brought the case clearly within the doctrines laid down in *R. v. Thurborn*; (n) for unless the circumstances of the finding are such that the finder is warranted in believing that the goods are lost, or that the owner could not be found, it is larceny. Here the note was lost in the sense that it was dropped out of the owner's purse; but it was not lost in the sense that the owner did not know where to find it. As soon as the owner discovered his loss, he went at once to the shop and inquired for it. Before a man can appropriate a thing innocently, he must believe it to be lost in the sense that the owner does not know where to find it. (o)

Upon an indictment for stealing a gold chain, breast-pin, eye-glass and pin, Rolfe, B., told the jury, 'If a man is possessed of a chattel,

them to be so, and has no reasonable means of finding the owner, he may convert them to his own use, although the owner may after all have only mislaid the goods. A

man cannot be found guilty of larceny unless he has the *animus furandi*.<sup>1</sup>

(n) *Ante*, p. 198.

(o) *R. v. Moore*, L. & C. 1, A. D. 1861.

#### AMERICAN NOTE.

<sup>1</sup> This appears to be the law in America, see *Lawrence v. S.*, 1 Humph. (Tenn.) 228.

*Wolfstein v. P.*, 6 Hun (N. Y.), 121. Bishop, ii. s. 879.

he does not lose the property in it, because he places or drops it in a field; nay, if he drops it in a street, it still remains his property. The only case where a party can be justified in converting it to his own use is, where it has fallen where a party may fairly say that the owner has abandoned it, or if the party cannot be found to whom it belonged. If I had an apple and dropped it, it might be presumed that I abandoned it; but if I drop £500, the presumption is that I do not mean to abandon it. If I drop a thing where there is no reasonable means of finding out that it belongs to me, then, though I am found out to be the owner, the party finding it would not be guilty of felony if he converted it to his own use; though he would be liable to an action of trover.' (p)

Three pigs which had been bitten by a mad dog were shot and buried by their owner. The prisoners dug up the pigs and sold them to a meat salesman for £9 3s. 9d. It was submitted: (1) That the owner had abandoned his property in the pigs; (2) That the pigs were of no value to the owner; (3) That the pigs were attached to the soil and could not be the subject of larceny; but the Court held that the property had not been abandoned as the intention of the owner was to prevent the pigs being made any use of and affirmed the conviction. (q)

In one case it appeared that a pocket-book containing bank notes had been found by the prisoner in the highway, and afterwards converted by him to his own use; upon which Lawrence, J., observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion will constitute a felonious taking. (r) And in another case, a learned judge said, 'Suppose a person finds a cheque in the street, and, in the first instance, takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it.' (s)

Prisoner received from his wife a £10 Bank of England note, which she had found, and passed it away. The note was endorsed 'E. May' only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station the prisoner said he knew nothing about the note. The jury were directed that if they were satisfied that the prisoner could within a reasonable time have found the owner, and if instead of waiting the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted, and it was held that the jury ought to have been asked whether the prisoner at the time he received the note believed the owner could be found; and that the conviction was wrong. (t)

(p) R. v. Peters, 1 C. & K. 245. A. D. 1843.

(q) R. v. Edwards & Stacey, 13 Cox, C. C. 384.

(r) Anon. cor. Lawrence, J., Stafford Sum. Ass. 1804, MS.

(s) Per Parke, B., *Merry v. Green*, 7 M. & W. 623. R. v. Thurborn, *ante*, p. 198.

Parke, B., 'A cheque must at least have the name of the drawer and drawee upon it, and in general there must be the means, by the names on the document, of finding the owner of the cheque.' See R. v. Gardner, L. & C. 243.

(t) R. v. Knight, 12 Cox, C. C. R. 102. R. v. Davies, 11 Cox, C. C. 227.

Where, upon an indictment for stealing a hat, it appeared that the prosecutor, having his hat knocked off by some one, the prisoner, who had his own hat on his head, picked up the prosecutor's hat, and carried it home; J. A. Park, J., said, in summing up, 'If a person picks up a thing, when he knows that he can immediately find the owner, and, instead of restoring it to the owner, he converts it to his own use, this is felony.' (u)

**Money found in the house by a servant.** — Upon an indictment for stealing four £5 notes in the dwelling-house of her master, it appeared that the prisoner, when asked by her master what she had done with the money, at first said, she had not seen it, but afterwards said, she found the notes in the passage of the house; and it was contended that, if that statement were true, the prisoner was not guilty of felony, as their being in the passage would not necessarily lead to the conclusion that the notes were her master's property, and she might have supposed that they were dropped by some person, who had come to the house. J. A. Park, J., 'It is suggested that this is not a felony, because the prisoner might have found the notes in the passage. What passage? Why, the passage of her master's house. What, if I drop a ring, is my servant to take it away?' After referring to the case before Lawrence, J., (v) the learned judge proceeded, 'In the present case, there was no necessity for the prisoner to keep the property till it was advertised; for, as she found it in her master's passage, she should have ascertained whether it was her master's; at least, she should have asked him that question.' (w)

**Money found in second-hand bureau.** — The point arose in the Court of Chancery upon the following facts. Ann Cartwright died possessed of a bureau, in a secret part of which she had concealed nine hundred guineas *in specie*. After her death, Richard Cartwright, her personal representative, lent the bureau to his brother Henry; who took it to the East Indies and brought it back, without the contents of it being discovered. It was then sold to a person named Dick for three guineas, who delivered it to one Green, a carpenter, for the purpose of repairing it. Green employed a person named Hillingworth, who found out the money. Hillingworth received only a guinea for his trouble; but, in consequence of his discovery, the whole sum of nine hundred guineas was secreted by Green, by Green's wife, and by one E. Sharp, and converted to their own use. On these suggestions, Cartwright, the personal representative of the original owner of the bureau, filed a bill of discovery against Green and his wife, and Mrs. Sharpe; in which bill Dick joined, but did not claim any of the money on his own account; and the defendants demurred to the bill on the ground that an answer to the discovery sought might subject them to criminal punishment. After the argument upon this demurrer, the Lord Chancellor said, that the real question was, whether the bill charged a felony, and that the distinctions upon that point were so extremely nice, that he should not trust himself to say anything upon them until he had seen all the cases, and consulted some of the judges. Some time afterwards his Lordship delivered his opinion,

(u) R. v. Pope, 6 C. &amp; P. 346.

(v) *Supra*, note (r).

(w) R. v. Kerr, 8 C. &amp; P. 176, J. A. Park, J.

and said, 'I have looked into the books, and have talked with some of the judges and others; and I have not found in any one person a doubt that this is a felony. To constitute felony, there must, of necessity, be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt that this bureau being delivered to Green, for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly; but not being entrusted with it for the purpose of opening it, that is felony, according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it.' (x)

Where a person purchased at a public auction a bureau, in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use, and at the time of the sale no person knew that the bureau contained anything whatever, it was held that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use; but that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was not larceny. To an action for false imprisonment, the defendants pleaded that the plaintiffs stole a purse containing money, the property of one Tunnicliffe, and that they gave him in charge to a peace officer to be taken before a magistrate to be examined concerning the premises. (y) At the trial it appeared that at a sale by public auction, in October, the plaintiff purchased for £1 6s. an old bureau, the property of Tunnicliffe: the plaintiff kept the bureau in his house, and on the 18th of November following, Garland, a carpenter's apprentice, while doing some repairs to the bureau, remarked to the plaintiff that he thought there were some secret drawers in it, and touching a spring he pulled out a drawer, which contained some writings; the plaintiff then discovered another drawer, in which was a purse containing several sovereigns and other coins, and under the purse a quantity of bank notes. Of this property the plaintiff took possession, and telling Garland that the notes were bad, he opened the purse, and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came in

(x) Cartwright v. Green, 8 Ves. 405. 2  
Leach, 952.

(y) The replication was *de injuria*.

possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the money to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants went with a police officer to the plaintiff's house, took him into custody, and conveyed him before a magistrate on a charge of felony, when he was discharged, the magistrate doubting whether a charge of felony could be supported. A witness stated that after the bureau was sold, some one of the bystanders observed that the plaintiff might have bought something more than the bureau, as one of the drawers would not open, upon which the auctioneer said, 'so much the better for the buyer; I have sold it with its contents.' The auctioneer, however, stated that there was one drawer which would not open, and that what he said was, 'that is of no consequence; I have sold the secretary, but not its contents.' It did not appear that any person knew that the bureau contained anything whatever. Tindal, C. J., told the jury that, as the property had been delivered to the plaintiff, as the purchaser, he thought there had been no felonious taking, and left to them the question of damages only, reserving leave for the defendant to move to enter a nonsuit; and after argument, and time taken to consider, the following luminous judgment was delivered by Parke, B.: 'We have come to the conclusion that, if the defendants' case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff, which ought to have been left to the jury, and which, if believed by them, would have given a colourable right to him to the contents of the secretary, as well as to the secretary itself, viz., the declaration of the auctioneer, that he sold all that the piece of furniture contained, with the article itself; and then the abstraction of the contents could not have been felonious. There must, therefore, be a new trial. But if we assume, as the defendants' case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary, if there happened to be anything in it; and, indeed, without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny. It was contended, that there was a delivery of the secretary, and the money in it, to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that, though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding, applies to this. The old rule that, "if one lose his goods, and another find them, though he convert them *animo furandi* to his own use, it is no larceny," (s) has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is,

(s) 3 Inst. 108.

or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny. (a) Under this head fall the cases where the finder of a pocket-book with bank notes in it, with a name on them, converts them *animo furandi*; or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain; or a tailor who finds and applies to his own use a pocket-book, in a coat sent to him to repair by a customer whom he must know: all these have been held to be cases of larceny, and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny unless the taking would be a trespass, and that is true; but, if the finder from the circumstances of the case must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also from *Wynne's case*, (b) that if, under the like circumstances, he acquire possession, and mean to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny. We, therefore, think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a colour of right to the property.' (c)

**Intent to steal subsequent to finding.** — The prisoner found two heifers which had strayed upon the public road, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on his (S.'s) marshes, and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property, to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found (1) that at the time the prisoner found the heifers he had reasonable expectations that the owner could be found, and that he did not believe that they had been abandoned by the owner; (2) that at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently; (3) that the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use. Held, that upon the second finding a conviction of larceny, or of larceny as a bailee, could not be sustained. (d)

On an indictment for stealing a bag and papers, it appeared that an attorney's clerk had left the bag on a bench in the outer room of the Masters' office of the Queen's Bench, while he went into the inner

(a) *Ante*, p. 196.

(b) *Ante*, p. 200. This position is at variance with *Milburne's case*, 1 Lew. 251, and with 2 East, P. C. p. 685, and does not seem fairly deducible from *Wynne's case*, as there the prisoner must have known the box was put in the coach; and as he assisted in taking out the luggage, his leaving the box behind was evidence of an intention at that

time to convert it to his own use. There was no evidence of his intending to restore it, but a statement after he was in custody that he had been the same day to the prosecutor's for that purpose, of the truth of which nothing is stated in the report. C. S. G.

(c) *Merry v. Green*, 7 M. & W. 623.

(d) *R. v. Matthews*, 12 Cox, C. C. R. 489.



room to transact some business. There he saw the prisoner, who was asking charity, and who in a few minutes left the room. On returning to the place where the bag had been left, the prosecutor missed it. As he was returning to his employer's chambers, he met the prisoner in the street with the bag; on being given into custody, the prisoner said that he took the bag believing that it had been accidentally left in the office by the owner, and that his intention was to restore it to him. On a former occasion some papers, which had been missed by the prosecutor, had been brought to his office by the prisoner, who received a shilling for his trouble. The Recorder, after consulting Erle, J., told the jury, 'You must be satisfied that the prisoner took this property against the consent of the owner, and for the purpose of gain. I am of opinion that it is not essential to the sustaining of this charge that he had an intention of converting this bag permanently to his own use. I will ask you, first, whether you think he took it with the intent to exact a reward from the owner for its restoration, and with a determination not to restore it unless such reward were given to him? If such is your view of the circumstances, I shall have no hesitation in saying that the prisoner has committed larceny. Or, secondly, do you think that, having reasonable grounds for believing that the bag belonged to some person in the inner office, who had deposited it there for a short time until he should return for it, the prisoner took it with an intention of returning it absolutely, and at all events taking the chance of any reward being given him for the pretended service? Even in this case I am of opinion that he would be guilty of larceny; but I would reserve that question.' (e)

Upon an indictment for stealing a watch, the evidence seemed to prove that the prisoner had found the watch, and subsequently appropriated it to his own use. It was therefore contended, on the part of the prosecution, that if at the time the prisoner found the watch, he took possession of it with a view of stealing it, or if he found the watch, and intended to detain it until a reward was paid for the same, he was guilty of larceny. The jury delivered the following written verdict, the words in italics having been subsequently added by the jury after explanation by the Court:—'Not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward, *from the time he first had the watch*;' and, upon a case reserved, it was held that taking the finding in conjunction with the facts, the prisoner could not be deemed to have committed the offence of larceny. The jury had found the prisoner 'not guilty of stealing,' and there was no finding that the prisoner feloniously took the watch; they had, therefore, acquitted him. (f)

On an indictment for stealing a banker's cheque for £82 19s. laid in one count as the property of J. Goldsmith, and in another as that of T. Boucher, it appeared that Boucher, a lad of fourteen, found the cheque, and shewed it to the prisoner, who told him that it was only an old cheque of the Royal British Bank, and that he wished to shew it to a friend, and so kept the cheque. Boucher could not read; he

(e) R. v. Spurgeon, 2 Cox, C. C. 102, December, 1846. The jury found that the prisoner took in order to exact a reward, and would not have returned the bag without a

reward. In this case there clearly was no loss at all.

(f) R. v. York, 1 Den. C. C. R. 835. 2 C. & K. 841. A. D. 1848.

went to the prisoner's shop the same day, and asked for the cheque; the prisoner from time to time made various excuses for not giving up the cheque: and Boucher never saw it again. The prisoner saw Goldsmith, and said he knew the cheque was Goldsmith's, asked what reward was offered, and on being told five shillings, said he would rather light his pipe with it than take five shillings. The cheque had never been received either by Goldsmith or Boucher. The jury found that 'the prisoner took the cheque from Boucher in the hopes of getting the reward; and, if that is larceny, we find him guilty;' and, upon a case reserved, it was held that these facts did not shew any felonious taking. The mere withholding of the cheque under the circumstances did not amount to such a taking as is required to constitute the offence of larceny. (g)

On an indictment for larceny, it appeared that some timber had been severed from a raft on the high seas and stranded; it bore the owner's mark. The prisoner removed the timber from the shore to his own house, and effaced the marks. On the following day he gave notice of the possession of the timber to the agent of the Receiver General of Admiralty droits. Cresswell, J., told the jury, 'There are two questions for your consideration, Did the prisoner take this timber feloniously for the purpose of converting it to his own use, or did he take it with intent, by defacing the marks so that it might not be identified, that it might become a droit of the Admiralty, which would entitle him to the salvage? Should you be of opinion that the latter was his intent, a delicate question will arise whether that would be sufficient to constitute a felony—a point of which I have considerable doubt, and which I shall reserve.' (h)

Upon an indictment for stealing a lamb, it appeared that the prosecutor had ten white-faced lambs in a field, and that the prisoner was allowed to put twenty-nine black-faced lambs into the field for a night's keep, for one penny a-head. The next day the prisoner went to one Calvert and asked him to buy twenty-nine lambs, which he agreed to do; Calvert counted the lambs, and informed the prisoner that there were thirty instead of twenty-nine, and pointed out to him a white-faced lamb, upon which he said, 'if you object to take thirty I will draw one;' Calvert, however, bought and paid for the whole. The white-faced lamb was proved to be one of the ten belonging to the prosecutor, and it appeared that the prisoner must have taken the lambs from the field early in the morning, which was thick and rainy. The Chairman told the jury that, though the prisoner did not know that the lamb was in his flock till it was pointed out to him, he should rule that in point of law the taking occurred when it was pointed out to the prisoner and sold by him and the jury having found that at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him, it was held, upon a case reserved, that the prisoner committed a trespass when he drove the lamb out of the field, though that was not a felonious trespass, and that the prisoner,

(g) *R. v. Gardner*, L. & C. 243. A. D. 1844. The jury found the prisoner guilty of feloniously taking it for his own use.

(h) *R. v. Watts*, 1 Cox, C. C. 349. A. D.

being originally a trespasser, continued a trespasser all along, and the moment he sold the lamb with a felonious intent he became a thief. (i)

## SEC. VII.

*The Taking, &c., must be Animo Furandi.*

The taking and carrying away must be felonious, that is, done *animo furandi*.

One of the most material considerations respecting the taking and carrying away of goods necessary to constitute larceny is, whether the fact were done *animo furandi* — ‘*cum animo dico, quia sine animo furandi non committitur.*’ (j) The ordinary discovery of such felonious intent is where the party commits the fact clandestinely, or, upon its being laid to his charge, denies it: but this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi*. It is useful to refer to those points which have already come under consideration: but new cases will continually occur, in which the felonious intent must be left, upon the particular circumstances, to the due and attentive consideration of the Court and jury, who will not forget the excellent rule, that in doubtful cases it is proper rather to incline to acquittal than conviction. (k)

**Where the taking is only a trespass.** — It is clear that the taking, though wrongful, may only amount to a trespass. Thus, if a man takes away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner or of other persons who are known to the owner. (l) And the evidence of its being only a trespass will be strong, where a person, having possessed himself of the goods of another, avows the fact before he is questioned. (m) Again, if a man leaves a harrow or plough in a field, and another person who has land in the same field uses those instruments, and having done with them, either returns them to the place where they were, or acquaints the owner with his having taken them, this is no felony, but at most a trespass. (n) And the same conclusion must be drawn where a man, having cattle upon a common which he cannot readily find, takes his neighbour's horse which is depasturing on the common, rides about upon it to find his cattle, and when he has done with it turns it again upon the common. (o) But the case will not be so clear where the property is taken without the privity or leave of the owner, and no intention to return it is manifested by the party by whom it was taken.

Where two men were indicted for stealing a mare and a gelding, it

(i) *R. v. Riley*, Dears. C. C. 149.

(j) *Ante*, p. 121.

(k) 1 Hale, 509. 4 Blac. Com. 232.

(l) 1 Hale, 509.

(m) 2 East, P. C. c. 16, s. 98, p. 661.

(n) 1 Hale, 509. 4 Blac. Com. 232.

(o) 1 Hale, 509.

appeared that they went to the stables of the prosecutor at a place called Petty France, in the night-time, and took out the mare and the gelding, and rode on them to Lechdale, a place about thirty miles off, where they took them to different inns, and left them in the care of the ostlers, directing the ostlers to clean and feed them, and saying that they should return in three hours: and in the course of the same day the prisoners were taken at a distance of fourteen miles from Lechdale, walking towards Farringdon, in Berkshire, in a direction from Lechdale. The jury, having been directed to consider whether the prisoners, when they took the mare and gelding, intended to make any further use of them than to ride them for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out, found the prisoners guilty; but they added that they were of opinion, that the prisoners meant merely to ride the horses to Lechdale, and to leave them there; and had no intention to return for them, or to make any further use of them. At a conference of the judges this finding was considered; when one of them (*p*) thought that the case amounted to felony because there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them: and another of the judges appears to have entertained doubts upon the case. (*q*) But the rest of the judges held it to be only a trespass, and no felony, as there was no intention in the prisoners to change the property, or make it their own, but only to use for the particular purpose of saving their labour in travelling. They agreed, however, that it was a question for the jury; and that, if the jury had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned. (*r*)

Where the prisoner took away a horse and other property all together, and after going some distance turned the horse loose and proceeded on foot to a place where he was stopped attempting to sell some of the other property; it was left to the jury to say, whether the prisoner had any intention of stealing the horse; for that, if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for that purpose, he would not be in point of law guilty of stealing the horse. (*s*)

Where on an indictment for horse stealing, it appeared that the horse was taken by the prisoner out of a stable near where he lived, at Byton, with a bridle, and ridden by him to Bewdley on his way to Birmingham, a distance of forty miles, where he left the horse at an inn, and it was contended that the prisoner, wishing to see Birmingham, merely took the horse to assist him along the road; Atcherly, Serjeant, told the jury that 'if a person, without leave or authority, takes a horse for frolic, or any purpose, without intent to steal, he is not guilty of felony. This intent must be gathered from the circum-

(*p*) Grose, J.

(*q*) Lord Alvanley. It appears that his lordship, who had been recently called to the Bench of C. B., not having been present when the case was first under consideration,

declined giving any express opinion. 2 East, P. C. c. 16, s. 98, p. 663, note (*a*).

(*r*) R. v. Phillips, 2 East, P. C. c. 16, s. 98, p. 662.

(*s*) R. v. Crump, 1 C. & P. 658. Garrow, B.

stances, especially from the disposition to sell the animal. In this case the prisoner does not appear to have ever offered the horse for sale; but when he arrived at the inn at Bewdley, he had the horse fed, and then went to sleep elsewhere, and, moreover, he returned to the neighbourhood whence he took the horse and where he was well known.' (t)

The prisoner took from the house in the night a young girl's bonnet, and some other articles of her dress, and carried them to a hay-mow where he had twice had connection with her; and the jury thought that he only took them in order that she might again go to the mow, and that he might have another opportunity of soliciting her to repeat the connection. Upon a case reserved, the judges thought the taking with such an intent was not felonious, and the prisoner was pardoned. (u)

Upon an indictment for stealing one hundred pounds weight of copper ore, the property of S. Davey and others, it appeared that Davey and others were the adventurers in a mine, and the prisoners and two others were tributers in the mine, but not adventurers. The prosecutors were tributers also in the mine, but not adventurers. Tributers (generally in companies of four) take from the adventurers a certain number of yards in the mine, called a pitch, from which they dig out ore, and throw it into a heap or pile in some level, whence they convey it along the level to a shaft, and so up to the surface, where it is taken by the adventurers, and the tributers do not interfere further. The tributers are paid according to their agreement, so much in the pound on the selling price of the ore: where it is very good they receive a smaller sum than where it is inferior, because the same quantity of labour (which is what they contribute), produces a more valuable commodity in the one case than in the other. The prosecutors' pitch contained better ore than the prisoners'. The prosecutors received 2s. 4d. in the pound from the adventurers, the prisoners, 5s. 6d. The prisoners had taken a large quantity of ore from the prosecutors' pile, and added it to their own. It was objected that by taking ore out of one pile, and putting it in another, the prisoners did not steal from the adventurers, for both piles remained in the possession of the adventurers, if the tributers were but servants; and if the tributers were tenants in common, still, as both piles were intended to come, and ultimately would come into the hands of the adventurers, there could be no stealing from them. For the prosecutors it was answered that the adventurers were cheated, for they would have to pay 5s. 6d. in the pound on the ore removed to the prisoners' pile, whereas, if it had remained in the prosecutors' pile, they would pay only 2s. 4d. in the pound; and besides, that the unauthorised removal of the ore from the prosecutors' pile, with a fraudulent intention to appropriate it to their own benefit, was a larceny the moment it was removed, which could not be cured by returning it in any way to the adventurers; and the learned judge (v) who tried the case, thought a

(t) *R. v. Addis*, 1 Cox, C. C. 78. This case does not warrant the marginal note. 'It is not felony to take a horse and ride him forty miles away, there leaving him, if there was no attempt to sell or dispose of him.'

(u) *R. v. Dickinson*, MS. Bayley, J., and R. & R. 420.

(v) Patteson, J., who differed from the other judges on the case reserved.

larceny was proved; but upon a case reserved, the judges held the conviction wrong. (*w*)

In consequence of the preceding decision the 2 & 3 Vict. c. 58, s. 10, was passed; but that clause is repealed, and by the 24 & 25 Vict. c. 96, s. 39, 'Whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (*x*)

Where an indictment on the repealed clause alleged that the prisoners being employed in a certain mine, called Carn Brea mine, within the County of Cornwall, three thousand pounds weight of copper ore, the property of Joseph Lyle and others, the adventurers in the said mine called Carn Brea mine, then and there being found, then and there feloniously did take and remove, with intent then and there feloniously to defraud the said Joseph Lyle and others; Cresswell, J., held the indictment bad for not alleging that the ore was in the mine when it was removed. (*y*)

The prisoner, who was indicted for stealing skins, was employed by the prosecutors, who were tanners, to dress skins of leather. The skins when dressed were delivered to the foreman, and every workman was paid in proportion to the work done by himself. The skins were afterwards stored in a warehouse adjoining the workshop. The prisoner got access clandestinely to the warehouse, and carried away the skins in question, which had been dressed by other workmen. The prisoner did not remove the skins from the tannery, but they were recognised the following day at the place where he usually worked in the workshop. It was a common practice at the tannery for one workman to lend work, that is to say, skins dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman, and get paid for it on his own account as if it were his own work. A question arose as to the intention of the prisoner in taking the skins from the warehouse. The jury found that the prisoner did not intend to remove the skins from the tannery, and dispose of them elsewhere, but to deliver them to the foreman and get paid for them as if they were his own work, and in this way he intended the skins to be restored to the possession of his masters. And upon a case reserved upon the question, whether on the finding of the jury the prisoner ought to have been convicted of larceny, the judges held that he ought not. If this case could be considered open upon the authorities, there seemed great reason to hold that it was a larceny, but that as the Court had so lately determined, in *R. v. Webb*, (*z*) that the intention of the taker must be to deprive

(*w*) *R. v. Webb*, R. & M. C. C. R. 481.

(*x*) The repealed clause was confined to Cornwall. The new clause extends to England and Ireland.

(*y*) *R. v. Trevenner*, 2 M. & Rob. 476.

(*z*) *Supra*, note (*w*).

the owner wholly of the property, the conviction could not be supported. All the cases shew that if the intention were not to take the entire dominion over the property, that is no larceny. Therefore here there is wanting the essential element of larceny, viz., the intention to deprive the owner wholly of his property. (a)

So where the prisoners were indicted for stealing gloves from their master, a glovemaking, and it appeared that when they had done any work, the practice was to take the finished gloves to an upper room, and lay them on a table, in order that the workmen might be paid according to the number finished. The prisoners broke open a store-room, on the premises of the master, took out a quantity of finished gloves, and laid them on the table in the upper room, also part of the same premises, with intent fraudulently to obtain payment for them as for so many gloves finished by them; upon a case reserved, it was held, on the authority of the preceding case, that this was not larceny. (b)

Upon an indictment for larceny against Manning and Smith, it appeared that Manning was in the service of the prosecutor, and had the care of his warehouse, in which the bags which the prosecutor used in his trade as a potato dealer were kept. Smith had for some years supplied the prosecutor with bags, which he made, and from time to time, when he had finished a lot, his custom was to take them, and put them down at the warehouse door of the prosecutor, and shortly afterwards either he or his wife used to come and receive payment for them from the prosecutor. One morning Manning brought out of the warehouse twenty-four bags, which had been marked by the prosecutor, and put them at the place where Smith used to deposit the bags he brought for the prosecutor. Shortly afterwards Smith's wife came, and asked payment for them as for bags that her husband had brought there that morning: upon this Smith was sent for, and asked whether he had brought those bags there; he said 'Yes, and that he and his wife had been working at them till twelve o'clock the night before.' 'Nay,' said the prosecutor, 'those bags are mine.' 'Yes,' replied Smith, 'they will be yours when you have paid for them.' The prosecutor then pointed out the marks on them. The jury were told that if they were satisfied that Manning

(a) *R. v. Holloway*, 1 Den. C. C. 370. 2 C. & K. 942. (Cf. *R. v. Richards*, 1 C. & K. 532, *post*, p. 220, and *R. v. Hall*, 1 Den. C. C. 381, *post*, p. 214.) It is well worthy of notice that in this case the prisoner never claimed either the property in, or the possession of the skins; all at the utmost that he assumed was the mere custody as a servant. The like observation applies to *R. v. Webb*. These cases, therefore, entirely differ from those where a person, not a servant, takes possession of a chattel even for a temporary purpose. In the course of the argument, Alderson, B., said, 'If a servant takes a horse out of his master's stable, and turns it into a road with intent to get a reward the next day by bringing it back to his master, would he be guilty of larceny?' In fact, this case is precisely the same as if the prisoner had never removed the skins at all

(for the removal made no change in the property or possession), but had merely alleged that he had dressed a number of skins lying on the floor of the warehouse, and thereby had obtained the amount that would have been due to him if he had dressed those skins. C. S. G.

(b) *R. v. Poole*, D. & B. C. C. 345. Crompton, J., said, 'If this had been the first time the point had been raised. I should have been inclined to think that there was sufficient here to make out the *lucri causa*. But that is clearly not the question; the *lucri causa* exists as much in false pretences as in larceny; and the question in these cases is, did the prisoner intend to assume such a dominion over the goods as was wholly inconsistent with the master's ownership?'

brought his master's bags out of the warehouse and placed them by the door for the purpose of enabling Smith to receive payment for them from his master, and with intent that he should do so as if they had been new bags finished by Smith, for which he was entitled to be paid, that that would be larceny; and if they were satisfied that this had been done so by Manning in pursuance of previous engagement between him and Smith, that Smith, though absent when the bags were so removed, would be an accessory before the fact to the larceny; and the jury having found that the bags had been so removed for the purpose, and with the intent aforesaid, and that the same had been done in pursuance of a previous arrangement between him and Smith, and having found both guilty; it was held, upon a case reserved, that the direction to the jury was right, and that both prisoners had been properly convicted. (c)

On an indictment for stealing fat it appeared that the prisoner was a servant of the prosecutor, who was a tallow-chandler. The prosecutor, entertaining some suspicion, marked a quantity of fat, which was in a room above his candle-room. In the latter room was a pair of scales used in weighing the fat the prosecutor bought for the purpose of his trade. When the prisoner went to dinner there was no fat in the scales, and the warehouse was locked. The prisoner returned and asked for the keys of the warehouse, and went in, taking nothing in with him. In a short time he returned the keys to the prosecutor and went away. The prosecutor then went into (the room over) the candle-room, and found that all the fat he had marked had been removed, put into a bag, and placed in the scales in the candle-room. The prosecutor then went into the street and met one Wilson and the prisoner. The latter on being asked where the fat came from that was in the scales, said it belonged to a butcher named Robinson; and Wilson, in the prisoner's presence, stated that he had come to weigh the fat, which he had brought from Robinson's. The prosecutor told Wilson he would not pay him for the fat until he had seen Robinson, and left the warehouse for that purpose. Wilson and the prisoner then ran away. The jury were directed that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room, and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to Robinson, and with the intention of appropriating the proceeds to his own use, the offence amounted to larceny. The jury convicted, and upon a case reserved, the judges were all of opinion that the offence was larceny. The prisoner took the fat intending to deal with it as his own; to treat it as the property of the alleged vendor. The intention was that the fat should never revert to the owner as his own property except by sale. It was, therefore, severed from the owner completely, unless he chose to buy back what was in truth his property. The only question attempted to be raised here was as to the *animus furandi*, the intent to deprive the owner of his property. What better proof could there be of such intent than the assertion of such a right of ownership by the prisoner as to entitle him to sell it? (d)

(c) *R. v. Manning*, Dears. C. C. 21.

(d) *R. v. Hall*, 1 Den. C. C. 381. 2 C. & K. 497. In the course of the argument,

Coleridge, J., asked, 'If A. takes the horse of B. wrongfully, keeps it a month, disguises it, and then sells it back to B. as a new



**Stealing railway tickets.**—The prisoner was indicted for stealing three railway tickets and three pieces of paste-board, laid in one count as the property of the London and North-Western Railway Company, and in another as that of the station-master at a station. The prisoner went into the ticket-office at the station, took out three first-class tickets for the journey from that station to York, and stamped them in the machine for February 8. The last train on that day for York had gone, and the prisoner in vain tried to restamp the tickets with another date. Tickets stamped for one day might be restamped for another day, and so rendered available. It was objected that there was no such absolute taking away without an intention to restore as to constitute the offence of larceny: but Patteson, J., held that it was a question for the jury, whether the prisoner took the tickets with an intention to convert them to his own use and defraud the Company of them; and told the jury that if the prisoner took the tickets with intent to use them for his own purposes, whether to give to friends, or to sell them, or to travel by means of them, it would not be the less larceny, though they were to be ultimately returned to the Company at the end of the journey. (e)

Where it appeared that a mare was missed, and the next day the prisoner said that if the prosecutor would get the agent to pay the prisoner £8 or £9, some of the neighbours would go and find the mare, and that unless the matter was settled, the mare would be removed a day's journey; and thereupon it was agreed by the prosecutor's son to give the prisoner £12, as he could not get the mare otherwise, and ultimately the prosecutor paid the prisoner £6, and the mare afterwards was returned; the jury were told that if the prisoner had got some person to take away the mare with the intention of obliging the prosecutor to pay him a sum of money for the return of the mare, which in fact he knew he had no claim for, it was a felonious stealing of the mare, and they convicted the prisoner; and, upon a case reserved, on the question whether the direction to the jury was correct, it was held that the conviction was right, and that the jury were right in their finding, as there was evidence to justify such a finding. (f)

A taking of another's property may also be by mistake, arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and, by mistake, without knowing or taking heed of the difference, shear them, it is no felony. But if B. knew them to be the sheep of another person, and tried to conceal that fact; if, for instance, finding another's mark upon them, he defaced it, and put his own mark upon them, this would be evi-

horse, is that larceny?' It was answered, No. Alderson, B.: 'Then if a man stole (took) a bank note, and brought it to the owner to be changed, it would be no larceny.'

(e) R. v. Beecham, 5 Cox, C. C. 181. Patteson, J., also held that the station-

master had no property in the tickets. See R. v. Boulton, 1 Den. C. C. 508. R. v. Kilham, 39 L. J. M. C. 109, *post*, 'False Pretences.'

(f) R. v. O'Donnell, 7 Cox, C. C. 337. This decision was in Ireland. See the case, *post*.<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> The same has been held in America, see C. v. Mason, 105 Mass. 163, 7 Am. R. Berry v. S., 31 Ohio St. 219, 27 Am. R. 506. 507.

dence of felony. (g) And a like conclusion may be drawn, where a party having possession of another's property, appears desirous of concealing it, or of preventing the inspection of the owner, or of any person who may make the discovery; or where, being asked, he denies having the property, though it is clear that he knew of its being in his possession. On the other hand, a mode of conduct of a different description in these several respects will be evidence to rebut any felonious intent. (h)

**Man stealing his own goods.**—A man may be guilty of felony in taking his own goods; namely, where, having bailed them to another person, he afterwards steals them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred. (i) But, if A. take away the trees of B., and cut them into boards; or, if A. take the cloth of B. and make it into a doublet; B. may take the boards or the cloth, and it will not be felony. (j) So if A. take the hay or corn of B., and mingle it with his own heap or cock, or take B.'s cloth, and embroider it; B. may retake the whole heap of corn or cock of hay (at least so much of them as cannot be easily distinguished from his own), and the garment with the embroidery; and such retaking will be no felony. (k)

**Goods taken by a claim of right.**—If goods be taken on a claim of right or property in them, it will be no felony; at the same time it is matter of evidence whether they were *bona fide* so taken, or whether they were not taken from the person actually possessing them, with a thievish and felonious intent. And, therefore, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretence of law, and then running away with them, would be a felony. (l) Where a keeper found snares, which had been set by the prisoner, with game in them, and took the game and snares for the use of the lord of the manor, and the prisoner demanded them with menaces, and the keeper thereon gave them up; it was left to the jury to say, whether the prisoner acted under a *bona fide* impression that he was only getting back the possession of his own property: for although he might be liable for a trespass, yet, if he demanded them under a *bona fide* belief that he was entitled to them as his property, he would not be guilty of larceny. (m) If the owner of land upon which a horse has strayed take the horse *damage feasant*, or if the lord of a manor seize a horse as an estray; though perchance he has no title so to do, yet as the act is not done *felleo animo*, it will not be felony. (n) But any act of this kind is open to proof of a felonious intention; so that if new marks are given to the horse to disguise him, or his old marks are altered, these will be considered as presumptive circumstances of a thievish intent. (o)

(g) 1 Hale, 506, 507.

(h) 2 East, P. C. c. 16, s. 97, p. 661.

(i) 1 Hale, 513. 2 East, P. C. c. 16, s. 95, p. 659. 3 Inst. 110.

(j) 1 Hale, 513.

(k) 1 Hale, 513. 2 East, P. C. c. 16, s. 95, p. 659.

(l) 3 Burn's J. D. & W. 414, citing 1

Hale, 507. 1 Hawk. c. 33, s. 8. Farre's case, Kel. 43.<sup>1</sup>

(m) R. v. Hall, MS. C. S. G., and 3 C. & P. 409, Vaughan, B. See this and other cases, *ante*, p. 83, and see R. v. Holloway, 5 C. & P. 524.

(n) 1 Hale, 506, 509.

(o) 2 East, P. C. c. 16, s. 95, p. 659.

#### AMERICAN NOTE.

<sup>1</sup> See also S. v. Bond, 8 Iow. 540.

In a case where, after a seizure of uncustomed goods, some persons broke at night into the house where they were deposited, with a design to retake them for the benefit of the former owner, it was holden that any presumption of a felonious intent to steal, as laid in the indictment (which was for a burglary), was rebutted by the fact which the jury found, namely, that the prisoners intended to retake the goods on the behalf of their former owner. (*p*)

**Taking corn by gleaning.**—The following observations on the subject of a felonious taking of corn by *gleaning*, are made in a work, in which much useful matter is collected:—‘An idea very universally prevails among the lower classes of the community, that they have a right to glean, that is, to take from off the land the corn that remains thereon after the harvest has been gotten in; than which notion nothing can be more erroneous. By custom, indeed, such a right may possibly in some particular places exist; and the laudable kindness of tenants generally induces them to permit the poor to collect the corn they have left upon the land, and to appropriate it to their own use. As a right, however, it has no more existence than a right to take the tenant’s furniture from out of his messuage, and the pillage in the one case is as much felony as the plunder would be in the other: for the act is not simply a trespass, but a felony; and the compiler well remembers a conviction at the Old Bailey, on an indictment found for the exercise of this supposed right. The parties were tried before Rooke, J. (if he mistake not), about six years ago.’ (*q*)

But upon this it is submitted, that though the right to take corn by gleaning has no existence, except possibly by custom in some particular places, (*r*) such a taking will not necessarily amount to a felony. Undoubtedly it will be an act open, like other acts of trespass which have been mentioned, to proof of a felonious intention, upon which it is peculiarly the province of the jury to determine; but it can hardly be contended that such taking will amount to larceny, if it should appear to have been merely a taking of the corn left on the ground after the crop had been carried, and to have been done openly, under a claim of right not altogether without colour, though not capable of being established by proof, or to have been done under an apparent sanction, arising from former similar acts of the same individual, or of others in the neighbourhood, having been allowed by the occupier of the land.

It has been observed, with respect to cases where goods have been taken on a claim of right, that if there be any fair pretence of property or right of the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal. (*s*) The master of a Prussian vessel, captured by a British ship, and carried into the port of Weymouth, was held not to be guilty of larceny in taking goods from the vessel under the particular circumstances; there being no evidence that he took them for the purpose of converting them to his own private use. (*t*)

Where there is clearly the *animus furandi* in some of the parties con-

(*p*) *R. v. Knight*, 2 East, P. C. c. 15, s. 22, p. 510, and c. 16, s. 95, p. 659.

(*q*) Woodf. Landlord and Tenant, chap. ix. p. 242 (Ed. 1814).

(*r*) *Steel v. Houghton & Wife*, 1 Hen. Blac. 51. *R. v. Price*, 4 Burr. 1925.

(*s*) 2 East, P. C. c. 16, s. 95, p. 659.

(*t*) *R. v. Van-Muyen, R. & R.* 118.

cerned in a felonious taking, it may be negatived as to another party, if it appear that such other party had a different object in view from that of obtaining any share of the stolen property. Donally was indicted for a burglary in the house of a Mr. Poole, and Vaughan as accessory before and after the fact to the 'said felony and burglary.' It appeared that Donally, at the instigation of Vaughan, who was in the employment of the Police office at Bow-street, had concerted with three other men, to rob the house of Mr. Poole, and that it was agreed that Vaughan and another officer should lie in wait to apprehend the three other men, and that the reward for their conviction should be divided amongst them. Vaughan had told Mr. Poole that his house would be robbed that night, desiring him to mark a piece of cloth, and leave it on the counter, to take care to fasten the latch of the door, and to make no resistance, as he should not lose anything; to which Poole consented, and left the house with Vaughan and the other officer to watch; which they did in a passage on the opposite side of the street. Mr. Poole's house was robbed by Donally and the three other men; and the three men who accompanied Donally were almost immediately apprehended by Vaughan and Barrett, and had been tried at a former sessions for burglary; but convicted only of stealing in the dwelling-house to the amount of 40s., in consequence of its being possible that the robbery was committed by day. Upon the present indictment against Donally and Vaughan, the jury acquitted Donally of the burglary, but found him guilty of stealing in the dwelling-house to the value laid in the indictment of £5, and Vaughan as accessory before and after the commission of the said felony and stealing in the dwelling-house. Upon this finding it was objected, that this could not be larceny in Donally, because not done *animo furandi*; and further, it was objected on behalf of Vaughan, that as the indictment was against him as accessory to a burglary committed by Donally, and as the jury had acquitted the principal of the burglary, the charge against the accessory must necessarily fail. The learned judge also doubted, with respect to Vaughan, whether he could be said to incite or procure Donally to commit an offence where he engaged him to take the part of apparently joining in it for the purpose of apprehending the offenders. Upon a case reserved, ten of the judges held the conviction wrong. They were of opinion that, as Donally was not present to aid or assist (though the other offenders thought he was) but to detect, and as he had no intent that the felony should be successful, he had not the felonious intention necessary to make him a principal, although he acted from a bad motive, viz., the reward. But several of the judges seemed to think that he was liable to be indicted as an accessory before the fact. Lord Ellenborough, and Holroyd, J., thought the conviction right; that although there was a clear intention that the felony should be discovered, yet there was another intention not inconsistent with the former, viz., that the felony should at all events be committed: and the presence of Donally did in fact aid and assist and countenance the commission of a felony. (u)

(u) *R. v. Donally*, R. & R. 310. S. C. the objection taken on behalf of the prisoner  
2 March, Rep. 571. From this decision it Vaughan.  
became unnecessary to give any opinion upon

## SEC. VIII.

*The Taking Lucri Causa.*

As noticed, *ante*, p. 122, a learned judge defined larceny as being 'a wrongful taking of goods with intent to spoil the owner of them *causâ lucri*,' but if this motive be a necessary ingredient, it appears that it is not confined to the acquisition of pecuniary advantages, or to the taking of the thing stolen for the sake of its worth.

The prisoner forced open a stable door, took out a horse, led it about a mile to an old coal pit, and there backed it down and killed it, his object being that the horse might not contribute to furnish evidence against one Howarth, who was under a charge for stealing it; he had no intention of deriving any pecuniary benefit from taking the horse. Thomson, C. B., saved the point, whether a taking with this intent constituted larceny; and, upon conference, six judges against five held it not essential that the taking should be *lucri causâ*: they thought a taking, *fraudulenter*, with intent wholly to prove the owner of the property, sufficient; but some of the six also thought that the object of protecting Howarth might be deemed a benefit or *lucrum*. (*v*)

Where a letter sorter in a post-office went to a water-closet, and, after he had placed himself upon the seat, put his hand between his legs, and he was immediately taken into custody, and two letters, sealed and unopened, lay on the paper in the pan, and the jury found that the prisoner, having committed a mistake in sorting the letters, secreted them in the water-closet, in order to avoid the penalty which was supposed to be attached to such a mistake; it was held, on a case reserved, that the prisoner was guilty of larceny; for he must have intended wholly to deprive the owners of the letters; the moment the prisoner dropped the letters in the water-closet there was an *asportavit*, and the intent was shewn by the place where they were dropped. (*w*)

The prisoner was convicted of stealing at Ross, from an officer of the post-office, a post letter. The prisoner had been cook to Mrs. Garbett of Upton Bishop, and had given notice to leave, and was in treaty with Mrs. Dangerfield of Cheltenham, for a similar situation. Mrs. D. had consented to employ her if a satisfactory answer from Mrs. G. should be returned to a letter making inquiries as to her

(*v*) R. v. Cabbage, MS. Bayley, J., and R. & R. 292.

(*w*) R. v. Wynn, 1 Den. C. C. 365, 2 C. & K. 859.

## AMERICAN NOTE.

<sup>1</sup> The law does not appear to be quite settled in America upon the question whether the taking *lucri causâ* is essential to the crime of larceny. The better opinion seems to be that it is not. And some of the Courts have laid it down as law that it is sufficient if there be a taking with intent to deprive the owner of his property, though no advan-

tage of any sort be gained by the taker. And this would appear to be the right doctrine if the true meaning be given to the words "deprive of his property." See Williams v. S., 52 Ala. 411. P. v. Juarez, 28 Cal. 380. Warden v. S., 60 Miss. 638. P. v. Woodward, 31 Hun. N. Y. 57. S. v. Davis, 38 N. J. L. 176. Pence v. S., 110 Ind. 95.

character. This letter, the subject of the present indictment, was written by Mrs. D., directed to Mrs. G., and posted at Cheltenham, and was duly forwarded to the post-office at Ross. Mrs. G. having found fault with the prisoner, discharged her from her service, and told her that a character would not be given to her. The day after her dismissal she went to the post-office at Ross, and applied to the clerk for the letter from Cheltenham, addressed to Mrs. G., stating that she was a servant of Mrs. G., and that Mrs. G. expected a letter from Cheltenham that morning, which she was to take; but on being informed that the one letter by itself could not be given, she took from the office all the letters for Mr. and Mrs. G., including that written by Mrs. D., and burnt it, but delivered the others to a person, who safely conveyed them to Mr. and Mrs. G. And, upon a case reserved, upon the question whether the taking and destroying of the letter under these circumstances amounted to larceny, all the judges present, except Platt, B., were of opinion that this was larceny; for supposing that it was a necessary ingredient in that crime, that it should be done *lucris causâ* (which was not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character. (x)

The prisoner was indicted for the offence of stealing an iron axle, the property of William Williams and others, his masters. It appeared that the prisoner was in the employment of Messrs. Williams, ironmasters, as a puddler; his duty being to convert pig iron into puddle bar; for which he was paid according to the weight of the puddle bar produced from his furnace: and that the prisoner threw into his furnace an iron axle belonging to his masters, which had formerly been used for a tram cart. It was proved that the value of the axle in its former state was from 6s. to 7s., and that the benefit to the prisoner was a little better than a penny. Tindal, C. J., told the jury that it was manifest the act done by the prisoner caused the destruction of the axletree in its former state, so that it never could be restored in specie to the masters as an axletree, though it might increase the mass of iron produced from the furnace: and if they were satisfied that the throwing the axle into the furnace was an act done by him without the consent and against the will of his masters, and that the pay of the prisoner was thereby increased, and that his object and motive was to obtain such increase of pay, all that was necessary, in point of law, to constitute a felony was made out. That the gain to the prisoner was indeed extremely small, in this particular instance; but that the character and nature of the offence did not depend upon the extent of the gain to the party offending or injury to the master: which, however, it must be observed, were extremely disproportionate to each other; and which loss to the masters might be carried almost to an incalculable amount by the opportunity of repeating the offence. (y)

(x) R. v. Jones, 1 Den. C. C. R. 188. 2 C. & K. 236. In the course of the argument, Pollock, C. B., said, 'For the prisoner's counsel's argument the case would be the same if the prisoner had picked the post-man's pocket of the letter. I see no difference. Will it be contended that picking a

rich man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?' Parke, B., 'Suppose you pick A.'s pocket to give to a beggar in the next street.' See R. v. Gillings, 1 F. & F. 36, post, 'Post Office.'

(y) R. v. Richards, Monmouth Sum. Ass.

Before the 26 and 27 Vict. c. 103, it was decided that clandestinely taking the master's corn, though to give the master's horses, was felony; especially if by so feeding them the servant's labour was likely to be diminished. (z)

By the 26 and 27 Vict. c. 103, s. 1: (a) 'If any servant shall, contrary to the orders of his master, take from his possession any corn, pulse, roots, or other food, for the purpose of giving the same or of having the same given to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not by reason thereof be deemed guilty of or be proceeded against for felony, but shall, on conviction of such offence before two justices of the peace, at their discretion, either be imprisoned, with or without hard labour, for any term not exceeding three months, or else shall forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of five pounds, and if such penalty shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour, for any term not exceeding three months, unless such penalty be sooner paid: Provided always, that if upon the hearing of the charge the said justices shall be of opinion that the same is too trifling, or that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the charge, without proceeding to a conviction: Provided also, that if upon the trial of any servant for feloniously taking from his master any corn, pulse, roots, or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under this Act, and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the Court before which such trial shall take place shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any person under the provisions of this Act: Provided also, that in case of non-payment of any penalty to be imposed by the Court on such servant, he shall be imprisoned, with or without hard labour, for any term not exceeding three months, as the Court shall order, unless such penalty be sooner paid.' (b)

A parcel containing letters was sent by a coach of which the prisoner was the proprietor, the prisoner, instead of delivering the parcel, opened it, read the letters, and disposed of them as he thought proper; and it was held, that this was a trespass and breach of contract, but no felony, although it was done to gratify some idle curiosity, or perhaps to prevent the letters from arriving. (c)

1844. Verdict, guilty. The text is a correct copy of C. J. Tindal's note of the case which he gave the Editor. S. C. 1 C. & K. 582. C. S. G.

(z) *R. v. Morfit*, MS. Bayley, J., and R. & R. 307. *R. v. Handley*, C. & M. 547, Patteson & Cresswell, JJ. But see *R. v. Privett*, 1 Den. C. C. R. 193. 2 C. & K. 114, Erle, J., and Platt, B. *R. v. Smith*, 1 Cox, C. C. 10, per Abinger, C. B., and Rolfe, B.

(a) The Act recites that 'the offence of taking corn or other food by a servant from the possession of his master, contrary to his orders, for the purpose of giving the same, or of having the same given, to the horses or other animals of such master, is felony.'

(b) Sec. 2 gives an appeal; and Sec. 5 confines the Act to England, so that the offence remains a felony in Ireland.

(c) *R. v. Godfrey*, 8 C. & P. 563, Lord Abinger, C. B.

The prisoner was indicted, for stealing pieces of paper, and it appeared that two very important despatches had been received in the Colonial Office, and that a certain number of copies of these despatches had been privately printed for distribution among the members of the Government, and some of them had been delivered at the Colonial Office, and placed on a table in that office; the prisoner had been in that office, and close to the table where the copies were lying, and shortly afterwards he sent one of these copies to the editor of the 'Daily News' newspaper, with a note marked 'private,' requesting that the despatch might be inserted in the 'Daily News,' and stating that no other journal had received a copy. The editor had no previous acquaintance with the prisoner. The editor wrote to the prisoner at the address mentioned in his letter, and he replied that it was 'all right,' but he did not wish his name to be mentioned in any way as connected with the publication. The despatches were published, and in consequence of a letter from the editor the prisoner called on him, and introduced himself as the person who had sent the despatches, and he pressed the editor not to give any further information. There was no pecuniary inducement for the act; but it rather appeared that the prisoner bore some resentment to the Colonial Minister for the refusal of an appointment. The editor stated that the only object for which the despatches were sent to him, as he understood, was that they might be published in the 'Daily News.' Martin, B., told the jury that the offence consisted in the taking away the property of another without his consent, and with the intention at the time to convert that property to the use of the taker. Such documents as these were clearly the subject of larceny, and as the stealing of the paper itself would have been a felony, the fact of the paper being printed made no difference: and the only question for the jury was, whether the evidence established to their satisfaction that at the time the prisoner took the documents away from the Colonial Office, he intended to deprive that office of all property in them, and convert them to his own use. (d)

## SEC. IX.

### *Goods in respect of which Larceny may be committed.*

#### *a. — Goods part of the Freehold.<sup>1</sup>*

By the common law, larceny cannot be committed of things which savour of the realty, and are, at the time they are taken, *part of the freehold*; whether they be of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings, and articles, such as lead, &c. annexed to buildings. (e) The severance and taking

(d) *R. v. Guernsey*, 1 F. & F. 394. See now *The Official Secrets Bill*, 1889, vol. I. p. 430.

(e) 3 Inst. 109. 1 Hale, 510. 1 Hawk. P. C. c. 33, s. 34. Bac. Ab. tit. *Felony* (A). 4 Blac. Com. 232. 2 East, P. C. c. 16, s. 27, p. 587.

#### AMERICAN NOTE.

<sup>1</sup> See *S. v. Hall*, 5 Harring. 492. *Jackson v. S.* 11 Ohio N. S. 104. *S. v. Burt*, 64 N. C. 619. *Bartlett v. Brown*, 6 R. T. 37.



of things of this description is, at common law, only a trespass. One reason for which doctrine (though it does not apply to the whole of the articles which have been enumerated) is said to be, that things which are a part of the freehold, being usually more difficult to remove, are less liable to be stolen: (*f*) possibly also, the doctrine may have proceeded upon certain subtleties in the legal notions of our ancestors; (*g*) and it may perhaps in some measure have originated in the greater security from private depredations of the things which were part of the freehold, than of those which were merely personal, in the earlier times, when articles of provision and other personal chattels (frequently the most valuable) were carried from place to place by the individual tenants, in that attendance in the camp which was exacted by their military tenures. (*h*)

But things, though they savour of the realty, may become the subjects of larceny by being severed from the freehold: thus, if stones be dug out of a quarry, wood be cut, fruit be gathered, or grass be cut, larceny may be committed of them. (*i*) And this will be the case, not only where they have been severed by the owner, but also by the thief himself, if there be an interval between his severing and taking them away; so that it cannot be considered as one continued act. If therefore the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at another time when they are so turned into personalty and take them away, it is larceny. (*j*) Thus, though 'if a thief severs a copper, and instantly carries it off, it is no felony at common law; yet if he lets it remain, after it is severed, any time, then the removal of it becomes a felony, if he comes back and takes it: and so of a tree which has been some time severed.' (*k*)

(*f*) 1 Hawk. P. C. c. 33, s. 34. 2 East, P. C. c. 16, s. 27, p. 587.

(*g*) 4 Blac. Com. 232.

(*h*) Bac. Ab. tit. *Felony* (A).

(*i*) 3 Inst. 109. 1 Hale, 510.

(*j*) 1 Hawk. P. C. c. 33, s. 34. 4 Blac. Com. 233. 2 East, P. C. c. 16, s. 27, p. 587. And so in 1 Hale, 510, it is said, 'But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel; and so it was agreed by the Court of King's Bench, 9 Car. 1, upon an indictment for stealing the lead of Westminster Abbey.' Dalt. c. 103, p. 166 (new edit. c. 156, p. 501). See *R. v. Townley*, *post*, p. 250.

(*k*) Per Gibbs, C. J., *Lee v. Risdon*, 7 Taunt. 191. When a demise of real property is made, anything annexed to the freehold continues part of the inheritance of the landlord, and becomes part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property

demised; and, therefore, when he separates any part of it, to convert it from a chattel real to a chattel personal, his right of using it is at an end for any legal purpose, that right being only to use it in the state in which it was before, and the person who has a right to the first estate of inheritance has a right to the immediate possession of the thing that has been severed, in the like manner as he has the right to the immediate possession of timber, where it is severed from the inheritance. Per Holroyd, J., *Farrant v. Thompson*, 5 B. & Ald. 826. And if a stranger sever a parcel of the freehold during the term, the part so severed immediately vests in the landlord, if he be owner in fee. *Berry v. Heard*, Cro. Car. 242. *Herlakenden's case*, 4 Rep. 62. But if the landlord has only an estate for life, the property vests in the owner of the inheritance. Per Lord Kenyon, *Gordon v. Harper*, 7 T. R. 9. See *Blackett v. Lowes*, 2 M. & S. 494, as to timber improperly cut by customary tenants vesting in the Lord of the Manor. See *R. v. Townley*, *post*, p. 250, particularly the judgment of Blackburn, J. As to severing grass and leaving it, see *R. v. Foley*, 17 Cox, C. C. 142.<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> *Bell v. S.*, 4 Bax. 426. *S. v. Bragg*, 86 N. C. 687, and see *Jackson v. S.*, 11 Ohio

*St. 104*, and *P. v. Williams*, 35 Cal. 671, where the rule is objected to, but followed,

This being the common law, and many of the descriptions of property which come within this notion of a connection with the freehold being thereby placed in a very precarious and unprotected situation, the Legislature from time to time interfered for their protection, and made the wrongful taking of them in some instances felony, and in others a minor offence, punishable by summary proceedings before a magistrate.<sup>1</sup> These provisions are for the most part amended and consolidated by the 24 & 25 Vict. c. 96.

**Ore of metal, coal, &c.** — By Sec. 38, 'Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (*l*)

**Metal, glass, wood, &c., fixed to house or land.** — Sec. 31. 'Whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any (*m*) land being private property, or for a fence to any dwelling-house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground, (*n*) shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; (*o*) and in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person.' (*p*)

In a case upon the 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68, where the prisoner was indicted for stealing a 'window casement made of iron, lead, and glass,' the property of the benchers of the Middle Temple, fixed to a certain building situate in Elm Court, it was holden that

(*l*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 37; and 9 Geo. 4, c. 55, s. 30.

(*m*) See *R. v. Richards*, R. & R. 28, decided under the repealed Act 4 Geo. 2, c. 32. The words of this Act differ from the present Act.

(*n*) It seems that stealing fixtures out of a churchyard was punishable under the former enactment, 7 & 8 Geo. 4, c. 29, s. 44. *R. v. Blick*, 4 C. & P. 377, *Bosanquet*, J. *R. v. Jones*, Gloucester Spring Ass. 1828, MSS. C. S. G. *R. v. Jones*, D. & B. C. C. 555. See *Davis's case*, 2 East, P. C. c. 16, s. 31, p. 593.

(*o*) *Post*, p. 296.

(*p*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 44, and the 9 Geo. 4, c. 55, s. 37 (1). The word 'sever' is added in order to include cases where the offender does not 'rip, cut or break'; e. g., where a fixture is unscrewed. The words of the former enactments were 'square, street, or other place,' &c.; they have been altered so that 'place, may not be limited to a place *ejusdem generis* with square or street. The words 'in any burial-ground' are added to do away with the doubts as to fixtures in churchyards, &c.

#### AMERICAN NOTES.

and *contra*, *ex parte Wilke*, 34 Tex. 155. *S. v. Berryman*, 8 Nev. 262. *S. v. Parker*, 34 Ark. 158, 36 Am. R. 5. See also *S. v. Hall*, 5 Harring. Del. 492. It seems to be a question for the jury whether the severance and

the carrying away were one act or two, see *Bradford v. S.*, 6 Lea, 634.

<sup>1</sup> In Ohio it was held to be larceny to steal a leathern-belt, connecting certain wheels in a saw-mill. *Jackson v. S.*, 11 Ohio St. 104.

the case was not within the Acts. The Court said that the statutes amongst the several articles which they enumerated did not mention '*a casement*,' and that as the 21 Geo. 3, c. 68, was made to remedy the defects of the 4 Geo. 2, c. 32, which mentioned every specific article by name, the words 'any copper, brass, bell-metal, utensil, or fixture,' were to be taken as substantive nouns, and not as descriptions of the sorts of fixtures which the Legislature intended to protect. (*q*) Such an offence, however, would be clearly within the provisions of the present statute upon an indictment properly framed.

Where the prisoner was indicted on the 4 Geo. 2, c. 32, for stealing two hundred weight of lead, fixed to a house and buildings, the facts were, that the house in question being to be let, the prisoner, giving a false description of his situation in life and his place of residence, obtained possession of it under a treaty for a lease of it for one and twenty years, which was agreed to be executed; and, in a few days after he had so obtained possession of it, stripped it of the lead on the roof, and of the leaden pipes, &c. The jury said that they were of opinion that he had entered into the contract for the purpose of getting a fraudulent possession of the house, and found a verdict of guilty: and, upon a case reserved, though no opinion was publicly delivered, the prisoner afterwards was sentenced. (*r*)

In an indictment under the 4 Geo. 2, c. 32, the first count charged that the prisoner 150 pounds weight of lead belonging to the Rev. C. G., then and there fixed to a certain building, called Hendon Church of the said C. G., then and there did steal, &c. The second count stated the property as belonging to the churchwardens by name, and as fixed to a certain other building, called Hendon Church, of the said churchwardens: upon a case reserved, the judges were unanimous that a church was included within the words 'any building whatsoever.' And regarding the person or persons in whom the property or the freehold of the church by law resides, a majority of the judges were of opinion, that the first count charging that the lead was stolen from the parish church of Hendon, and laying it to be the property of the vicar, was sufficient to support this indictment. It was also thought by many of the judges, that as this statute had made the stealing lead from any building a felony, the averment that the lead was stolen from a certain building called Hendon Church, was of itself a description of sufficient certainty, and that the further averment in whom the property resided was immaterial and unnecessary; the allegation that it was affixed to a building, describing the sort of building, and that the building, whether church or house, belonged to such a person, being all that the law in such a case required; and that the allegation as to the property might be rejected as surplusage. (*s*)

(*q*) *Senior's case*, 1 Leach, 496. 2 East, P. C. c. 16, s. 31, p. 593. In *R. v. Hedges*, 1 Leach, 201, 2 East, P. C. c. 16, s. 30, p. 590, note (*b*), the question appears to have turned upon whether the window sashes stolen were *fixed* to the freehold, which was ruled in the negative, upon the facts of the case, which shewed that they were only attached by a *temporary* fastening.

(*r*) *Munday's case*, 2 Leach, 850. 2 East, P. C. c. 16, s. 31, p. 594.

(*s*) *R. v. Hickman*, 1 Leach, 318, S. C. 2 East, P. C. c. 16, s. 31, p. 593, Buller, J., thought that charging the lead to be property was absurd and repugnant; property in this respect being only applicable to personal things, and that it should only be charged to be lead affixed to the church, or a house

**Buildings within the statute.** — A summer-house, used occasionally for tea and refreshment, situate in a park, at the distance of half a mile from the dwelling-house, was held to be a building within the 4 Geo. 2, c. 32. (*t*)

Upon an indictment for stealing two pieces of wood fixed to a certain building, it appeared that the place was intended for a cartshed in a field, and that on all its sides it was boarded up, except where there was a door which had a lock on it; it had a wooden frame-work for a roof ready for thatching, but it had no thatch, some gorse being thrown on it; and Littledale, J., held that this was a building within the 7 & 8 Geo. 4, c. 29, s. 44. (*u*)

But where on a similar indictment for stealing a plank it appeared that the plank was used as a seat in the grounds of the Duke of Beaufort, and that there was a wall, and pillars at the end of it, and that the plank was laid in mortar on the top of the wall and pillars, and there was no roof; J. A. Park, J., held that this was not a building within the meaning of the Act. (*v*)

An indictment under the 7 & 8 Geo. 4, c. 29, s. 44, alleged that the prisoner stole certain lead 'then being fixed to a certain wharf,' and it appeared that the lead stolen formed the gutters of two sheds on a wharf of the prosecutor; which sheds were constructed of brick, timber and tiles, with lead gutters. It was contended that the indictment was bad, as the word 'wharf' did not necessarily imply a building; and secondly, that there was a variance, for the indictment alleged that the lead was fixed to a wharf, and the proof was that it was fixed to a shed; but it was held, on a case reserved, that 'it is enough if the indictment alleges that the lead is fixed to that which may be a building, and which is proved by the evidence to be one. The allegation that the lead was fixed to a wharf, without saying that the wharf is a building, imposes that burden of proof on the prosecutor; but there is sufficient evidence here to shew that that which the lead was affixed to was in fact a building. The evidence must be fairly taken to shew that the shed from which the lead was stolen was part and parcel of the wharf itself.' (*w*)

On an indictment for stealing lead fixed to the dwelling-house of T. Wood, a witness proved that he managed the property from which the lead was stolen for his nephew, T. Wood; that he ordered all repairs, received the rent in his nephew's absence, and let the property to the present tenant; and, upon a case reserved, it was held that this was sufficient evidence that the house belonged to T. Wood. He was in possession, as he received the rent, and employed another person to let it, and the only rational inference from these facts was that the house was his. (*x*)

A count for stealing lead fixed to a parish church laid the property in the vicar, F. E. Ley, and it was objected that the lead was

belonging to such a person. See *R. v. Isley*, 1 Leach, 320, note (*a*), S. P. In a previous case it had been held that lead affixed to a church could not be laid as the property either of the churchwardens, or of the inhabitants and parishioners. *R. v. Parker*, 2 East, P. C. c. 16, s. 31, p. 592.

(*t*) *R. v. Norris*, R. & R. 69.

(*u*) *R. v. Worrall*, 7 C. & P. 516.

(*v*) *R. v. Reece*, Monmouth Lent Ass. 1828, MS. C. S. G.

(*w*) *R. v. Rice*, Bell, C. C. 87, 28 L. J. M. C. 64.

(*x*) *R. v. Brummit*, L. & C. 9.

either the property of the rector or churchwardens; but Alderson, B., held that it was rightly laid in the vicar. (*y*)

Where, upon an indictment under the section, it appeared that at the time the prisoner took the fixtures they had been severed from the building, it was held that he could not be convicted of stealing fixtures, nor could he be convicted on that indictment of larceny. (*z*)

So also if a person steal fixtures in one county and carry them into another county, he cannot be indicted for simple larceny in the county into which he carries them. (*a*)

In a subsequent chapter the provisions relating to stealing chattels and fixtures let to tenants and lodgers will be found.

By the 24 & 25 Vict. c. 96, s. 32, 'Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound,) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; (*b*) and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds), be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny. (*c*)

The prisoner was indicted under the repealed Act, 7 & 8 Geo. 4, c. 29, s. 38, for stealing pear-trees of the value of more than £1, described in one count as growing in a garden, and in another as in ground adjoining to a dwelling-house, and it appeared that the dwelling-house was occupied by a tenant of the prosecutor, and that a paved entry or walk of about a yard in width ran along the back of the house and was fenced on the opposite side by a low paling, with a wicket gate in the centre, which opened on an unfenced gravel walk running at right angles to the entry down the middle of a plot of inclosed ground of about half an acre. The ground on one side of this walk was occupied by the tenant as his garden; the other side was the ground on which the pear-trees were growing, and was retained by the prosecutor in his own occupation. The trees were grafted seedlings about seven feet high, and intended for sale. There were a few

(*y*) *R. v. Miles*, 1 Cox, C. C. 351. It is not stated from what part of the church the lead was taken. Bacon's Ab. Churchwarden's B. was cited. Another count contained no allegation as to the property, and Alderson, B., declined to express any opinion as to the sufficiency of that count. See *Rex v. Hickman*, *supra*, p. 225, and also the Year Book, 7 Ed. 4, pl. 1, p. 14, cited *ante*, p. 55.

(*z*) *R. v. Gooch*, 8 C. & P. 293.

(*a*) *R. v. Millar*, 7 C. & P. 665. See this case, *post*.

(*b*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 38, and 9 Geo. 4, c. 55, s. 31 (1). As to the punishment, see *post*, p. 296.

(*c*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 38, and 9 Geo. 4, c. 55, s. 31 (1). As to the punishment, see *post*, p. 296.

currant and raspberry bushes on the same part of the ground, and in the preceding summer the prosecutor had had a crop of potatoes and cabbages growing among the pear-trees. It was held first, that the land was not adjoining to the house; for ground cannot be properly said to adjoin a house unless it is absolutely contiguous, without anything between them: secondly, that the pear-trees were trees within this section, and not 'plants' within section 42: thirdly, that it was a question for the jury whether the place was a garden or not: (d) and fourthly, that the words 'adjoining or belonging to' only referred to the word 'ground,' and not to 'park, pleasure-ground, garden, orchard, or avenue.' (e)

Upon an indictment on the 7 & 8 Geo. 4, c. 30, s. 19, for feloniously and maliciously damaging one ash, one elm, and a hundred thorn shrubs growing in a hedge, thereby doing injury to an amount exceeding £5, a sworn valuer proved that it would be necessary to stub up the old hedge, and estimated the injury to the trees at £1, and the expense of stubbing, posts and rails to protect the new hedge, quickwood, setting, and clearing at £4 14s. 6d.; it was objected that the injury must be in respect of a growing tree, sapling, or underwood, and that there was no evidence of such injury beyond one pound; and, on a case reserved, it was held that the amount of injury must be confined to the injury done to the trees, and that the consequential injury cannot be taken into consideration. (f)

Upon an indictment for cutting eight trees with intent to steal, whereby an amount of injury was done to them exceeding £5, framed upon the latter part of the 24 & 25 Vict. c. 96, s. 32, proof that the aggregate value of a number of trees cut at one time exceeded the amount of £5, will satisfy the indictment, though no one tree was of the value of £5. (g)

By the 24 & 25 Vict. c. 96, s. 33, 'Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, *either* against this or any former Act of Parliament, shall afterwards commit any of the

(d) *R. v. Hodges*, M. & M. 341. Parke, J., and J. A. Park, J. *Qu.*, whether it can be said that ground 'adjoins or belongs to' a dwelling-house within this Act, unless it be occupied by the same person who occupies the dwelling-house. C. S. G.

(e) S. C. MS. C. S. G. In *R. v. Taylor*, R. & R. 373, it was held that young apple and pear trees, from four to six feet high in the stem without the top, and which had been grafted and planted in order to sell the fruit which they might produce, were trees within the 9 Geo. 1, c. 22, s. 1, now repealed. See *Tarry v. Newman*, 15 M. & W. 646, that an information on the 7 & 8 Geo. 4, c. 29, s. 39, might be laid by any person.

(f) *R. v. Whiteman*, Dears. C. C. 353. It may well be doubted whether the thorns in a hedge are shrubs; and, if they were, still they would come within Sec. 34 of the Larceny Act, *infra*.

(g) *R. v. Shepherd*, 37 L. J. M. C. 45. The judge at the trial left the case to the jury, directing them that in order to convict the prisoner, they must be satisfied that he cut down at one time, or so continuously as to form one transaction, such a number of the trees as would make the injury done amount to a sum exceeding £5, and the direction was held to be right. See *R. v. Williams*, and *R. v. Thoman*, *post*.

said offences in this section before-mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the offences in this section before-mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.' (h)

Sec. 36. 'Whosoever shall steal, or shall destroy or damage with intent to steal, any plant, (i) root, fruit, or vegetable production growing in any garden, orchard, pleasure ground nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the offences in this section before-mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.' (j)

Where the prisoners were proved to have cut down clover in a field and carried it to a cart, Williams, J., held that clover was a cultivated plant used for the food of beasts within the 7 & 8 Geo. 4, c. 29, s. 43. (k) But in a subsequent case it was doubted whether grass growing in a field was a cultivated plant within the same clause. (l)

#### b. — *Written Instruments.*<sup>1</sup>

Larceny could not by the common law be committed of *written instruments*, whether they related to real estate or concerned mere choses in action. If they related to real estate, the taking of them was considered as merely a trespass and no felony, upon a principle allied to those already mentioned, namely, that they concern the land, or (in technical language) savour of the realty, are considered as part of it by the law, and descend with it to the heir: (m) and when they

(h) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 39. There was a similar clause in the 14 & 15 Vict. c. 92, s. 5 (l). As to the punishment, see *post*, p. 296. Secs. 34, 35, & 37 create offences punishable summarily.

(i) See *R. v. Hodges*, *ante*, p. 228.

(j) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 42; and 14 & 15 Vict. c.

92, s. 5 (l). As to the punishment, see *post*, p. 296. C. S. G.

(k) *R. v. Brumby*, 3 C. & K. 315.

(l) *Morris v. Wise*, 2 F. & F. 51. Byles, J., reserved the question.

(m) 3 Inst. 109. 1 Hale, 510. 1 Hawk. P. C. c. 33, s. 35. 4 Blac. Com. 234. 2 East, P. C. c. 16, s. 34, p. 596.

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<sup>1</sup> See *P. v. Loomis*, 4 Denis, 380. *Johnson v. P.*, *ibid.* 364. *C. v. Rand*, 7 Mete. 475. *Thomasson v. S.*, 22 Geo. 499. *Payne*

*v. P.*, 6 Johns. 103. *Spangler v. C.*, 3 Binn. 533. *Starkey v. S.*, 6 Ohio N. S. 266.

concerned mere *choses in action*, as bonds, bills, and notes, they were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in the possession of the person from whom they were taken. (n)

Upon an indictment for stealing a parchment writing, purporting to be a commission for ascertaining the boundaries of certain manors, pursuant to an order of the Court of Chancery, the goods of our sovereign lord the king; and also another parchment writing annexed thereto, purporting to be a return made to the said commission, the goods of persons unknown; it was found by a special verdict, that the prisoner was guilty of privately taking away these parchment writings, being of the value of one penny each, with intent to steal them. It was urged by the counsel for the Crown, that the reason why felony could not be committed of charters which concerned the realty, was that they could not be valued; but that the reason would not apply in this case, because a value had been affixed by the jury; and that it was well known that for certain purposes old parchments will sell for a considerable price: and it was also urged, that the relation to the realty did not alone constitute the exemption, as there could be no doubt that it would be felony to steal an heirloom, though that savours of the realty. The Court, however, were unanimously of opinion, that as the parchment writings in question concerned the realty, no larceny could be committed of them. (o)

But stealing rolls of parchment is larceny according to the value of the parchment, though they are the records of a court of justice, unless they concern the realty. The first count charged the prisoner with stealing one roll of parchment, being records of the Court of Common Pleas, value ten shillings, the property of the king; the second count was the same, except laying the property in the judges of the Court; the third was the same, except laying the property in the prothonotaries; the fourth was the same, except laying the property in F. Sherwin. The fifth, sixth, seventh, and eighth counts were similar to the first, second, third, and fourth counts, but described the property stolen as one roll of parchment. The facts to prove the stealing were clear, and the jury found the prisoner guilty on the first four counts. Knowlys, R., was clearly of opinion that the crime of larceny at common law could not be established on the four last counts, charging the thing stolen to be mere parchment of the value of ten shillings; and he entertained very strong doubts whether an actual existing record of the Courts at Westminster could properly be described as mere parchment, so as to change its actual use and nature, and reduce it to mere personal chattels, the subject of larceny at common law: and he submitted that the stealing of a record of the Court at Westminster was only a misdemeanor, and no felony, till the 8 Hen. 6, c. 12, and that only in such cases where the judgment was liable to be reversed by such theft. In *Westbeer's case*, neither the commission nor the return could be legally considered as parchment, and as such a personal chattel; so in this case, the same principle would apply, and the roll of records could not legally be considered as a

(n) 1 Hawk. P. C. c. 33, s. 35. 4 Blac. (o) *Westbeer's case*, 1 Leach, 12. 2 East, Com. 234. 2 East, P. C. c. 16, s. 36, p. 597. P. C. c. 16, s. 34, p. 596.



mere personal chattel, which waste parchment would be; but, upon a case reserved, the judges held that as the records did not concern the realty, as in *Westbeer's case*, stealing the parchment was larceny. (p)

The doctrine of charters and other written assurances concerning the realty not being the subject of larceny was carried so far, that it was holden that no larceny could be committed of the box or chest in which they were kept. (q)

Upon an indictment for stealing a piece of paper, it appeared that the paper when stolen had written upon it an agreement between the prosecutor and the prisoner, signed by each of them, by which the prisoner contracted to build two cottages for the prosecutor for a sum specified, and the latter agreed to pay instalments at certain stages of the work, and the remainder on completion; and it was agreed that alterations during the progress of the buildings should not affect the contract. At the time of the theft the prisoner had been paid all the money he was entitled to under it, but there was money owing for alterations, and the work was still going on under it. The matter of the agreement was of the value of twenty pounds or upwards, and therefore by law required a stamp, but as between the parties to it, it would be available as an agreement without a stamp, but no evidence was given on either point. It was objected that the paper was a *chose in action*, though unstamped, and therefore not the subject of larceny as a piece of paper; and, upon a case reserved, after a verdict of guilty, it was held that the prisoner ought not under the circumstances to have been convicted of stealing a piece of paper; for at the time when it was stolen it was an agreement, and therefore it was a *chose in action*, and it was clear that at common law larceny could not be committed of a *chose in action*; and the reason why title-deeds and *choses in action* were not the subject of larceny was because the parchment was evidence of the title to land, and the written paper was evidence of the right; and though the instrument was stolen, the right remained the same; (r) and as a right could not be the subject of larceny, neither could the paper which was evidence of it. (s) As to the agreement not being a *chose in action* because all that was due had been paid upon it, the agreement was still executory, and might be used by either party to prove his right. (t)

By the 24 & 25 Vict. c. 96, s. 29, 'Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court], to be kept in penal servitude for life [or for any term not

(p) *R. v. Walker*, R. & M. C. C. R. 155.  
 (q) *Staundf.* 25 b. 1 Hale, 510. And the same law is laid down in 3 Inst. 109, as to the box or chest, though it be of great value; and the reason given is, that 'it shall be of the same nature the charters be of; *et omne majus dignum trahit ad se minus*.'

(r) Per Alderson, B.

(s) Per Maule, J.  
 (t) *R. v. Watts*, Dears. C. C. 326. Parke, B., differed in opinion, and held that at the time the instrument was stolen, it was not evidence of a *chose in action*; being unstamped, it was not available either at law or in equity.

less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument is the property of any person: Provided, that nothing in this or the last preceding (u) section mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.' (v)

The first count charged the defendant with stealing the will of Mary Baskerville; the second count charged that the defendant the will of the said M. B. 'unlawfully and for a fraudulent purpose did conceal:' the third count charged that the defendant the will of the said M. B. 'unlawfully and for a fraudulent purpose did destroy.' It was opened for the prosecution that Mrs. Baskerville had died in the year 1835, having made her will, by which she left a sum of money to a person named Apperley, the interest of other money to her (Mrs. B.'s sister), Mrs. Rowland, and after her decease the principal to be divided among Elisha Cooper's children; and that this will was given by Mrs. Baskerville to a nurse, who gave it to Mr. Rowland, the husband of Mrs. Rowland, who put it on a desk, from which it was taken away by the defendant; and that, after this, administration was taken out by Mrs. Rowland as sole next of kin of Mrs. Baskerville, and that the defendant, who was the assignee of

(u) See *post*, p. 233.

(v) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o). This clause is taken from the 7 & 8 Geo. 4, c. 29, ss. 22, 24, and 9 Geo. 4, c. 55, ss. 22, 24 (1). The offences contained in this clause were formerly only misdemeanors; by this clause they are not only made felonies, but subjected to the same punishment as the forgery of a will, on the ground that these offences are just as criminal and mischievous as the forgery of a will. The words 'cancel, obliterate,' 'the whole or any part of,' were introduced to make this clause co-extensive with the preceding and subsequent sections. Four material alterations were made in the proviso. 1. The words 'charged with' are substituted for 'indicted for;' so that no disclosure made after the defendant has been charged with the offence

will come within the proviso. 2. The word 'first' has been introduced before 'disclosed' in consequence of *R. v. Skeen*, Bell, C. C. 97, where the minority of the judges held, that a statement made before a Commissioner of Bankrupts was a disclosure within the 5 & 6 Vict. c. 39, s. 6, although the same facts as were contained in that statement had been previously proved before a magistrate or hearing a charge against the defendant. Under this clause no disclosure will avail unless it be absolutely the first disclosure. 3. The word 'compulsory' has been introduced before 'examination or disposition,' so as to exclude any voluntary examination or deposition. See *R. v. Strahan*, 7 Cox, C. C. 85. Lastly, The proviso is extended to examinations, &c., in insolvency. The provision in the former enactments as to value was unnecessary. See note (2), *post*. C. S. G.

Mr. Rowland, for the benefit of creditors, paid away the property in making a dividend on Mr. Rowland's debts. Alderson, B., 'The words of the Act of Parliament are "for any fraudulent purpose destroy or conceal any will, codicil, or other testamentary instrument." The purpose ought, I think, to be stated in the indictment, which here it is not. (w) But I think also that if the defendant concealed this will, and took the money which ought to have gone to Mrs. Apperley and Elisha Cooper's children, to pay Mr. Rowland's debts, that would be a fraudulent purpose within the Act of Parliament.' (x)

By the 24 & 25 Vict. c. 97, s. 28, 'Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any document of title to lands shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court], to be kept in penal servitude [for the term of three years or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]; (y) and in any indictment for any such offence relating to any document of title to lands, it shall be sufficient so allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof. (z)

By Sec. 1, 'The term "document to title to lands" shall include any deed, map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate.' (a)

Upon an indictment on the former section for stealing three deeds relating to real estate, Patteson, J., told the jury, 'Although this is not a felony, you must be satisfied that the defendant took these parchment writings under such circumstances as would have amounted to larceny, had deeds of the kind been the subject of larceny.' (b)

On an indictment upon the repealed Act 7 & 8 Geo. 4, c. 29, s. 23, it appeared that the prisoner held certain premises under a lease from the prosecutor, who had possession of the counterpart. The prisoner told the prosecutor's clerk that if he would get him the counterpart he would give him £10; he said he had altered the lease so as to make it appear to be for seventy-one instead of twenty-one years, and he wanted the counterpart that he might alter it in the same way. The clerk informed the prosecutor, and, acting under his directions, he took the counterpart, and gave it to the prisoner, and he gave him

(w) But see *Holloway v. R.*, 17 Q. B. 317. *R. v. Wynn*, 1 Den. C. C. 365, and *R. v. Douglas*, 13 Q. B. 42, that it is unnecessary to state the purpose.

(x) *R. v. Morris*, 9 C. & P. 89. This case was decided under the 7 & 8 Geo. 4, c. 29, s. 22.

(y) See the proviso in sec. 29, *ante*, p. 232. The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(z) This clause is taken from the 7 & 8

Geo. 4, c. 29, s. 23; and the 9 Geo. 4, c. 55, s. 23 (1). This clause introduces the new offence of destroying, &c., documents of title for a fraudulent purpose. Under the former enactments, the offences were misdemeanors. This clause makes them felony. The 14 & 15 Vict. c. 100, s. 24, rendered the provision as to the nonstatement of the value unnecessary.

(a) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 23; and 9 Geo. 4, c. 55, s. 23 (1), with the additions in *italics*.

(b) *R. v. John*, 7 C. & P. 324.

£10. It did not however clearly appear whether the deed was given into the prisoner's hands by the clerk, or put on the table and taken up by the prisoner; and it was held that if the deed was delivered by the clerk into the hands of the prisoner, he ought not to be convicted; but that if he took it off the table he might be convicted. (c)

By the 24 & 25 Vict. c. 96, s. 30, 'Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously *cancel*, obliterate, injure, or destroy *the whole or any part of* any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or *of* any original document whatsoever of or belonging to any Court of Record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such Court, or *of* any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or *of* any original document whatsoever of or belonging to any Court of Equity, or relating to any cause or matter begun, depending, or terminated in any such Court, or *of* any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any of Her Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of *felony*, and being convicted thereof shall be liable, [at the discretion of the Court], to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person.' (d)

A warrant of execution on each of two judgments against the prisoner in two plaints in the County Court had issued against him, under which a levy had been made by the high bailiff of the Court, and the warrants were handed to the under-bailiff, who was then left in possession of the prisoner's goods. The prisoner, a day or two afterwards, forcibly took the warrants out of the deputy-bailiff's hands, kept them, and then ordered him away as having no longer authority to remain there, and, on his refusal to leave, forcibly turned him out of the house in which the goods were. For these acts the prisoner was indicted, and convicted upon an indictment framed upon the 24 & 25 Vict. c. 96, s. 30, which charged in the first count a stealing of the warrants of execution, and in the second a taking of the same from a person having the legal custody of them for a fraudulent purpose:—Held, that the facts did not afford any evidence of a larceny of the documents, but did disclose a fraudulent purpose within the meaning of the statute, and that the conviction must be supported on the second count. (e)

(c) *R. v. Lawrence*, 4 Cox, C. C. 438. The Recorder. See the cases, *ante*, p. 128.

(d) This clause is taken from the 7 & 8 Geo. 4, c. 55, s. 21; and 9 Geo. 4, c. 55, s. 21 (1). The offences contained in this clause were formerly only misdemeanors; they are made felonies by this clause. The provision as to value in the former enact-

ments was unnecessary. The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(e) *R. v. Bailey*, 41 L. J. M. C. 61, *et per Cockburn, C. J.*, 'I think that when he took the warrants his motive was fraudulent. He acted as he did in order to take possession of the goods and turn the bailiff out.'

It has been observed that written instruments which were mere *choses in action*, as being of no intrinsic value, and not importing any property in possession of the party from whom they were taken, were not at common law the subjects of larceny; (f) which offence can be committed only in respect of goods which have some worth in themselves, and do not derive their worth merely from their relation to some other thing. (g) But the Legislature found it necessary to interfere upon this subject, and make the stealing of *choses in action* in many instances an offence of the degree of felony.

As to larceny of written instruments, by the 24 & 25 Vict. c. 96, s. 27, 'Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate, the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security.' (h)

By Sec. 1, 'In the interpretation of this Act: The term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, *bought and sold note*, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or *therein mentioned or referred to*:' (i)

'The term "valuable security" shall include any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign State, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign State or country, or to any deposit in *any* bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign State, and any document of title to lands or goods as hereinbefore defined.' (j)

That would be in fraud of the execution and in fraud of the law, and would constitute a fraudulent purpose within the meaning of the statute.

(f) *Ante*, p. 231.

(g) 1 Hawk. P. C. c. 33, s. 35. 2 East, P. C. c. 16, s. 36, p. 597.

(h) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 5; and 9 Geo. 4, c. 55, s. 5 (I).

This clause introduces the new offences of destroying, cancelling, or obliterating valuable securities for any fraudulent purpose. The latter part of the former clause was confined to goods, &c., mentioned in a warrant of order.

(i) This clause is taken from the 5 & 6 Vict. c. 39, s. 4, with the addition of 'transfer' and 'valuable thing' from the 7 & 8 Geo. 4, c. 29, s. 5, and the new words in *italics*.

(j) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 5, and 9 Geo. 4, c. 55, s. 5 (I). It extends the former enactments to funds of bodies corporate, companies, and societies in foreign countries, and to deposits 'in *any* Bank,' instead of 'in any Savings' Bank.' The last words in this clause are introduced in order that the terms 'valuable security' may include all the matters contained under the previous definitions of

The prisoner was convicted on an indictment, under 24 & 25 Vict. 96, s. 27, for stealing 'a certain valuable security, to wit, an agreement between L. and C., whereby C. was entitled to receive payment of certain sums of money, and which said sums of money were then due and unsatisfied to C.' It was proved that the sums were not due till sometime after the stealing. Held, that since this section limits the term 'valuable security' to securities 'other than a document of title to lands,' it is material, in an indictment under this section, to describe the valuable security, so as to shew that it is within the section; that the description here given ought to have been proved; and that since it had not been proved, the conviction could not be supported. (*k*)

In a case upon the 2 Geo. 2, c. 25, s. 3, where the prisoner was convicted of stealing a note, by which the maker promised to pay to the prosecutor or order a sum of money, but which the prosecutor had not endorsed, all the judges held that its not being endorsed was immaterial. (*l*) In a case upon the same statute where the prisoners were indicted for stealing a bill of exchange, it appeared that, when the bill was stolen from the prosecutor at Manchester, two names only were endorsed upon it; but that when it was negotiated by one of the prisoners, at Leicester, a third name was added to the two other endorsers: upon which it was objected, on behalf of the prisoners, that this being an indictment in Leicester, for *then and there* stealing a bill of exchange, whereon were endorsed the names of the two first endorsers, it was not supported by the evidence of a bill with an additional name endorsed thereon, at the time the bill was negotiated by one of the prisoners, in Leicester. But the prisoners were convicted; and upon a case reserved, the judges all agreed that the addition of the third name made no difference; that it was the same bill that was originally stolen; and, therefore, that the conviction was proper. (*m*)

In a case upon the 15 Geo. 2, c. 13, relating to embezzlements by servants of the Bank of England, which will be mentioned in a subsequent chapter, a prisoner was indicted for stealing certain bills, commonly called exchequer bills; and as it appeared that the person who signed them, on the part of the government, was not legally authorised so to do, the Court held that they were not good exchequer bills, and the prisoner was consequently acquitted. (*n*)

In some counts the prisoner was charged with stealing 'promissory notes;' and in others he was charged with stealing 'one hundred and thirty-five *pieces of paper*, each being respectively stamped with a stamp of four shillings, value four shillings, being the stamp directed by the statute in such case made and provided on every promissory note for payment to the bearer on demand of any sum of money not exceeding, &c.; one hundred and eighty-four *pieces of paper*, each being respectively stamped with a stamp of one shilling, &c.; and seventy-seven *pieces of paper*, each being respectively stamped with a

'document of title to goods,' and 'document of title to lands;' so that wherever the terms 'valuable security' occur in the subsequent parts of the Acts, all the matters contained in these definitions may be included. As to documents of title to lands, see *ante*, p. 233. (*k*) *R. v. Lowrie*, 36 L. J. M. C. 24.

(*l*) *Anon.* 2 East, P. C. c. 16, s. 37, p. 598.

(*m*) *R. v. Austin*, 2 East, P. C. c. 16, s. 37, p. 602.

(*n*) *Aslett's (first) case*, 2 Leach, 954.

stamp of one shilling and sixpence, &c., all the said pieces of paper being so stamped as aforesaid, and being the property, &c.; and each and every of the said stamps being then available, and of full force and effect, against the peace, &c.' It appeared that the paid notes in question were made up into a parcel by the London bankers, and sent by the mail to the country bankers, who never received them, and were under the necessity of issuing other notes on fresh stamps in their stead. Many of the paid notes, so missed, were traced to the possession of the prisoner, under very strong circumstances of suspicion. The prisoner's counsel objected that the charge being for a larceny, the law required that the property stolen should be of some value; that the notes, having been paid, were become, both with respect to the money they were intended to secure, as well as to the stamps, mere waste paper; that their former value was extinct; and that before they could again become valuable property, it was necessary they should have been actually *re-issued* by the firm of the country bank. And it was objected, as to the counts for stealing the stamped pieces of paper, that they could not be sustained; as the *stamps*, having been issued, were not at the time when they were taken in any way saleable as stamps; that their operation, as stamps, was, at that time, completely at an end; and that they would not reassume the character of stamps, until the notes, to which they were affixed, had undergone the process of being re-issued. The jury having found the prisoner guilty, the case was referred to the twelve judges, whose opinion was afterwards delivered by Grose, J., to the following effect:— 'The question submitted in this case to the consideration of the judges was, whether the paper and the stamps are, under the circumstances of the case, the subjects of larceny at common law; or, in other terms, whether they are the property of, and of any value to Messrs. Large & Co. (the country bankers), who were unquestionably the owners of them. These gentlemen had paid for the paper, the printing, and the stamps of these papers, which once existed, both in character and in value, as promissory notes. Their character and value, as promissory notes, were certainly extinct at the time they were stolen; but, even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value as papers, for it would have saved their owners the expense of reprinting other notes, and of purchasing other stamps, to which expense, it was proved, they were put, on their being deprived of these papers, by the crime of the prisoner. In what sense or meaning, therefore, can it be said that these stamped papers were not the valuable property of their owners? They were, indeed, only of value to those owners; but it is enough that they were of value to them: their value as to the rest of the world is immaterial. The judges, therefore, are of opinion, that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and that the prisoner has been legally convicted.' (o)

(o) Clarke's case, 2 Leach, 1036, and R. in this case, with which the author has been & R. 181. In a MS. note of the judgment favoured, the principle is thus stated, 'If a

The indictment in some counts charged the prisoner with embezzling pieces of paper of the value of one penny, and in other counts, 'pieces of paper partly written and partly printed,' bearing stamps, the values of which were specified: all the counts charged them to be 'of the goods and chattels' of the prosecutor. A stamp distributor had remitted to the prosecutor, by post, the first halves of country bank notes, to the amount of £190, and evidence was given to shew that this letter was received by the prisoner, and that he had embezzled the notes; it was objected that these halves of country notes were not goods and chattels: if the notes had been entire, they would have been *choses in action*, not goods and chattels, and in their present state they were of no value. Bosanquet, J., 'They might have been made of value to the prosecutor, by his putting the two halves together.' After citing *Clark's case*, his lordship added, 'I will consider of the objection, and if I should think it is a valid one the prisoner shall have the benefit of it.' The prisoner was afterwards sentenced to be transported. (*p*)

The first count charged the prisoner with receiving thirty pieces of paper of great value, to wit, of £30 each, the said pieces of paper being (stamped with a stamp value 5*d.*, the same being the stamp directed and required by the statute in that case made and provided, on every promissory note for payment to bearer on demand for every sum of money not exceeding £1 1*s.*) of the goods and chattels of J. Whitehead and others. Second count the same, but substituting the words 'being duly stamped as directed and required by the statute in such case made and provided,' instead of the words between the brackets. Third count, receiving 'thirty valuable securities, commonly called promissory notes, each of the said valuable securities being for the payment of the sum of £1, and of the value of £1, of the property of J. Whitehead and others, and the said valuable securities at the several times of committing the several felonies last above mentioned, being of great value, to wit, £30.' Fourth, for receiving 'thirty other valuable securities of great value, to wit, of the value of £30.' Neither of the two last counts stated that the moneys secured by the valuable securities remained due and unsatisfied. The prosecutors, Whitehead and Co., were country bankers, and were in the habit of issuing promissory notes of £10, £5, and £1; the two former were made payable at the house of Glyn and Co., in Lombard-street, the £1 only in the country, but were occasionally paid when presented to Glyn and Co. The course of business at that house was, at the close of every day to roll up in a bundle all the notes which had been paid in the course of the day, and to lock up these bundles until an opportunity offered of delivering them to one of the parties when in town, or of sending a parcel of them to be re-issued. On the 21st of November, 1827, a large bag was delivered at the house of Glyn and Co., to one of the partners of the house of Whitehead and Co., containing the bundles of several days, and he was robbed of the bag at the

chattel be valuable to the possessor, though not saleable, and of no value to any one besides, it may still be the subject of a larceny. C. S. G.

(*p*) R. v. Mead, 4 C. & P. 535. See R. v. Jones, 1 Den. C. C. 551, *post*. 'False

Pretences,' where the prisoner obtained the halves of a £5 note, which were sent in two different letters, and were described as 'two pieces of paper' of the goods and chattels of the prosecutor, and this was held to be correct.



door of Furnival's Inn coffee-house when about setting off for the country by the mail, and some of the notes were traced to the prisoner under circumstances which satisfied the jury of his guilty knowledge in receiving them, and they found him guilty. And, upon a case reserved, it was contended that in order to bring a case within the 7 & 8 Geo. 4, c. 29, s. 5, the notes must be outstanding, and the money purporting to be payable on them must be due and unpaid. In this case the notes had been satisfied, and were in the hands of the makers, they could not therefore be valuable securities of the value they purported to be, and had indeed been when in circulation. Besides, there was no averment that the money was due and unpaid, nor could those notes be said to be goods and chattels of the value of the stamps, or of any other value; they were, in fact, of none; but, supposing them to be of value, and the property of the owners, they could not be called goods and chattels. The judges, ten of whom were present, held the conviction right; some doubted whether the notes could properly be called valuable securities; but if not, they all thought that they were goods and chattels. (*q*)

The first count charged the prisoner with stealing 'ten bills of exchange for the payment of £500 each, of the value of £500 each,' the property of Mr. Astley. The second count, 'ten orders for the payment of £500 each, and of the value of £500 each.' The third count, 'ten securities for the payment of £500 each, and of the value of £500 each.' And the fourth count, 'ten pieces of paper, each being respectively stamped with a stamp of six shillings, and of the value of six shillings,' &c. It appeared that in consequence of an advertisement offering to lend money upon bills of exchange or other personal security, the prosecutor, who had occasion for a sum of money, had an interview with the prisoner, who told him he could accommodate him with £5000 at £6 per cent. The prisoner produced from his pocket-book ten blank stamps, and the prosecutor wrote on each of them the words, 'Payable at Messrs. Praed and Co., 189, Fleet-street, London.' Nothing was written on the stamps at that time but these words; the prisoner took the stamps away. The prosecutor saw him again several days afterwards; he said the prosecutor had omitted to sign his name, and he again produced the ten pieces of paper; the prosecutor signed them, and wrote 'accepted' on each of them, and gave them to the prisoner again; he said he would send the money in a few days by the mail, but it was never sent. For the prisoner it was contended that the papers taken were not the subject of larceny, and that the 7 & 8 Geo. 4, c. 29, only made perfect and available instruments the subject of larceny; and secondly, that there was no felony, because the paper stamps being the property of the prisoner, no trespass was committed in taking them. Littledale, J., 'With respect to the first, second, and third counts, I am of opinion that when these acceptances were taken from the prosecutor, they were neither bills of exchange, orders, or securities for money.' After stating the facts, the learned judge proceeded, 'These papers were again taken away by the prisoner, and it appears to me, that, when they were so taken away, they were neither bills of exchange nor orders for the payment of money, but were only in a sort of embryo state, there being the means of making them bills

of exchange. The 7 & 8 Geo. 4, c. 29, s. 5, enacts, that if any person shall steal any 'bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or any other state,' the party is to be punished as he would be for stealing a chattel of the like value. Now, how could this be said to be of any value? and of what value can it be said to be? If these papers had been stolen from a dwelling-house, could they be charged to be of the value of £500 each? There is no sum mentioned in them, and no drawer; and they being, as I before observed, but a kind of embryo security, I am of opinion that the first three counts of this indictment are not proved. There is, however, a fourth count, which describes the papers as ten pieces of paper, each having a six shilling stamp; and upon this count the question is, whether the prisoner can be said to have stolen this property? The fourth count correctly describes them, but it seems to me that the circumstances under which they were obtained by the prisoner were not such as to make the prisoner liable for a felony. If a person by a false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He took them from his pocket, and Mr. Astley never had them, except for the purpose of writing on them; they were never out of the prisoner's sight; Mr. Astley writes on them, as was intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they were never out of his possession at all. The case cited (*r*) was a case in trover, and, to maintain trover, it is not necessary that the party should have manual possession of the goods; if he has a right of possession, that is sufficient. To support an indictment for larceny, there must be such a possession as would enable the party to maintain trespass. It has been incidentally mentioned that these stamps might be charged in account to Mr. Astley, but that could only be if the transaction was completed. However, we must only take into consideration that which occurred on the last occasion, when the words "accepted" and "F. D. Astley" were written. Indeed, it appears to me, that on neither of the occasions when these parties met, can the prosecutor be said to have had either the property or the possession of these papers, so as to make the prisoner guilty of larceny in taking the papers out of the house.' (*s*)

So an unstamped order for the payment of money, which ought to be stamped under the 55 Geo. 3, c. 134, was not a valuable security within the same section. The prisoner was convicted of obtaining an order for the payment of the sum of £2 by false pretences; the order was a cheque drawn upon Messrs. Child and Co., payable to D. Francis Jones for £2, and it was not payable to D. F. Jones, but to D. Francis Jones only; it was not payable to order or bearer. Upon a case reserved, the judges were of opinion that it was not a valuable secu-

(*r*) *Evans v. Kymer*, 1 B. & Ad. 528. the same effect. See *R. v. Smith*, *ante*,

(*s*) *R. v. Hart*, 6 C. & P. 106. Bolland, p. 188.  
B., and Bosanquet, J., delivered opinions to

city, as it ought to have been stamped, and therefore the banker would have subjected himself to a penalty of £5 by paying it. (t)

The prosecutors entered into an agreement with the prisoner that he should draw bills on them up to a certain amount, that they should accept them and that the prisoner should endeavour to get them discounted, and that in the event of his succeeding in so doing, he should pay them a certain proportion of the proceeds, or, in the event of his not succeeding within a certain time, should return the bills. The prisoner drew two bills without inserting the drawer's name, and these were accepted by the prosecutors and handed back to the prisoner, who subsequently completed the bills by inserting the drawer's name, and succeeded in getting them discounted. He converted the proceeds to his own use. It was held that the acceptances at the time of their delivery by the prosecutors to the prisoner were 'securities for the payment of money' within the meaning of 24 & 25 Vict. c. 96, s. 75. (u)

The prisoner was charged in different counts with stealing a cheque for £13 9s. 7d., a piece of paper, value one penny, and an order for the payment of money. The Great Western Railway Company being indebted for poor rates to the overseers of the poor of Taunton St. James in the sum of £13 9s. 7d., a cheque for that amount was, by the proper authority, drawn at Paddington on their London bankers, and then transmitted through the hands of various officers of the Company to the Superintendent at the Taunton Station, who placed it in the hands of the prisoner (the chief clerk there), ordering him to pay it to the overseer, and to bring him a stamped receipt upon his return. On his return the superintendent asked the prisoner if he had paid the overseer; he answered, 'Yes,' and, being asked for the receipt, said that the overseer, not having one by him, had promised to send it to a certain inn in the town for him. In truth, the prisoner had not paid it, and the next morning but one got it cashed by a tradesman, and applied the proceeds to his own use. It was objected, that the cheque, being issued in Taunton, though made within fifteen miles of the bank, could not be read for want of a stamp, and was not a valuable security. Coleridge, J., thought that the cheque was either issued at Paddington, or not until the cashing of it at Taunton; and that in the first case it was clearly within the exemption of the Stamp Act; (v) and that in the second it was stolen before the issuing, and that an unstamped cheque, made within distance, but not issued, was a valuable security within the statute. Coleridge, J., also thought that the cheque might be considered as stolen when the prisoner, instead of applying it, as he was ordered, in payment to the overseer, had appropriated it to himself, of which the false statement to the superintendent was evidence, and that the cashing of it afterwards was only further evidence of the appropriation. The cheque was therefore read, and the prisoner convicted; and, upon a case reserved, the judges held the conviction right, as the stealing of the piece of paper was sufficient to sustain a count for larceny. (w)

(t) *R. v. Yates*, R. & M. 170. See *R. v. Mucklow*, R. & M. 160, *ante*, p. 181.

(u) *R. v. Bowerman* (1891), 1 Q. B. 112.

(v) This Act is now repealed.

(w) *R. v. Perry*, 1 Den. C. C. 69. 1 C. & K. 725. *Ex parte Bignold*, 1 Deac. R. 735, was cited as to issuing a cheque. As the conviction was held right on the count

The first count charged the prisoner with stealing four warrants and orders for the payment of money, to wit, for £5 each, and of the value of £5 each; the second, four warrants and orders for the payment of £5, and of the value of £5 each, commonly called post-office money orders; and the third, four valuable securities, that is to say, four warrants and orders, commonly called post-office money orders. The documents were in the following form:—

‘Post-office, Shrewsbury, Sept. 18, 1841.

‘No. 1,182. £5 0s. 0d.

‘Credit the person named in my letter of advice the sum of five pounds, and debit the same in this office,

‘JOHN W. TOWERS, Postmaster.

‘To the Post-office, London.’

And under each was a receipt, which the person receiving the money was to sign. The course of business is that the postmaster who receives the money writes a letter of advice to the post-office in London, stating the orders which he has given. Upon inspection of the letter of advice and the orders there appeared to be a difference in the signature, and some difficulty occurred in ascertaining which was the genuine signature of the postmaster at Shrewsbury. It was clearly proved that the prisoner had stolen the papers. Upon a case reserved, the first objection was, that this was not an order for the payment of money; but the judges were unanimously of opinion that it was an order for the payment of money. The next objection was, that it was an order by the postmaster, but was not drawn on any one; but the judges were of opinion that the designation or address of this order was sufficient authority to the persons who carried on business at the post-office in London. And lastly, that there was no proper proof that this was a regular post-office order, as there was not sufficient proof that the order was signed by the postmaster; but the judges were of opinion that it was not necessary it should be in the handwriting of the postmaster himself; it was enough that it was in the handwriting of the postmaster, or some person by him authorised to sign. (x)

In a case where the prisoner was indicted upon the 7 Geo. 3, c. 50, s. 1, relating to larcenies and embezzlements by persons employed in the post-office, and the indictment charged him with secreting a letter containing certain ‘*promissory notes*’; it was objected, on his behalf, that the notes contained in the letter could not be considered as promissory notes, the money having been paid to the holders of them, while they possessed the character of promissory notes, by the bankers in London; and that as they had not been re-issued in pursuance of the statutes, they had not been revived, as those statutes direct, and therefore were not good and valid promissory notes. But,

for stealing a piece of paper, no opinion was expressed on any other point, and therefore it must not be assumed that the ruling of Coleridge, J., at the trial was erroneous. See *R. v. Heath*, 2 M. C. C. 33. Walsh’s

case, R. & R. 215. 2 Leach, 1054. *R. v. Metcalf*, R. & M. 433.

(x) *R. v. Gilchrist*, 2 Moo. C. C. 233. C. & M. 224. Octr. Sess. of C. C. C. 1841. See *R. v. Vanderstein*, 10 Cox, C. C. R. 177 (Irish), *post*, *Forgery*.

upon a case reserved, a majority of the judges were of opinion that these notes, though not re-issued, still retained the character, and fell within the description of *promissory notes*; that they were, as promissory notes, valuable to the owners of them; and therefore that the verdict was right. (y) But a case is mentioned in which it was ruled that it was not felony within the 2 Geo. 2, c. 25, to steal bankers' notes completely executed, but which had never been put into circulation; on the ground that no money was due upon them. (z)

But where a party was compelled by great violence and menace of death to sign a promissory note on stamped paper previously prepared by the prisoner, and the prisoner was present during the time, and withdrew the note as soon as it was made, it was holden not to be a case within the 2 Geo. 2, c. 25. The indictment charged the prisoner with robbing the prosecutor in a dwelling-house, and taking from him a promissory note of the value of £2,000, signed by the prosecutor, against the form of the statute; and another count laid the note as the property of the prosecutor. The prisoner inveigled the prosecutor to her house, where he was detained by force for several hours, and at length induced, by great violence and menace of death, to sign the promissory note in question. It was dated March 30, 1795, and promised in the usual form of two months after date to pay the prisoner, or order, £2,000. And the prisoner attempted to get the note discounted the next day, without success. The jury having found the prisoner guilty, the case was reserved for the consideration of the judges; the principal objection to the conviction, as urged by the counsel for the prisoner, being that the case was not within the 2 Geo. 2, c. 25, the note being of no value while in the hands of the prosecutor, and the statute only extending to secure valid existing securities in the possession of the party robbed. It was argued, that nothing could be said to be due on this note as the statute required; and that it never was the property, nor in the possession of the prosecutor, the paper and stamp being the property of the prisoner, and never out of her possession; that the prisoner had in fact acquired the note, not by stealing, but by duress. There was considerable difference of opinion amongst the judges upon this point. It is said, that nine of them expressly held that the offence was not within the statute; some of them thinking that the statute was only intended to protect existing available notes in the hands of the person from whom they were taken; and that this note did not come within that description, being of no value in the hands of the prosecutor; and others inclining to think that the note was of value from the moment it was drawn; but that it never was in the possession of the prosecutor, but continued all the time in the possession of the prisoner herself, by whose duress the prosecutor was com-

(y) *Ranson's case*. 2 Leach, 1090, R. & R. 232. See *R. v. West*, D. & B. 109, *post*.

(z) *Anon. cor.* Lord Ellenborough, C. J., *Carlisle*, 1802, mentioned in the notes to 4 Blac. Com. 234, and in note (b), in 2 Leach, 1061. But they would probably be deemed valuable property, and the subject of larceny at common law. See *Clarke's case*, *ante*, p. 237. Some of the judges in *Ranson's*

case thought that the 2 Geo. 2, c. 25, and 7 Geo. 3, c. 50, were in *pari materia*, and that the term promissory note was to be taken in each act to mean notes on which the money thereby secured still remained due and unsatisfied to the holder thereof: but the majority of the judges, as we have seen, differed.

pelled to make it. And Eyre, C. J., observed, that the property never existed till the force, but arose out of it; and that therefore it was different from the case of money. And admitting that if the prosecutor had brought the note in his pocket, it would have been a case within the Act, though the note would not be available while in his possession (upon which point he should have hesitated), yet this was not that case. But all the nine judges considered that the whole transaction was one continued act, and that the note was procured by duress, and not by stealing. Ashurst, J., who differed, thought that it was not a single act, but that there was a distinguishable interval between the writing of the note and the actual taking of it by the prisoner, during which the prosecutor had the possession of it; and that therefore it was taking from him an instrument of value within the meaning of the statute, as it would have been available against him in the hands of an innocent holder. On this ground, also, Macdonald, C. B., doubted. Buller, J., was absent. The opinion of the majority of the judges was afterwards delivered by Ashurst, J. He stated 'that as the Legislature at the time of passing the 2 Geo. 2, c. 25, s. 3, whereby the stealing a *chose in action* was made felony, could not possibly have a case like the present in contemplation, it was not within that Act of Parliament; that it was essential to larceny that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and the ink were the property of the prisoner; and the delivery of it by her to him could not, under the circumstances of the case, be considered as vesting it in him.' (a)

The prisoner was indicted under 2 Geo. 2, c. 25, for stealing a bank post bill made for the payment of the sum of £100, of lawful money of Great Britain; the bank post bill was in form a promissory note, and therefore would not support the indictment, unless the court could take notice judiciously that a bank post bill was in form a note. The prisoner, however, was convicted, and a motion was made in arrest of judgment, on the ground that at the time the 2 Geo. 2, c. 25, passed, it was not known what a bank post bill was. Upon a case reserved, it appeared that bank post bills were not in use until two years after that statute passed, and the judges thought that they could not take notice, that what was afterwards called a bank post bill fell within any of the descriptions in that statute; and they also thought that they could not say, as the instrument was not set out, what a bank post bill was; and, further, that as the instrument was not what, at the time the statute passed, could properly be called a bill, the prisoner should have been acquitted. (b)

Upon an indictment for receiving an instrument described in one

(a) *R. v. Phipoe*, 2 Leach, 673. 2 East, P. C. c. 16, s. 37, p. 599; and see *R. v. Edwards*, 6 C. & P. 521, which was a very similar case, but the paper on which the order was written was in the possession of the prosecutor for half an hour, whilst he

was fastened down to a chair, and this was held to make no difference: *ante*, p. 81. See *Walsh's case*, 2 Leach, 1061. *R. & R.* 215. And see the *Commonwealth v. Yerkes*, 12 Cox, C. C. 208.

(b) *R. v. Chard*, *R. & R.* 488.

count as 'a warrant for the delivery of goods, viz., for the delivery of a watch,' and in other counts as 'a pawnbroker's ticket' and 'a piece of paper,' knowing it to be stolen, it appeared that a pawnbroker's ticket was stolen, and the prisoner received it. It was — 'George Gegau, 41, High-street, Brompton. 25th Nov. 1858 — 213. Gold watch, £1, 5s. John Hallsall, Brompton Barracks. Money lent on plate, watches, furniture, &c.' And, upon a case reserved, it was held that this ticket was a warrant for the delivery of goods within the meaning of the 7 & 8 Geo. 4, c. 29, s. 5; for the word 'warrant,' as applied to the delivery of goods in this section, comprehends any instrument which warrants or authorises the party holding the goods to deliver them, and requires him so to do; and looking to the legal effect of this instrument, and the operation given to it by the 39 & 40 Geo. 3, c. 39, and not to the mere form in which it is expressed, the pawnbroker's ticket may well be held to be a warrant for the delivery of goods. But, supposing that not to be the case, the document may well be described as a pawnbroker's ticket or piece of paper. It clearly was so unless it fell within the rule, by which certain documents of title, and certain documents concerning mere choses in action, were not the subjects of larceny, and it did not fall within that rule. (c)

Where there was a burial society at Bolton, and a weekly subscription of one halfpenny, for twenty weeks, entitled the representatives of a deceased member to the sum of £2 10s., and the president of the Society was induced by false pretences to sign the following document:—

'Bolton United Burial Society, No. 23.

'Bolton, September 1st, 1853. Mr. W. A. Entwisle, treasurer. Please to pay the bearer £2 10s., Greenhalgh, and charge the same to the above Society.

ROBERT LORD.

'BENJAMIN BESWICK, president.'

It was held that this was a valuable security within the 7 & 8 Geo. 4, c. 29, s. 5. (d)

Where the prisoner had borrowed of D. Williams £600, and executed to him a mortgage in fee of freehold lands, and afterwards borrowed of him the further sum of £200, and executed another mortgage by way of further charge upon the same land, and both deeds contained the usual covenants for payment of principal and interest, and the prisoner broke into a house by night for the purpose of stealing these deeds, it was held, on a case reserved, that being existing securities for the payment of money, they were clearly choses in action, and, as such, could not properly be described as goods and chattels. (e) But where the prisoner was indicted for stealing three deeds, being a security for money, and two of them were a conveyance in fee by lease and release from W. Price to J. Bailey, of certain freehold land, and the third a mortgage by demise of the same property, from J. Bailey and his trustee to J. Walters, for the term of 500 years,

(c) *R. v. Morrison*, Bell, C. C. 158. See *R. v. Kay*, 11 Cox, C. C. 529.

(d) *R. v. Greenhalgh*, Dears. C. C. 267.  
(e) *R. v. Powell*, 2 Den. C. C. 403.

for securing the sum of £20; it was held that the mortgage was a security for money within the 7 & 8 Geo. 4, c. 29, s. 5. (f)

Upon an indictment for stealing securities for money, it appeared that among dealers in railway shares upon the London Stock Exchange, the documents in question were dealt with under the name of the Great Luxemburg Railway Shares, and that they were scrip, and entitled the holders thereof to receive dividends and that they passed by delivery as bank notes. No evidence, however, was given of the existence of any fund out of which the dividends were payable, or the payment of any dividends, or of the existence of the Company. It was objected that the documents were not included in the 7 & 8 Geo. 4, c. 29, s. 5; but, on a case reserved, after a verdict of guilty, it was held that the conviction was right. The documents fell within the words 'valuable securities' within the meaning of that section, and the words 'anybody corporate, company, or society' were large enough to include a foreign body corporate, or company. (g)

c. — *Animals, Birds, and Fish.*<sup>1</sup>

The third subject of inquiry, under the the head of personal goods in respect of which larceny may be committed, arises when the property taken consists either of *animals, birds, or fish*.

With regard to domestic animals, such as horses, oxen, sheep, and the like, there is no doubt whatever that they were the subjects of larceny at common law. (h) And the stealing of many of these animals has been made highly penal by an enactment which will be noticed in a subsequent chapter. (i) Domestic birds also, as ducks, hens, geese, turkeys, peacocks, &c., are clearly the subjects of larceny. (j) So also larceny may be committed of their eggs or young ones. (k)

And as the stealing of such animals is larceny, it is also larceny to steal the produce of them, though taken from the living animals. Upon this ground it was holden by all the judges, on a case reserved for their opinion, that milking a cow at pasture, and stealing the milk, was larceny. (l) And it has also been holden that larceny may be committed by pulling wool from the bodies of live sheep and

(f) R. v. Williams, 6 Cox, C. C. 49. The marginal note states that 'a mortgage deed, and the deeds accompanying it, constitute a security for money; ' but all that was contended for by the prosecution was that 'a mortgage was a security for money.'

(g) R. v. Smith, Dears. C. C. 561. The new clause has introduced words to meet the second point.

(h) 1 Hale, 511. 1 Hawk. P. C. c. 33, s. 43.

(i) *Post*, Chap. XIII.

(j) 1 Hale, 511. 1 Hawk. P. C. c. 33, s. 43.

(k) *Id. ibid.* Hale's Sum. 68, 69.

(l) Anon. 2 East, P. C. c. 16, s. 49, p. 617. 1 Leach, 171.

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<sup>1</sup> See S. v. House, 65 N. C. 315. Wallis v. Mease, 3 Binn. 546. C. v. Chace, 9 Binn. 15. Warner v. S., 1 Iowa, 106. S. v.

Murphy, 5 Blackf. 498. P. v. Campbell, 4 Parker, C. R., 386. C. v. Beaman, 8 Gray, 497.



lambs with a felonious intent. (*m*) In one report of this last decision it is given as a part of the opinion of the judges, that in order 'to prevent the thoughtless and wanton frolics which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when, perhaps, they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis*, requires the property stolen to be of the value of twelvepence.' (*n*) The distinction, however, between grand and petty larceny was abolished by the 7 & 8 Geo. 4, c. 29, s. 2, but the application of it in this case seems to have been very questionable. Undoubtedly the quantity of wool taken, if considerable, would have been a strong additional circumstance in the evidence of felonious intent necessary to sustain a charge of larceny; but supposing the quantity not to have been of greater value than twelvepence, yet if the felonious intent of the party was manifest, as it might have been from the manner in which the fact was committed, the use to which the property was applied, and the behaviour of the party, there does not appear to have been any good reason why such a taking should not have been considered as petit larceny. (*o*)

Where the animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed (and known to be so), or confined. Thus, if hares or deer be so inclosed in a park, that they may be taken at pleasure, or fish in a trunk or net, or as it seems in any other inclosed place which is private property, and where they may be taken at any time, at the pleasure of the owner; or pheasants and partridges be confined in a mew; or pigeons be shut up in a pigeon-house; or swans be marked and pinioned, or (though unmarked) be kept tame in a moat, pond, or private river; or if any of these creatures be dead and in the possession of any one—the taking of them with felonious intent will be larceny. (*p*) And of some things *feræ naturæ*, though not fit for food, felony may be committed, if they be reclaimed; in respect of their generous nature and courage, serving *ob vitæ solatium* of princes and noble persons, to make them fitted for great employment; so that larceny may be committed of hawks and falcons, when reclaimed and known to be so; (*q*) and it may be committed also, it is said, of young hawks, in the nest; (*r*) but not of the eggs of hawks or swans, though reclaimed, the reason of which seems to be that a less punishment, namely, fine and imprisonment, was appointed for taking them by statute. (*s*) The stealing a stock of bees seems to be admitted to be felony. (*t*)

(*m*) Martin's case, 1 Leach, 171. 2 East, P. C. c. 16, s. 49, p. 618.

(*n*) 1 Leach, 172.

(*o*) It should be observed also that in the abstract of Martin's case, 2 East, P. C. c. 16, s. 49, p. 618, it is not stated as any part of the opinion of the judges that the property stolen should be above the value of twelvepence. And at the conclusion of the report in which that position is advanced, the doctrine appears to be contradicted, where it is said, 'if a wicked disposition be discovered, *une disposition à faire un mal chose*, as it is described by Britton, it may

be evidence of felony, notwithstanding the trifling quantity of the thing taken.'

(*p*) 3 Inst. 109, 110. 1 Hale, 511. 3 Hawk. P. C. c. 33, s. 41. 4 Blac. Com. 285. 2 East, P. C. c. 16, s. 41, p. 607.

(*q*) 1 Hawk. P. C. c. 33, s. 36. 3 Inst. 97, *et seq.*, and 3 Inst. 109. But the 37 Ed. 3, c. 19, is repealed by the 7 & 8 Geo. 4, c. 27.

(*r*) 1 Hale, 511. This law had relation to the trained hawks of former days.

(*s*) 11 Hen. 7, c. 17, and 31 Hen. 8, c. 12. 1 Hawk. P. C. c. 33, s. 42. 2 East, P. C. c. 16, s. 41, p. 607.

(*t*) 2 East, P. C. c. 16, s. 41, p. 607, cit-

Where pigeons (*u*) were shut up in their boxes every night, and stolen out of such boxes during the night, Parke, B., held it to be larceny. (*v*) So where pigeons were so tame that they came home every night to roost in boxes at the side of the house of their owner, it was held to be larceny, if they were taken by night out of such boxes, although the boxes were not shut up at night. (*w*) And it has been held in other cases that tame pigeons may be the subject of larceny, although they have an opportunity of getting out and enjoying themselves in the open air. (*x*)

Where on an indictment for stealing tame pheasants it appeared that pheasants' eggs from the coverts had been hatched by common hens, and the hens with their broods had been removed into a paddock, and confined under coops, through the bars of which the pheasants could at any time easily pass; the coops, with the hens, were moved about from place to place, and the pheasants followed the hens; they were about a month old, and could fly thirty or forty rods; they were fed daily at the coops, and would come to the keeper when he whistled, and at night they nestled under the hens. In the course of time they would have been allowed to escape into the coverts and would become wild. Lord Campbell, C. J., told the jury that, if they thought the pheasants were tame, and had in fact never become wild, and were under the control and dominion of the keeper at the time they were taken, the prisoner was guilty of larceny. (*y*)

But a different doctrine prevails with respect to animals and other creatures *feræ naturæ* which are *unreclaimed*, as it is considered that no person has a sufficient property in them to support an indictment for larceny. Thus larceny cannot be committed of deer, hares, or conies, in a forest, chase, or warren; of fish, in an open river or pond; of wild fowls, when at their natural liberty; of old pigeons, out of the

ing *Tibbs v. Smith*, T. Ray, 33. 2 Blac. Com. 392, 393.<sup>1</sup>

(*u*) As to punishment by summary conviction for unlawful killing, &c., of pigeons, see 24 & 25 Vict. c. 96, s. 23.

(*v*) Luke's case, Rosc. Cr. Ev. 577, and ex relatione Mr. Granger. The case was determined on the ground that the pigeons were reclaimed, and not on the ground that they were shut up in their boxes at the time they were taken.

(*w*) *R. v. Brooks*, MS. C. S. G., and 4 C. & P. 131, Taddy, Serjt. '*Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant (ut sunt cervi, cigni, pavones, et columbæ et hujusmodi) eo usque nostra intelliguntur quamdium habuerint animum revertendi.*' Bracton, lib. 2, c. 1, fol. 9, cited in the case of *Swans*, 7 Rep. 16 b. See 11 Just. Inst. Tit. I, XV. In the argument of *Dewell v. Sanders*, Cro. Jac. 490, Doderidge, J., said,

that if pigeons come upon my land I may kill them, and the owner hath not any remedy; but the owner of the land is to take heed that he takes them not by any means prohibited by the statutes. Ad quod Croke and Houghton accord. But Montague, C. J., held the contrary, and that the party hath *jus proprietatis* in them, for that they be as domestics, and have *animum revertendi*, and ought not to be killed, and for the killing of them an action lies; but, adds the reporter, the other opinion is the best. See also 3 Blac. Com. 392.

(*x*) *R. v. Chenfor*, 2 Den. C. C. 361. Luke's case, as stated in note (*v*), *supra*, was recognized. In *R. v. Howell*, 2 Den. C. C. 362, note, Parke, B., had ruled the same way.

(*y*) *R. v. Head*, 1 F. & F. 350. *R. v. Cory*, 10 Cox, C. C. 23. See *R. v. Garnham*, 8 Cox, C. C. 451.

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<sup>1</sup> See also *S. v. Murphy*, 8 Blackf. 498. *Harvey v. C.*, 23 Grat. 941. As to what amounts to a reclaiming, see *Gillet v. Mason*, 7 Johns. 16. *Ferguson v. Miller*, 13 Am. D. 319. *Wallis v. Mease*, 3 Binn. 546.

But unreclaimed honey-bees are not the subject of larceny. *Rexroth v. Coon*, 15 R. I. 35; 2 Am. St. 863. Mocking birds reclaimed are the subject of larceny. *Haywood v. S.*, 41 Ark. 479.

dove-house; (z) or even of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. (a) But larceny may be committed of the flesh or skins of any of these or other creatures fit for food, when they are killed, because they are then reduced to a state in which a right of property in them may be claimed and exercised. (b)

It seems that no person has any property in rooks, so that neither they nor their young ones can be the subject of larceny. (c)

It is so clearly established, that those creatures which are *feræ naturæ* can only become the subject of property by being dead, reclaimed, or confined, that it has been holden to be necessary that they should be so described in an indictment for stealing them. The prisoner, having been convicted on an indictment for stealing a pheasant of the value of forty shillings, of the goods and chattels of H. S., upon a case reserved, the judges after much debate all agreed that the conviction was bad; that in cases of larceny of animals *feræ naturæ* the indictment must shew that they were either dead, tame, (d) or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add 'of the goods and chattels' of such a one. (e)

Partridges about three weeks old and able to fly a little, which had been hatched and reared under a common hen, placed under a hen coop, and after the removal of the coop had remained about the place with the hen as her brood, sleeping under her wings at night, may be the subject of larceny. (f)

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded by one or other member of a shooting party, and was picked up or caught while it was alive, but in a dying state, by the prisoner, a boatman on a canal: it was held that the indictment was not proved. (g)

(z) 3 Inst. 109, 110. 1 Hale, 510, 511. 1 Hawk. P. C. c. 33, s. 39, 40. 4 Blac. Com. 235. 2 East, P. C. c. 16, s. 41, p. 607. But see 2 Blac. Com. 392.

(a) 1 Hale, 511.

(b) 3 Inst. 110. 1 Hale, 511. In 3 Inst. 110, it is said, 'But the deer, &c., being wild, yet when he is killed larceny may be committed of the flesh, and so of pheasant, partridge, or the like; and so note a diversity between such beasts as be *feræ naturæ*, and being made tame, serve for pleasure only, and such as be made tame and serve for food, &c., which diversity not being observed, hath made many men to err.'

(c) *Hannam v. Mockett*, 2 B. & C. 934. 4 D. & R. 518. The Court said that rooks were not generally used for food, but the contrary is certainly the case with young rooks, which are very commonly used for food. C. S. G.

(d) See *R. v. Lonsdale*, 4 F. & F. 56.

(e) *Rough's case*, 2 East, P. C. c. 16, s. 41, p. 607.

(f) *R. v. Shickle*, 38, L. J. M. C. 21, L. R. 1 C. C. R. 158, *et per* Bovill, C. J., 'Although partridges by nature are wild, in

this case they were from their birth being brought up tame. Upon the facts of this case I think these partridges were practically under the care and dominion of the prosecutor.'

(g) *R. v. Roe*, 11 Cox, C. C. 554. Bovill, C. J., said, 'If the indictment had simply alleged that the prisoner had stolen one partridge, it would have been bad, for, to make a partridge the subject of larceny, it must be shewn either that it was dead, or, if alive, that it was reduced into possession, or that it was under the owner's control. In this indictment it is alleged that the partridge was dead. This allegation is not a matter of form merely, but it is one of substance, as was held long ago in *Rough's case* (2 East, P. C. 607). The proof on the trial was that the bird was wounded, and was either picked up or caught by the prisoner. At the time it was picked up or caught by the prisoner; it was alive, but in a dying state, *i. e.*, the prisoner caught, while it was alive, a wounded partridge. The proof therefore fails to establish the charge in the indictment that the prisoner stole one dead partridge. If the partridge had been reduced

Poachers killed rabbits on Crown land, put some in bags and some in bundles, strapped them together by the legs, and concealed them in a ditch on the same land, as a place of deposit till they could conveniently remove them, before eight o'clock in the morning. The prisoner, about a quarter to eleven o'clock on the same day, went with two others to the ditch and began to remove the rabbits. The prisoner knew of the manner in which the rabbits had been killed. It was to be taken as fact that the poachers had no intention to abandon the wrongful possession of the rabbits: Held, that the killing and placing the rabbits in the ditch and subsequently removing them constituted one inseverable act of taking and carrying away, and therefore there was no larceny. (*h*)

into possession there might have been some ground for charging a larceny in a different form, but we cannot enter into the question on the present indictment.' Willes, J., said that he wished to add for himself that he was not satisfied that if the partridge had been dead when picked up by the prisoner, it would have been sufficiently reduced into possession (by any member of the shooting party) so as to sustain the charge of larceny.

(*h*) *R. v. Townley*, L. R. 1 C. C. R. 315. 40 L. J. M. C. 144, *et per* Martin, B., 'I am of the same opinion. And I arrive at this conclusion, because I think it most important that the criminal law should rest on plain distinctions, and not on distinctions which are imperceptible to ordinary persons or evident only to lawyers. Now it is perfectly clear that a person who kills a rabbit and carries it away is not guilty of larceny: that proposition is as old as the common law itself. Then if a man kill a rabbit, and, finding some one sees him, hides it, meaning to take it the moment the person watching goes away, why should that be larceny? There certainly is a dictum in Hale's Pleas of the Crown (p. 510) to the effect, that where a man cuts down trees, &c., and goes away, and then comes again in an hour or so to fetch them away, the act would be larceny. *Lee v. Risdon* (7 Taunt. 191) is an authority to the same effect, and I am by no means insensible of the fact that from the passage in Hale and the judgment of Gibbs, C. J. (7 Taunt. 191), that conclusion might not be drawn; but it is in the present case to be taken as a fact, "that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them," and the question for us is whether on those facts the prisoner was properly convicted of larceny. Now I cannot think that he was not guilty of larceny when he put them in the ditch, and yet that when he came to take them away he was guilty of larceny. It seems to me a very refined doctrine, and I concur with the Court in thinking that the prisoner is not guilty, considering it to be more consistent with reason and good sense, to hold that taking

the game and hiding it, with the immediate intention of removing it, and going there to bring it away was not larceny.' *Et per* Blackburn, J., 'There is a dictum of Lord Hale, which it would not be right to disregard (1 Hale, P. C. 510), where it is stated, that although the severing of lead from Westminster Abbey, if no lead were carried away directly would not be felony, yet this Court, in 9 Car. 1, decided, that if the man had severed it from the Abbey, and in an hour or so after came and carried the lead away, it would be larceny, "because the act is not discontinued but interpolated, and in that interval the property lodgeth in the right owner as a chattel," then the learned author refers to Dalton, c. 156, p. 873 Q. Nevertheless, there we have Lord Hale reporting a case in 9 Car. 1, with his own approval, and in *Lee v. Risdon*, 7 Taunt. 191, Gibbs, C. J., a great authority, speaks of it as being clear law, that if a copper be severed from the soil, and afterwards taken away, that would be larceny. If that proposition is to be understood to be that whenever a thing is severed from the soil, and after it is severed and has become the property of the owner of the soil, and the party severing it has gone away and abandoned all kind of possession, and afterwards when his wrongful possession has ceased, comes again and resumes it, it would be larceny. I have no fault to find with it, but it does not apply to the present case. If it means that the fact of there being an interval of time during which there was no full possession by the wrongdoer, would render the subsequent carrying away larceny, that principle would apply here, and if it were necessary to determine whether we should overrule Lord Hale's dictum or not I should require some time to consider; but if it is to be understood, as my Brother Bramwell and the majority of the Court interpret it, it does not apply to the present facts; for when we find the large quantity of netting deposited in the place of concealment, and the rabbits strapped together already for market and hidden in the grass, no one could doubt but that the poachers had not parted with their possession at all, and that there had been a continuous possession. For these reasons I

The prisoner was employed under a keeper to snare rabbits, and he snared some and put them in a bag with the intention of appropriating them. He left them and the keeper discovering them marked them and replaced them in the bag. It was held that the act of the keeper did not amount to a reduction into possession of the rabbits, and therefore that the case fell within the last decision. (i)

And where a trespasser entered the close of another, and cut growing grass, and returned three days after and carried it away, it was held to be a larceny. (j)

The prisoner was indicted for stealing five pheasants, restrained of their natural liberty, the property of the prosecutor; and, upon its appearing that the prosecutor was not a qualified person to keep or shoot game, and that he bred these pheasants for sale, it was objected that he could have no property in them nor any legal possession sufficient to support the indictment; that by the several statutes (k) relating to the game laws, unqualified persons are forbidden, under certain penalties, to have pheasants in their possession; and that by one of those statutes authority was given to a justice of the peace to take away from such person any pheasant which he might have in his possession. But Grose, J., held that it was a sufficient legal possession for the purposes of the indictment, and the prisoner was convicted. (l)

The stealing of *deer*, of *fish*, and of *hares* and *conies*, in a warren, &c., had been made punishable by statute, as will be mentioned more particularly in some of the following chapters.

There is yet another kind of animals to be noticed; namely, those which, though they may be reclaimed, are not such of which larceny can be committed by reason of the *baseness of their nature*. Some animals, which, in this country, are now usually tame, come within the class in question; as *dogs* and *cats*. (m) And others which, though wild by nature, are often reclaimed by art and industry, clearly fall within the same rule as *bears*, *foxes*, *apes*, *monkeys*, *polecats*, *ferrets*, and the like. (n) The reason upon which this doctrine appears originally to have proceeded is, that creatures of this kind, for the most part wild in their nature, and not serving, when reclaimed, for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law that for their sakes a man should die. (o) And the doctrine extends to the whelps, or young, of such animals: the rule being established, that where no felony can be committed of any creatures that are *feræ naturæ*, though tame or reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den. (p)

think the prisoner was not properly convicted of larceny.

(i) R. v. Petch, 14 Cox, C. C. 116.

(j) R. v. Foley, 17 Cox, C. C. 142.

(k) These statutes are not now in force. See 1 & 2 Will. 4, c. 32, s. 1.

(l) Jones's case, 3 Burn's Just. tit. *Larceny*, D. & W. 457.

(m) See First Report of Commission on Criminal Law, p. 14.<sup>1</sup>

(n) 3 Inst. 109. 1 Hale, 511, 512.

(o) 1 Hawk. P. C. c. 33, s. 36. 4 Blac. Com. 236. 2 East, P. C. c. 16, s. 45, p. 614.

(p) 3 Inst. 109.

#### AMERICAN NOTE.

<sup>1</sup> In New York and in some other States dogs are declared to be property, and therefore become the subject of larceny. Bishop, ii. s. 773, note (12).

The doctrine respecting larceny of animals of a *base nature*, was considered in a case, where the prisoner was charged in the indictment with stealing 'five live tame ferrets, confined in a certain hutch, &c.' the property of D. Flower. The evidence brought the fact of taking the ferrets clearly home to the prisoner; and it was also proved that ferrets are valuable animals, and that those in question were sold by the prisoner for nine shillings. But the jury having found the prisoner guilty, the case was submitted to the consideration of the judges upon the question, whether ferrets must be considered as animals of so base a nature that no larceny can be committed of them. And the judges held that judgment ought to be arrested. (*q*)

With respect, however, to dogs, and also beasts and birds ordinarily kept in a state of confinement, we may refer to the chapter on that subject. (*r*)

#### d. — Electricity.

By the Electric Lighting Act, 1882, (*s*) s. 23, 'Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes, or uses any electricity, shall be guilty of simple larceny and punishable accordingly.'

Gas is also the subject of larceny (*t*) and so is water. (*u*)

### SEC. X.

#### Ownership of Goods.<sup>2</sup>

**Joint tenants or tenants in common.** — It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels or property of such person. And this ownership must, of course, exist as against the party by whom the goods are taken. Before 31 & 32 Vict. c. 116, joint tenants, or tenants in common, of a chattel, could not be guilty of stealing such chattel from each other. (*v*)

(*q*) *Searing's case*, *cor.* Wood, B., MS., and MS. Bayley, J., and R. & R. 350. The ferret was originally a native of Africa, but has been for a long time bred, kept and sold in this country, as a tame animal.<sup>1</sup>

(*r*) *Post*. Stealing dogs is a misdemeanor, see 24 & 25 Vict. c. 96, ss. 18 & 19, *post*, chap. xiii.

(*s*) 45 & 46 Vict. c. 56.

(*t*) *Ante*, p. 127.

(*u*) *Ferens v. O'Brien*, 11 Q. B. D. 21.

(*v*) 1 Hale, 616. 2 East, P. C. c. 16, s. 7, p. 558. See the 1 & 2 Vict. c. 96, s. 2, as to larceny by members of joint stock banks, *post*.

#### AMERICAN NOTES.

<sup>1</sup> There are some curious cases in America with respect to the hunting of foxes. The majority of the New York Court thought that a man who starts and hunts a fox on wild ground has no property in it; but Livingston, J., thought he had such an interest in it as to have a right of action against any one who carried it away. *Piereson v. Post*, 3 Caines, 175, 2 Am. D. 264. In another case it was held that if after wounding an animal, and continuing the

pursuit till evening, the hunter abandons the chase though the dogs continue it, he has acquired no property in the animal. *Buster v. Newkirk*, 20 Johns. 75. There is in America a common-law right to hunt animals *feræ naturæ* in the uncultivated and uninclosed lands of another person. See Bishop, ii. s. 776, note (1).

<sup>2</sup> As to joint ownership, see *S. v. Gay*, 1 Hill, 364. *Kirksey v. Fike*, 29 Ala. 206. *P. v. Thompson*, 34 Cal. 671.

**Partners.** — By 31 & 32 Vict. c. 116, after reciting that it is expedient to provide for the better security of the property of co-partnership and other joint beneficial owners against offences by part owners thereof, and further to amend the law relating to embezzlement, it is enacted: Sec. 1. 'If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners.' (w)

A prisoner was charged in an indictment under this section, that he being a member of a co-partnership called the Bedlington Colliery Young Men's Christian Association, feloniously did embezzle certain specified sums of money belonging to the said co-partnership. It appeared that the object of the association was not the acquisition of gain, but the spiritual and mental improvement of its members. It was held, that the participation in profits was essential to the idea of partnership; that the association was therefore not a co-partnership, and that the conviction was therefore bad. (x)

On an indictment for stealing a sovereign it appeared that the prisoners went into a shop, and having purchased some trifling articles, they laid a sovereign on the counter, and asked for change; the prosecutor turned round to his cash-box for change, and laid it on the counter, when he found the sovereign was gone. He immediately charged the prisoners with having taken it up, but they denied it, and said they saw him take it when he turned to get change; subsequently one of them stooped down and produced the sovereign, which she said she had found on the ground; and it was held that it was a question for the jury whether the prisoners put down the sovereign with the intention of fraudulently appropriating it as soon as the prosecutor turned his back. When they parted with the money and asked for the change, they must have intended to divest themselves of the property, and the prosecutor by getting change shewed that he acquiesced in the proposal, and the money was constructively his. (y)

**Goods let with a house or lodging.** — The goods of a ready furnished lodging must be described as the lodger's goods, and not the goods of the original owner. An indictment was for breaking in the day-time into Anderson's house, and stealing his goods. The goods were the furniture of a room let by Anderson to another person by the week; and, upon a case reserved, the judges held that the goods should have been described as the goods of such other person; for Anderson was

(w) See *R. v. Smith*, 39 L. J. M. C. 112, noticed, *post*, *Receiving Stolen Goods*. Upon an indictment under this statute against a partner or a joint beneficial owner for stealing, charging the prisoner with being a partner in one set of counts, and in another with being a beneficial owner of the property stolen. Held, that if upon the evidence it appears that he is guilty of embezzlement

and not of larceny he may, upon a proper direction to the jury, be found guilty of embezzlement upon the indictment by virtue of sec. 72 of 24 & 25 Vict. c. 96. *R. v. Rudge*, 13 Cox, C. C. 17.

(x) *R. v. Robson*, 16 Q. B. D. 137.

(y) *R. v. Jones*, 5 Cox, C. C. 156. The Recorder.

not entitled to the possession, and could not have maintained trespass ; and that the conviction was, therefore, wrong. (z)

**A man taking his own goods from a bailee.** — If A. bail goods to B., and afterwards *animo furandi* take the goods from B., with an intent to charge him with the value of them, it is felony. (a) And so if A., having delivered money to his servant to carry to some distant place, disguised himself, and robbed the servant on the road, with intent to charge the hundred with the loss, according to the provisions of the repealed statute, it was robbery in A. (b) For as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant to support an indictment. (c) The box of a female friendly society established according to 33 Geo. 3, c. 54, containing upwards of fifty pounds, was left in the custody of the landlord of the house where the society met : the prisoner was one of the members, and broke into the landlord's house in the night-time, and stole the box. Upon an indictment for burglary and stealing the box and its contents, a case was saved upon the question whether, considering the situation in which the prisoner stood with respect to this property, the conviction was right, and the judges were clear, that as the landlord was answerable to the society for the property, it was a right conviction. (d) But it was held before the 31 & 32 Vict. c. 116, *ante*, p. 253, that if the wife of a member of a friendly society, stole money of the society, deposited in a box in her husband's house, which was kept locked by the stewards, this was not larceny. (e) An indictment for burglary and stealing the box of a friendly society, in all the counts, except one, laid the property in one of the stewards, and in that one in the landlord of the public-house where it was kept. There were four stewards of the society, and, by the rules, the landlord ought to have had a key of the box, but, in fact, he had none. The box was deposited in a room in the public-house, and two of the stewards had each a key. Parke, J., intimated that the case must rest on the count which stated the property to be in the landlord. It was then objected that if there was any property in the landlord, it was a joint property between him and the stewards. Parke, J., 'I am of opinion that there is sufficient evidence to go to the jury of the property in the landlord alone.' (f)

(z) *R. v. Belstead*, MS. Bayley, J., and R. & R. 411. *R. v. Brunswick*, MS. Bayley, J., and R. & M. 27. See the observations of Bayley, B., on these cases, *post*, p. 259. As to larcenies by tenants and lodgers, see 24 & 25 Vict. c. 96, s. 74, *post*, chap. xxvi.

(a) *Staundf.* 26 a. 3 Inst. 110. 1 Hale, 513, 514. 1 Hawk. P. C. c. 33, s. 47. *Fost.* 123. *Aliquando etiam suæ rei furtum quis committit, veluti si debitor rem, quam creditori pignoris causa dedit, subtraxerit.* Just. Inst. lib. 4, tit. 1, s. 10. See Year Book, 7 H. 6, pl. 18, p. 43, cited 2 Leach, 840.

(b) *Fost.* 123, 124. 3 Inst. 110. 4 Blac. Com. 231. 2 East, P. C. c. 16, s. 7, p. 558, and s. 90, p. 654, where the learned author says, that even in this case he sees no objection to laying the property of the goods in

the servant ; for a delivery to a servant is a bailment, per Holt, C. J. *Savage v. Walthew*, 11 Mod. 135.

(c) See also the argument in *R. v. Deakin*, 2 Leach, 171.

(d) *R. v. Bramley*, MS. Bayley, J., and R. & R. 478.

(e) *R. v. Willis*, R. & M. 375, vol. i. p. 148.

(f) *R. v. Wymer*, 4 C. & P. 391. It is not stated in the report whether the prisoner was a member of the society or not ; if not, it seems difficult to see how any doubt could arise as to the property being rightly laid in the innkeeper, who had the actual possession, which (unless it be the possession of the feme covert or servant, which is, generally speaking, the possession of the husband or master) is enough to support an action of trespass or trover, [*Armory v. Delamirie*, 1



So where on an indictment for stealing the money of J. Holt and others, it appeared that Holt had a shop where goods were sold for the benefit of a society, called the Stockbridge Band of Hope Co-operative Industrial Society. Each member of this society partook of the profit, and was subject to the loss arising from the shop. Holt was a member and had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management. The prisoner, also a member of the society, assisted in the shop at the time of the offence. The prisoner was proved to have taken some of the money belonging to the society. It was objected that the prisoner was a joint owner of the money, and therefore could not be convicted; but, upon a case reserved, it was held that as Holt was the sole manager, and was answerable for the safety of all the property and money coming into his possession in the course of such management, he was *quoad hoc* the owner of the property in question, and therefore the conviction was right. (g) So where one count charged the prisoner with stealing the money of D. Bancroft, another the money of the Stockport Industrial and Equitable Co-operative Society, and it appeared that the society had been enrolled, but no trustees had been appointed pursuant to the 18 & 19 Vict. c. 63, s. 17. The proceeds of the society consisted of the payments of the members in respect of their shares, and the affairs were managed by a committee of shareholders, of which the prisoner was a member; and under their superintendence the actual duties of management were performed by a general manager and a treasurer. A store was under the management of D. Bancroft, a boy aged thirteen, and it was his duty to sell the goods at the store; and each day, before shutting up, the treasurer called at the store and stated an account of all money received with Bancroft, giving him a duplicate of such account. In consequence of suspicions, one of the members of the committee went with Bancroft to the store, and having taken the money and marked part of it, he restored it to the till, and the prisoner was seen to take some of the marked money from the till. It was objected that, as the prisoner was a member of the society, and a shareholder in the funds, he could not be convicted on either count; that the possession of Bancroft was the possession of the society, and the possession of the society was the possession of the prisoner in common with the other members; but, on a case reserved, it was held that as Bancroft was employed to sell the goods at the store, and had charge of the till there, from which the money was stolen, and was accountable for the money, he was sufficiently possessed of the money stolen to sustain the conviction on the first count. (h)

But on an indictment for stealing the money of T. Webster and others it appeared that two sick clubs were held at a tavern kept by T. Webster, one called the Ram and the other the Industry, to which the members paid small sums weekly, and were entitled to a

Str. 505. 1 Sm. Lead. C. 151,] and an indictment, although the possession were wrongfully obtained; for 'if A. steals the horse of B., and after C. steals the same horse from A., in this case C. is a felon, both as to A., and as to B.' 1 Hale, 507, C. S. G.

(g) R. v. Webster, L. & C. C. C. 77. This and the two following cases were decided before the 31 & 32 c. Vict. 116 (*ante*, p. 253), was passed.

(h) R. v. Burgess, L. & C. 299. 9 Cox, C. C. 302. See note (g), *supra*.

weekly allowance in case of sickness. Webster was a member and treasurer of both clubs, and the prisoner a member and secretary of both. The prisoner was paid a yearly salary for his services. When a considerable sum was collected, Webster handed it over to the prisoner, as secretary, who, accompanied by three committeemen, took it to the bank, where it was invested on deposit note in the names of the treasurer and secretary for the time being. This deposit note was taken the next club night and placed in the club box. On the day in question the prisoner told Webster that the committee were going to meet him to take the money to the bank. None of the committee came, and after some time Webster handed over to the prisoner £15 on account of the Ram club, and £5 on account of the Industry; the prisoner did not pay the money into the bank, but absconded with it; and it was held that Webster had parted with the possession of the money absolutely, and therefore the prisoner was not guilty of larceny. (i)

W. Marsden had a quantity of *nux vomica*, and, by means of one Cooper, employed Marsh and Co., lightermen, to enter it for exportation, and carry it to the ship. Exportation exempted it from the duty, which was two shillings and sixpence per pound. Marsh and Co. entered it accordingly, and gave bond to the Crown for its exportation, and sent it by their lighter to the ship: and on their way to the ship, W. Marsden, J. Marsden, and Wilkinson, who had charge of this lighter, took out the *nux vomica*, and substituted cinders and rubbish, the object being to get the *nux vomica* duty free. The indictment was against J. Marsden and Wilkinson for stealing the goods of Marsh and Co., and upon a case reserved, four of the judges doubted whether this were larceny, because there was no intent to cheat Marsh and Co., or to charge them, but the intent was to cheat the Crown; but seven judges held it a larceny, on the grounds that Marsh and Co. had a right to the possession until the goods reached the ship, and had an interest in that possession, and that the intent to deprive them of that possession wrongfully, and against their will, was a felonious intent as against them; because it exposed them to a suit upon their bond; and that even if there had been no intent as against them, the intent to cheat the Crown was in the opinion of most of the seven judges sufficient to make it a larceny. (j)

Upon an indictment for larceny, it appeared that the prisoner had been the owner of the property alleged to be stolen, but being in difficulties had arranged with the prosecutors, who were creditors, to execute an assignment to trustees for the benefit of his creditors, and that a deed of assignment was executed by him, whereby he

(i) *R. v. Marsh*, 3 F. & F. 523. Keating, J. Neither of the clubs had been enrolled. (j) *R. v. Wilkinson*, MS. Bayley, J., and R. & R. 470.<sup>1</sup>

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#### AMERICAN NOTE.

<sup>1</sup> In Massachusetts, where the real owner was charged with stealing his own goods from an attaching officer, he was allowed to shew that his intention was merely to

prevent his creditors from making further attachments, and he had no intent to defraud the officer. *C. v. Greene*, 111 Mass. 392.

assigned to the prosecutors as trustees, amongst other things, the property in question. No manual possession of the property was taken by the prosecutors prior to its removal by the prisoner, but he remained in possession after the execution of the deed in the same manner as before. The prisoner in the night-time removed property conveyed by the deed, including the articles mentioned in the indictment, and hid them in the house of one of his workmen. The jury found that the prisoner removed the property with intent fraudulently to deprive the parties beneficially entitled under the deed of the goods, but that he was not in the care and custody of the goods as the agent of the trustees; and, upon a case reserved after a verdict of guilty, it was held that since the jury had expressly found that the prisoner was not in the care and custody of the goods as the agent of the trustees, this clearly negatived a bailment, and that was the only way in which the case could be put on the part of the prosecution. The prisoner, therefore, being in lawful possession of the goods, could not be convicted of larceny. (*k*)

**Goods, &c., in the possession of the wife.** — Where goods are in the possession of the wife, they must be laid as the goods of her husband; thus if A. is indicted for stealing the goods of B., and it appears that B. was a *feme covert* at the time, A. must be acquitted. (*l*) And even if the wife have only received money as the agent of another person, and she is robbed of that money before her husband receives it into his possession, still it is well laid as his money in an indictment for larceny. An indictment charged the stealing of a £5 Bank of England note, the property of E. Wall, averring, in the usual way, that the money secured by the note was due and payable to E. Wall; it appeared that E. Wall's wife had been employed to sell sheep belonging to her father, of or in which her husband never had either possession or any interest, and she received the note in payment for the sheep, and it was stolen from her before she left the place where she received it. It was objected that the note never was the property of E. Wall, either actually or constructively; the money secured by it was not his, and he had no qualified property in it, as it never was in his possession; but it was held that the property was properly laid. (*m*) So where a wife found a purse containing money on a highway, and was robbed of it after she had proceeded half a mile further, and the owner of the purse was never discovered, Parke, B., held that the property was rightly laid in the husband. (*n*) In one count the prisoner was charged with breaking and entering the house of E. Andrews, and stealing her property; in another count the property was laid in the Queen; at the time the house was broken into, and the property stolen, the husband of E. Andrews was in gaol under sentence of imprisonment on a conviction for felony; all the property had been the husband's, and had remained in the house, and the wife continued in possession of the house and the goods, till they were stolen; and on a case reserved, it was held that the prisoner could only be convicted of larceny on the second count, which laid the

(*k*) R. v. Pratt, Dears. C. C. 360.

(*l*) 1 Hale, 513. And see now, as to the separate property of the wife, 45 & 46 Vict. c. 75, s. 12.

(*m*) R. v. Roberts, 7 C. P. 485, Little-dale, J., after consulting Patteson, J.

(*n*) R. v. Sallows, 2 Cox, C. C. 63. See note (*l*).

property in the Queen, for the goods were the property of the Crown without office found, but the house was the house of the husband until office found. (o) And where one count laid the property in goods in a married woman, and another in the Queen, and the woman proved her marriage and stated that her husband had been transported, it was held that the record of the conviction must be produced to prove that the goods vested in the Queen. (p)

**The ownership will not be divested from the true owner by an intermediate tortious taking.** — The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking. If, therefore, A. steal the goods of B., and afterwards C. steal the same goods from A., in such case C. is a felon, both as to A. and as to B., and he may be indicted for stealing the goods of B. (q) Upon this subject Gould, J., in delivering the opinion of the twelve judges in a case, said, 'It is a rule of law equally well known and established that the possession of the true owner cannot be divested by a tortious taking; and therefore if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property; because these acts of theft do not change the possession of the true owner.' (r)

But a distinction is taken in the following case. If A. steals the horse of B., and afterwards delivers it to C., who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B.: because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it; neither is he a felon to A., for he had it by his delivery. (s)

**Ownership sufficient where there is only a special property in the goods.** — There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a *special property* in them; and that they may be laid as the goods and chattels of such person in the indictment. A *lessee* for years, a *bailee*, a *pawnee*, a *carrier*, and the like, have such special property; and the indictment will be good, if it lay the property of the goods, either in the real owners, or in the persons having only such special property in them. (t)

(o) R. v. Whitehead, 2 Moo. C. C. 181. 9 C. & P. 429. See next note.

(p) R. v. Johnson, 1 Cox, C. C. 59. Patteson, J., and Gurney, B. These last two cases were decided before the passing the 33 & 34 Vict. c. 23, which abolishes forfeitures for treason and felony.

(q) 1 Hale, 507. 2 East, P. C. c. 16, s. 90, p. 654.

(r) By Gould, J., in Wilkinson's case, 1 Leach, 522.

(s) 1 Hale, 507.<sup>1</sup>

(t) 1 Hale, 513. 1 Hawk. P. C. c. 33, s. 47. 2 East, P. C. c. 16, s. 90, p. 652. The passage in the text is founded on the

passage in East. The passage cited from Hawkins does not support the position in the text, but only shews that the goods may be laid in the bailee; and the passage in Hale is in favour of the distinction drawn by Bayley, B.: it is, 'If A. have a special property in goods, as by pledge or a lease for years, and the goods be stolen, they *must* be supposed in the indictment [to be] the goods of A. If A. bail goods to B., to keep for him, or to carry for him, and B. be robbed of them, the felon may be indicted for larceny of the goods of A. or B., and it is good either way; for the property is still in A.,

#### AMERICAN NOTE.

<sup>1</sup> It is said that in America it is no defence that the prosecutor himself stole the goods from some one else. C. v. Smith, 129

Mass. 104. Ward v. P., 8 Hill, N. Y. 395. C. v. Finn, 108 Mass. 466.

But this position and the passage cited in support of it from East have been questioned, and it has been observed that, 'The law so declared in two text books of standard authority is unquestionably not reconcilable, in all its parts, with the decisions cited above in *R. v. Belstead*, and *R. v. Brunswick*. (u) The following clear and succinct observations, which have been allowed to appear in this work, will, it is conceived, be deemed valuable in pointing out the true legal distinctions which govern cases of this nature: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. In the latter case he does not for an instant part with the general right of possession; he confers a qualified right only, which he may put an end to when he will; in the former case, he parts with the whole right of possession for the time. The bailee for safe custody, the carrier, the tailor, the pawnee, have never more than a partial right; the owner may resume the goods, on satisfying their lien, when he will. The agister is in the same situation, and the decision as to him, in *R. v. Woodward*, (v) only is, that the cattle may be described as his, not that they must. The ground of decision in *R. v. Belstead*, and *R. v. Brunswick*, was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass.'" (w)

Where goods belonging to a guest at an inn are stolen, they may be laid to be the property either of the innkeeper or the guest. (x) And linen stolen from a washerwoman, by whom it was taken in to wash in the course of her business, may be laid as her goods. (y) In cases of this kind it is considered that the parties have a possessory property; being answerable to their employers, and being capable of maintaining an appeal of robbery or larceny, and having restitution. (z)

Where on an indictment for stealing certain iron of the Company of the proprietors of the Glamorganshire Canal Navigation, it appeared that the iron had been taken from the canal by the prisoner, who was not in the employ of the Company, while it was in process of being cleaned; and that if the property found on such occasions in the canal could be identified, it was returned to the owner, otherwise it was kept by the Company; it was held, upon a case reserved, that the property was rightly laid in the Company; for their property in the iron before it was taken away was of the same nature as that which a landlord has in goods left behind by a guest, and

yet B. hath the possession, and is chargeable to A. if the goods be stolen, and hath the property against all the world but A.' C. S. G.

(u) *Ante*, p. 254.

(v) Woodward's case, *post*, p. 263. note (g).

(w) MS. observations of Bayley, B. 3 Burn's Just. D. & W. 463. But see *R. v. Kendall*, 12 Cox, C. C. 598. This case was

not argued for the prisoner, and the point that the goods stolen were let on hire by the person alleged in the indictment to be the owner was not taken.

(x) Todd's case, 2 East, P. C. c. 16, s. 90, p. 653.

(y) Packer's case. 2 East, P. C. c. 16, s. 90, p. 653. 1 Leach, 357, note (a).

(z) 2 East, P. C. c. 16, s. 90, p. 653.

property so left is in the possession of the landlord for the purpose of delivering it up to the true owner, and he has a sufficient possession to maintain an indictment for larceny. (a)

So an agent has sufficient special property in the goods of his principal to support an indictment, laying them as his property. (b)

On an indictment for stealing notes and sovereigns, the money of P. Thwaites, it appeared that he was in partnership with Isaacs, who lived in Belgium, and that the money in question was partnership property. He had put the notes in his pocket for the purpose of obtaining bank post bills to be sent to his partner in Belgium to be used for partnership purposes. The sovereigns were the produce of a cheque drawn by him on a bank, in which the partnership moneys were deposited, but the account was in his name alone. The money was drawn out for the purpose of being used in the business of the firm, but some part of it would probably have been used in his own private disbursements. He considered himself responsible to his partner for the stolen money. The money at the time it was stolen was in one of the canvas bags used in the joint business. It was held that the property was rightly laid, as Thwaites had a special and individual trust of the joint property. (c)

Upon an indictment for stealing sugar, the property of the London Dock Company, it appeared that Archard, a carman, was employed by one Bach to convey two hogsheads of sugar, his property, from the London Docks to his warehouse, and that Archard sent the prisoner with two delivery notes and one of his horses and carts for that purpose, but that the clerk of the London Dock Company delivered to him, by mistake, two hogsheads of sugar belonging to a third person. The prisoner afterwards abstracted forty-five pounds weight of sugar from one of the hogsheads. It was contended that the property in the London Dock Company was founded on possession only, and therefore ceased as soon as they had parted with the possession. But, upon a case reserved after conviction, the judges were unanimously of opinion that the special property of the London Dock Company as bailees of the sugar was not divested by the delivery of it under a mistake, and therefore the property might well be laid in the London Dock Company. (d)

The prisoner was charged in the first count of the indictment with stealing twenty-two bank notes, of the value of £1,000 each, and one bank note of the value of £200, the property of Sir T. Plumer; and, in several additional counts, with stealing a written instrument, which, in some of them, was called 'a bill of exchange' for the payment of £22,200, and in others, 'a warrant for payment of money.' Sir T. Plumer, having contracted for the purchase of a large estate, consulted the prisoner, who was a stock-broker, and whom he had often employed before, as to the most advantageous time to sell out stock, and, influenced by his representations, on the 28th November, gave the prisoner a power to sell out a quantity of stock, which, on the ensuing morning, he contracted to sell for the sum of £21,700; and, on the 4th December, the prosecutor transferred the stock, and expressly

(a) *R. v. Rowe*, Bell, C. C. 93.

(b) *R. v. Jennings*, D. & B. C. C. 447.

(c) *R. v. Cole*, 4 Cox, C. C. 280. The

Common Serjeant, after consulting Talfourd, J.

(d) *R. v. Vincent*, 2 Den. C. C. 464.

ordered the prisoner immediately to invest the proceeds in Exchequer bills, and lodge them on his account at his bankers, Messrs. Gosling and Co., in Fleet-street; but the prisoner told him that it was then too late to procure Exchequer bills to such an amount; which the prosecutor supposed to be true (though in fact it was not), and therefore left him to receive the £21,730 of the purchaser, desiring that he would pay it into his bankers the same day, which he promised to do, saying at the same time, that he would call on the prosecutor the next morning, and get his cheque for such sum as he might choose to have laid out in Exchequer bills. The prisoner accordingly received the £21,700, paid it into his own bankers, Robarts and Co.'s; and on the same day paid into Gosling and Co.'s his own cheque on Robarts and Co. for £21,500, on the prosecutor's account. On the following morning he called on the prosecutor and received from him a cheque (the instrument mentioned in the indictment) on Gosling and Co.'s for £22,200. The prosecutor directed him to go to Gosling's and get the money for it, telling him that it was for the precise and express purpose, and for no other purpose whatever, of laying it out in Exchequer bills; which the prisoner positively promised he would do, and either pay the bills into Gosling and Co.'s, or bring them to the prosecutor by four o'clock on the same day. Nothing was said as to what was to be done with the money in case Exchequer bills could not be purchased. The prisoner then went to Gosling and Co.'s with the cheque, and there received for it £22,200, in twenty-two bank notes of £1000 each, and one bank note of £200; and on the same day he purchased with part of that money £6,500 Exchequer bills, which he lodged at Gosling and Co.'s on the prosecutor's account, and took a receipt for them. At about half-past four o'clock on the same day, the prisoner called on the prosecutor, and produced the receipt for the Exchequer bills, and stated that he had paid the remainder of the money into Gosling and Co.'s, as he had contracted with Coutts and Co. for Exchequer bills to the amount of £15,000, but that one of the partner's of the house of Coutts and Co., who was at that time absent from London, had the bills locked up in a drawer, and would not return to deliver them until the following Saturday, the 7th December; on which day the prisoner said he would call again for the prosecutor's cheque for that amount, and lodge the Exchequer bills for which he had so contracted at Gosling and Co.'s on the prosecutor's account. The prosecutor did not examine the papers delivered to him by the prisoner during the time the prisoner was with him; but upon looking at them after he was gone away, he was surprised to find that there was only a receipt for the Exchequer bills, and no receipt for the residue of the money. An inquiry was almost immediately made, when it was ascertained that the prisoner had, on the afternoon of that same day, set out for Falmouth in the mail coach, in which he had secured a place in a fictitious name; and that he had left a note, addressed to the prosecutor, with his clerk, dated the 7th December, and stated that the business respecting Coutts' Exchequer bills could not be finished until the following Monday. This note he had desired might not be delivered till the Saturday. For some time before he absconded, the prisoner had been labouring under great pecuniary embarrassments, and had

meditated an emigration to America; and about the 29th November he had applied to an American broker to procure for him American stock to the amount of £11,000, and stock nearly to that amount was accordingly bought for him, and paid for by him, on the 5th December, with eleven of the same bank notes of £1,000 each, which he had received for the prosecutor's cheque: and several others of the £1,000 notes so received for the prosecutor's cheque, had been paid away by him to different persons on his own account. On the same 5th December he paid to a dealer in foreign coin £300 for doubloons, which he had contracted for three days before, and which were delivered to him on that day. He was pursued and apprehended at Falmouth, as he was about to get on board a packet for Lisbon, to which place he acknowledged that he intended to go in the first instance, and afterwards take an opportunity of getting to America. On being told the charge made against him, he delivered up the £11,000 American bank shares, and the bag of doubloons. The question left to the jury was, whether the prisoner, before he received the cheque, had formed the design of converting the money which should be received by means of it to his own use, or whether that design arose in his mind after he was in possession of it. They were directed to find the prisoner guilty, if they were of opinion that the former was the fact. The jury were of that opinion, and returned a verdict of guilty; and a case was reserved upon the following objections: As to the counts which charged the stealing of a bill of exchange or warrant (*i. e.*, the cheque) it was objected that the cheque was one entire thing, and could not be said to be stolen, as part of the produce, *viz.*, £6,500, was applied to the prosecutor's use. As to the same counts, it was also objected, that under the 2 Geo. 2, c. 25, it was necessary that the instrument stolen should be of value in the hands of the party from whom it was stolen; that the cheque was of no value to the prosecutor in his own hands; but that if it had been lost by the prosecutor, and got into the hands of a third person, and had been stolen from that third person, it would be within the Act, as being then an instrument of value in that third person's hands, otherwise not. It was also objected that the prosecutor had parted in this case with both the property and possession of the bill of exchange or warrant, and without fraud or misrepresentation; and this case was said to be the same as that of a voluntary deposit of money with a banker, who had previously determined to apply it to his own use. That the identical notes paid to the prisoner were notes on which the prosecutor had no specific claim, and never were vested in him. That bank notes were not expected in return for the cheque, but another and a different thing, *viz.*, Exchequer bills. And that if the prosecutor had delivered the twenty-three notes themselves to the prisoner, he undertaking to buy Exchequer bills with them, it would have been only a breach of contract, which he was to fulfil by returning Exchequer bills, and that he was to be considered as debtor to the prosecutor for the deficiency. And after two arguments, all the judges present were of opinion that it was not a felony, and that the conviction was wrong upon several grounds. First, because there was no fraud or contrivance to induce Sir T. Plumer to give the cheque; secondly, because the cheque could not be called his goods



and chattels, and was of no value in his hands; (e) thirdly, because he had never had possession of the notes received at the bankers, so that they could not be called his notes;<sup>1</sup> and fourthly, because the bankers were discharged of the money by paying it on the cheque, so that they were not defrauded, and it could not be said the money was stolen from them. (f)

It has also been holden, that an agister of cattle has such a special property in them that they may be laid as his goods in the indictment. When this case was referred to the judges, after the conviction of the prisoner, there was at first some doubt upon the point: one of the judges observing that an agister of cattle is not liable for them at all events, like an innkeeper for the goods of his guest; but ultimately all the judges agreed that the conviction was right. (g)

Where a house was taken by Kyezor, and Miers, who lived on his own property, carried on the business of a silversmith there for the benefit of Kyezor and his family, but had himself no share in the profits, and no salary, but had power to dispose of any part of the stock, and might if he pleased take money from the till as he wanted it, and sometimes bought goods for the shop, and sometimes Kyezor did; it was held that Miers was a kind of bailee of the stock, and that the property in a watch stolen out of the house might properly be laid in him. (h)

In a case where, upon an indictment for stealing a window-glass and hammer-cloth from a carriage, it appeared that the prosecutor, in whom the property was laid, was a coach-master, and had the care of the carriage, which stood in a coach-house in his yard, at the time the articles were stolen from it; an objection that the property should have been laid in the owner of the carriage was overruled. (i) And a case was at the same time referred to by the Court in which a prisoner was convicted of stealing a chariot glass from a lady's chariot which had been put up at a coach-yard at Chelsea, while the owner of it was at Ranelagh; and the property was laid to be in the master of the yard, where the chariot had been put up. (j)

A sheriff's officer seized goods under a writ of *feri facias* against J. S., and afterwards stole part thereof. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described as the goods of the sheriff: but, upon the point being saved,

(e) See *R. v. Mucklow*, R. & M. 160, where a similar point was raised, but not decided.

(f) *Walsh's case*, R. & R. 215. 2 Leach, 1054, 1082. 4 Taunt. 258, 284. See *Taylor v. Plumer*, 3 M. & S. 562.

(g) *Woodward's case*, Leicester Sum. Ass. 1796, Mich. T. 1796, and Hil. T. 1797, at which last meeting of the judges, 4 Inst. 293, was referred to as shewing that an agister

has a possession, and 2 Roll. Ab. 551, as an authority, that an agister may maintain trespass against any one who takes the beasts. 3 East, P. C. c. 16, s. 90, p. 653. 1 Leach, 357, note (a). See *Rooth v. Wilson*, 1 B. & Ald. 59.

(h) *R. v. Bird*, 9 C. & P. 44, Bosanquet, J. See this case, *ante*, p. 48.

(i) *Taylor's case*, 1 Leach, 356.

(j) *Statham's case*, 1 Leach, 357.

#### AMERICAN NOTE.

<sup>1</sup> A servant who takes his master's cheque to a bank, and resolves there to convert to his own use the bills which he receives in payment of the cheque, does not steal the bills,

for the bills had never come into the possession of the master. *C. v. King*, 9 Cush. 284, 288.

the judges held that notwithstanding the seizure, the general property remained in J. S. (*k*)

But the indictment will not be sustainable if it appear in evidence that the party in whom the goods are laid had neither the property nor the possession of them; as is usually the case of a *feme covert* or servant, who have in their custody the goods of the husband or master. (*l*) Where a boy, fourteen years of age, lived with his father, worked for him, assisted him in his business, and obeyed his orders, and his father supported him, but paid him no wages, and he was left in charge of a stall from which some boots were stolen; it was held that the boy was not a bailee but a servant, and therefore the property in the boots could not properly be laid in him. (*m*) Thus it was decided that the goods in a dissenting chapel vested in trustees could not be described as the goods of a servant who had merely the care of the chapel, and the things in it, to clean and keep them in order, though he had the key of the chapel, and no person except the minister had any other key. The indictment was for stealing the chandelier and sconces of a dissenting chapel vested in trustees: and the things were described as the property of the trustees, and also of one Evans. The evidence as to the property of the trustees failed, and it appeared that Evans was servant to the trustees, and had the care of the chapel and the things in it, for the purpose of cleaning and keeping them in order, and that he had the only keys, except that the minister had a key of the vestry, from whence he could enter the chapel. Upon a case reserved, the judges were of opinion that the property could not be considered as the property of Evans. (*n*) So the plate of a club cannot be laid as the property of the steward of the club; for he is only a servant. (*o*) But though, generally speaking, the possession of the servant is the possession of the master, (*p*) yet there are some cases where a kind of special property has been considered to exist in the servant. Respecting the case lately mentioned, of a master delivering money to his servant to carry to a certain place, and then robbing his servant on the road, a learned writer observes, 'I see no objection to laying the property of the goods in the servant, for though, in general, it may be said that he has no property in them, as against his master, although he has against every other person; yet having a clear right to defend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master in his presence, by putting in fear, is a taking from the master, and the offender may be indicted for robbing him.' (*q*)

If a servant be employed by his master to receive money for him, and be robbed of such money before he take it to his master, the

(*k*) *R. v. Eastall*, Mich. T. 1822, MS. Bayley, J. See Chit. Arch. by Prentice, vol. i. p. 646.

(*l*) 2 East, P. C. c. 16, s. 90, pp. 652, 653.

(*m*) *R. v. Green*, D. & B. 113.

(*n*) *R. v. Hutchinson*, MS. Bayley, J., and R. & R. 412. They should be laid in such cases as the property of one of the

members 'and others.' *R. v. Boulton*, 5 C. & P. 537, vol. i. p. 26.

(*o*) *R. v. Ashley*, 1 C. & K. 198. See this case, *ante*, p. 32.

(*p*) *Post*, chap. xviii. And *ante*, p. 131, *et seq.* as to the distinction between a bare charge and a possession of goods delivered.

(*q*) 2 East, P. C. c. 16, s. 90, p. 654, *ante*, p. 254.

money may be described as the money of the servant. Upon an indictment for robbery of the moneys of S. Webb, it appeared that Webb's servant was sent out by his master to receive money from his customers, and was robbed of the money he had received, as he turned home. Alderson, B., was inclined to think the money could not be laid as the property of the master; for it was difficult to see how such an offence as the crime of embezzlement could have been a part of our criminal law if the possession by the servant of the property which had never come to the hands of the master, were construed to be the possession of the master; if it were, every servant, who converted to his own use property received by him for his master, would be guilty of larceny. (r)

The prisoner worked at a mill in the same room with three fellow-workmen, and was sent by them on pay-night for the wages of the four from the cashier of the works. The cashier gave the money for the four in a lump to the prisoner, who then went away and never gave any of it to his fellow-workmen. He was indicted for the larceny, and the indictment laid the property in the money in the workmen. At the trial, the indictment was amended by alleging the property to be in the proprietors of the works, instead of the workmen. Held, that the property was rightly laid as at first, in the men, and not in the masters; and that as the conviction had taken place on the amended indictment, which was wrong, the conviction must be quashed. (s)

The question concerning the sort of possession or special property which a servant may have in the goods of his master was much discussed in a case, where a stage-coach having been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the coachman. The count in the indictment on which the case proceeded laid the property in the coachman. The box was delivered by the servant of a tradesman in London to the book-keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and delivered it to a porter, who put it into the coach; and the coachman drove the coach to a place about thirty-eight miles from London, during which journey the box was stolen from the coach by the prisoners. The proprietors of the coach never called upon the coachman to make good any losses, except when they happened by his neglect, and for goods stolen privately from the coach they never expected any compensation from the driver. The jury having found the prisoners guilty, upon a case reserved, a majority of the judges

(r) *R. v. Rudick*, 8 C. & P. 237. His lordship discharged the jury, and directed a new bill laying the property in the servant to be preferred. *R. v. Bull*, 2 Leach, 841, cited in *Bazeley's* case, shews that the servant would not have been guilty of larceny if he had converted the money to his use; but a distinction seems to exist between cases where the question arises between the master and servant, and between the master and a third person. 'As between the master and servant or agent, where the master has not otherwise the possession than by the receipt of the servant or agent, the servant or agent

cannot be charged with a tortious or felonious taking, but as against a third person where there could be no question of a trust, the receipt of effects by an agent by the master's directions might be considered as a receipt by the master himself; and in the common course of business there is often no receipt or possession by the master.' Per Graham, B., *R. v. Remnant*, R. & R. 136, *post*, p. 266, and see *R. v. Murray*, R. & M. 276, *post*, tit. *Embezzlement*. 2 East, P. C. c. 16, s. 16, p. 568. And *R. v. Deakin*, *infra*. C. S. G.

(s) *R. v. Barnes*, 35 L. J. M. C. 204, 10 Cox, C. C. 255.

were of opinion that the property was well laid to be in the driver. Hotham, B., who delivered their opinion, said that the material question was, whether the driver had the possession of the goods, or only the bare charge of them; but that the case was not open to that distinction: for although, as against his employers, the masters of the coach, the mere driver can only have the bare charge of the property committed to him, and not the legal possession of it, which remains in the coach-master: yet, as against all the rest of the world, he must be considered to have such a special property therein, as will support a count charging them as his goods; for he has in fact the possession of and control over them; and they are entrusted to his custody and disposal during the journey. The inconvenience would be great indeed if the law were otherwise: as the difficulties and mistakes which must unavoidably arise in seeking after all the persons concerned as proprietors of a stage-coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable. That the law, therefore, on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor. (*t*)

Turner, as agent for Nash, sent up notes to Morgan, another of Nash's agents, and Morgan, as agent for Nash, sent them by the coach directed to Walker: and the prisoner stole them from the coach. The indictment having described them as Nash's, it was urged that they could not be so described, because Nash never had them, except by the hands of his agents; but all the judges thought they had been rightly described, and held the conviction right. (*u*) But the property cannot be laid in a man who has never had either actual or constructive possession, except as far as it resulted from the possession of the thief and of persons acting under him. Thus where Paul had ordered a hat of Beer, and the prisoner sent for it in Paul's name and got it, and was indicted for stealing Paul's hat, the judges held that the property could not be said to be in Paul. (*v*)

**Ownership of the clothes, &c., of children.** — Clothes and other necessities provided for children by their parents are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. (*w*) There are cases, however, of exclusive property in the children. Thus, in a case where the prisoner was charged with stealing wearing apparel the property of J. Wilson, and it appeared in evidence that the wearing apparel had been furnished by J. Wilson to his son George, and that the son was nineteen years of age and bound apprentice to his father, who had covenanted to find him in clothing; the Court held that the indictment was defective, and that the wearing apparel was exclusively the property of the son, who had been furnished with it in pursuance of the condition of the indentures. (*x*) And in a case which occurred at the old Bailey above a century ago, upon the Court

(*t*) *R. v. Deakin*, 2 Leach, 862, 876. 2 East, P. C. c. 16, s. 90, p. 653.

(*u*) *R. v. Remnant*, MS. Bayley, J., and R. & R. 136.

(*v*) *R. v. Adams*, MS. Bayley, J., and R. & R. 225.

(*w*) 2 East, P. C. c. 16, s. 91, p. 654. Hayne's case, 12 Rep. 112.

(*x*) *Forsgate's case*, 1 Leach, 463.

doubting whether the property of a gold chain, which was taken from a child's neck who had worn it for four years, ought not to be laid to be in the father, an ancient clerk of the court said that it had always been usual to lay it to be the goods of the child in such case; and that many indictments which had laid them to be the property of the father had been ordered to be altered by the judges. (y)

Where the prisoner was indicted for stealing a pair of trousers, the property of J. Jones, and it appeared that J. Jones bought the cloth of which the trousers were made and paid for it, but the trousers were made for his son Thomas, who was seventeen years of age; and J. Jones stated that he found clothes for his son, who was not his apprentice, but a labourer like himself, and worked for the same master, but at different work, and lived with his father. Patteson, J., said, 'I think the property is well laid. It may be laid in these cases either in the father or the child; but the better course is to lay it in the child.' (z)

**Property of surviving partner.** — In a case where the prisoner was indicted for sheep stealing, the property was laid in S. Dodd the elder, S. Dodd the younger, and several other persons of the same name. The evidence was, that S. Dodd the elder, and a son of his, who afterwards died, took a farm on their joint concern, and kept a stock of sheep, which was their joint property, upon it; that the son died intestate about five years ago, leaving a widow, who died soon after him, and several children (being the S. Dodd the younger and the other persons named in the indictment); that no division was ever made of the stock; and that it was from the same stock that all the sheep upon the farm at the time of the felony committed were bred; some before and some after the son's death. S. Dodd the elder continued to occupy the farm and use the stock as before, considering himself as acting for his grandchildren who were still infants, in respect of one moiety; and that he accordingly kept a regular account with them in his books. The prisoner having been convicted, the judges, upon a case reserved on the question whether the property were well laid jointly in the grandfather and grandchildren, were of opinion that it was well laid; for though in the case of joint traders there was no *jus accrescendi*, and the remedy survived: yet here it was proved, by the evidence of the grandfather, that he held one moiety for his grandchildren; and he might make distribution among them. And some of the judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent. The judges were all of opinion that it was not necessary that the property in the thing taken should be the strict legal property. (a)

So where the prisoner was indicted for stealing some drapery goods, which were stated in the indictment to be the property of B. Dodge and S. Chilcott, widow, it appeared that the goods in question had been part of the joint stock in trade of B. Dodge and one Chilcott, the

(y) Anon. 2 East, P. C. c. 16, s. 91, p. 654. 1 Leach, 464, note (a). If apparel be put upon a boy, this is a gift in the law; for the boy hath capacity to take it. Hayne's case, 12 Rep. 112.

(z) R. v. Hughes, C. & M. 593, S. C. MS. C. S. G.

(a) Scott's case, 2 East, P. C. c. 16, s. 91, p. 655. R. & R. 13.

late husband of S. Chilcott, who died without a will, leaving S. Chilcott and some young children; and no administration of his effects had been granted; but S. Chilcott, from the time of his death, acted as a partner, and regularly attended the business of the shop. The goods in question were stolen on the 6th of January, after the death of the husband, who died about the Christmas preceding: and on the 20th of January a division was made of the remaining stock in trade; S. Chilcott taking one half, and B. Dodge the other half. It was contended that the children, in respect of their interest under the statute of distributions, should have been named with B. Dodge and S. Chilcott, as joint proprietors; or that the property should have been alleged to be in the ordinary and surviving partner. But the learned judge who tried the prisoner, held that the actual possession in B. Dodge and S. Chilcott, as owners, was sufficient; upon which the prisoner was convicted: and the judges afterwards, upon a case reserved, held that the conviction was right. (b)

A case has been already mentioned, in which, upon an indictment for stealing pheasants, restrained of their liberty, it appeared in evidence that the prosecutor, in whom the property in the pheasants was laid, was not a person qualified to keep or shoot game; whereupon an objection was taken that he could not have any property in them, or any legal possession, sufficient to support the indictment, and was overruled. (c)

**Ownership of treasure trove, estrays, wrecks, &c.** — It is laid down, in some of the books, that larceny cannot be committed of things wherein no person has any determinate property; and, therefore, that the taking away treasure trove, or waif, or stray, before they have been seized by the persons who have a right thereto, cannot be felony. (d) But it is observed, that there seems to be some incorrectness in the generality of this position; as, although the lord has no determinate property in waifs, treasure trove, &c., till seizure, the true owner, though unknown, who has lost, or been robbed of the things, has still a property in them. (e) And as to the reason assigned by one writer of these things not being the subject of larceny, namely, the uncertainty of the true owner, (f) it is observed, that it, at least, implies that if the owner be known, larceny may be committed of them. (g)

**Ownership where the person of the owner is unknown.** — But, fur-

(b) *R. v. Gaby, cor. Chambre, J., MS. R. & R. 178.*

(c) *Jones's case, ante, p. 251.*

(d) 3 Inst. 108. 1 Hale, 510. 1 Hawk. P. C. c. 33, s. 38. Where in ploughing a field Butchers turned up certain pieces of old gold weighing eleven pounds and of the value of £530, and sold them to Thomas for old brass at sixpence a pound, saying where he had found them, and Thomas went to Willett, and the evidence led to the conclusion that they ascertained it was gold, and Thomas sent Willett to London, and he sold it for gold; they were held to be properly convicted of the misdemeanor of *concealing treasure trove*, although Butchers was wholly innocent; and it was also held that it

is not necessary in an indictment for this offence to allege that the prisoners concealed the treasure fraudulently; but it is enough to allege that they did it 'unlawfully, wilfully, and knowingly.' *R. v. Thomas*, 9 Cox, C. C. 376. L. & C. 313. 33 L. J. M. C. 22. It is not necessary in an indictment for concealing treasure trove to allege an inquisition before the coroner or to shew the title of the Crown by office found. *R. v. Toole*, 11 Cox, C. C. R. 75 (Irish).

(e) 2 East, P. C. c. 16, s. 40, p. 606, and s. 88, p. 651.

(f) *Pult de pace*, 131. And so also in 3 Inst. 108, the reason is given that *dominus rerum non apparet*.

(g) 2 East, P. C. c. 16, s. 40, p. 606.

ther, it is well settled that larceny may be committed by stealing goods, the owner of which is *not known*; and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown. (*h*) And it is said that the reason is, that the felony would otherwise go unpunished, which would be a great mischief in the law. (*i*) But upon prosecutions of this kind some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; and Lord Hale, C. J., said that he never would convict any person for stealing the goods *cujusdam ignoti*, merely because the person would not give an account how he came by them, unless there were due proof made that a felony had been committed of those goods. (*j*) It is said, therefore, with respect to these cases, that the true ground upon which persons so indicted may in any instance claim to be acquitted, when the other facts, necessary to constitute the crime of larceny, appear upon the evidence, seems to be a want of the proper proof that the taking was felonious, or *invito domino*, and not the want of any property in the true owner, who, by losing his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases. (*k*)

It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper if the owner be really known. (*l*)

Where the owner might easily have been ascertained, an indictment for stealing the goods of a person unknown, is not maintainable. (*m*)

It must be observed that in these cases an amendment may now be made under the 14 & 15 Vict. c. 100, s. 1, and the ownership stated according to the proof on the trial. See Vol. I. p. 53.

It is said that where a felony has been committed by stealing the goods of a person unknown, the King shall have the goods. (*n*)

**Ownership of goods belonging to a church and of shrouds or coffins in which corpses are deposited.**—The property in the bells, books, or

(*h*) 1 Hale, 512. 2 Hale, 181. 1 Hawk. P. C. c. 33, s. 44. 2 East, P. C. c. 16, s. 88, p. 651. Anon. Dy. 99 a, pl. 61, 285 a. Westbeer's case, *ante*, p. 230. And see note (*s*), *post*, p. 270.

(*i*) Per Fineux, C. J., Keilw. 25.

(*j*) 2 Hale, 290.

(*k*) 2 East, P. C. c. 16, s. 88, p. 651.

(*l*) 2 East, P. C. c. 16, s. 88, p. 651. R. v. Deakin, 2 Leach, 862, *ante*, p. 266. Walker's case, 3 Campb. 264, Le Blanc, J. And see R. v. Campbell, 1 C. & K. 82, and R. v. Stroud, 1 C. & K. 187.

(*m*) R. v. Robinson, Holt, N. P. C. 595. 2 Stark. Ev. 608. The averment in the indictment always is 'to the jurors afore-said,' i.e., the grand jury 'unknown,' and in R. v. Cordy, Gloucester Spr. Ass. 1832, MS. C. S. G., upon its being stated in argument that it had been held that if it were alleged that property was stolen by a person unknown, and it was proved at the trial that the person was known, the prisoner must be acquitted; Littledale, J., said, 'That case has been decided, but it is subject to some

doubt; the question is whether the person is known to the grand jury. It will be difficult to prove that he was so known, and unless he was known to the grand jury, I should doubt about that case.' If a case should occur where the witnesses who went before the grand jury were wholly ignorant of the party said to be unknown, and it turned out by other evidence, e.g., by a witness called for the prisoner, that the party was known, it would deserve consideration whether the prisoner would thereby be entitled to be acquitted. In R. v. Deakin, and Walker's case, *ante*, note (*b*), and R. v. Robinson, the grand jury had evidence before them to shew that an owner might be ascertained. It may, however, be difficult to distinguish this part of the indictment from the other parts, and as the prisoner may clearly contradict the other parts of the finding, it would probably be held that he might contradict this part also. C. S. G.

(*n*) 1 Hawk. P. C. c. 33, s. 44. 2 East, P. C. c. 16, s. 88, p. 651.

other goods belonging to a church, has been already spoken of. (o) It is clearly settled that there can be no property in a dead corpse. (p) If, however, a shroud be stolen from a corpse, it may be laid to be the property of the executors, or whoever else buried the deceased; but not as the property of the deceased himself. (q) And a case is mentioned where several persons were convicted of larceny, in stealing leaden coffins out of the vaults of a church; the coffins being laid as the goods of the executors. (r) If the personal representatives of the deceased cannot be ascertained, or even as it seems, if it appear probable, from the time which has elapsed since the death, that it might be a matter of some difficulty to ascertain them, it will be sufficient to lay such goods as the property of 'a person unknown.' Where the prisoner was indicted for stealing a leaden coffin, the property of a person unknown, it was objected that, though the coffin had lain in the ground near sixty years, yet, as the same family, of which the deceased had been a member, remained on the spot, and as it did not appear that any inquiry whatever had been made to ascertain the personal representative, there was want of reasonable diligence in the prosecutor; but it was ruled to be sufficient after so many years had passed. (s) In the same case it was also ruled that a count, laying the coffin as the property of certain persons being the then churchwardens, could not be supported. (t)

But where the prisoners were indicted for stealing lead from a vault in a church and the property was laid in the churchwardens and overseers of the township of Market Harborough, and it appeared that the lead had been taken from one of the coffins in the vault of a church which was situate in the parish of Great Bowden, a mile from Market Harborough, to which place it belonged. It had been out of use for many years except for the burial of the dead; but the Market Harborough people continued to bury their dead there, having no other Church of England burial-place. At the funeral service clergymen from Market Harborough officiated, but it did not appear that there was any rector, vicar, or other minister expressly attached to it. There were some portions of land belonging to it held by tenants who paid rent to the churchwardens and overseers of Market Harborough. The people of Great Bowden never used this church or burial-ground in any way. Lord Abinger, C. B., held that the property was well laid in the churchwardens and overseers of Market Harborough, to which township the church belonged. (u)

**Of the ownership of the goods of a deceased person.** — If a man die intestate, and the goods of the deceased be stolen before administration committed, such goods shall be supposed to be the goods of the ordinary: but if a man die, having made a will and appointed an executor, the goods shall be supposed to be the goods of the executor, even before probate is granted to him. (v) Where property is stolen before administration is granted, with the will annexed, in a case

(o) *Ante*, p. 54.

(p) 2 East, P. C. c. 16, s. 89, p. 652.

(q) Hayne's case, 12 Co. 112, and 3 Inst. 110, where the theft is called *furtum inaudium*. 1 Hale, 515. 1 Hawk. P. C. c. 33, s. 46. 4 Blac. Com. 236.

(r) Anon., 2 East, P. C. c. 16, s. 89, p. 652.

(s) Anon. Buller, J. 2 East, P. C. c. 16, s. 89, p. 652.

(t) *Id. ibid.*

(u) *R. v. Garlick*, 1 Cox, C. C. 52.

(v) 1 Hale, 514. 2 East, P. C. c. 16, s. 89, p. 652.



where the executor refuses to prove, it cannot be laid in the administrator. Upon an indictment for stealing the property of R. Roberts, it appeared that a person had made a will and appointed executors, who would not prove it, upon which Roberts took out letters of administration with the will annexed, but they were not dated till after the time when the felony was committed; and it was held that the property ought to have been laid in the ordinary, as letters of administration only had their operation from the time when they were granted, though the rights of an executor commence from the time of the death of the testator. (*w*) Neither the ordinary, nor an executor, nor administrator, need shew their title specially, it being founded on their own possession; in which case a general indictment lies without naming themselves ordinary, executor, or administrator. (*x*)

Where the deceased had lived in Gloucestershire, and left to go into Worcestershire, and was found dead in Worcestershire, and the property was taken from the body after his death; Patteson, J., held that the property was rightly laid in the Bishop of Worcester. (*y*)

Upon an indictment for stealing various articles, the property of the Bishop of Peterborough, within that diocese, it appeared that the property had belonged to F. Knight, and a witness stated that she died on the 14th of September; that she made no will, and no letters of administration had been taken out; that the whole of the drawers and boxes of the deceased had been searched and no will found, and that every means had been taken to find a will, but no will turned up; and the witness believed that there was not one. Another witness had searched the register of the proper local court, but no letters of administration had been taken out; it was objected that there was not sufficient evidence of the intestacy of the deceased; but, upon a case reserved, it was held that there was abundant evidence of the intestacy. (*z*)

Upon an indictment for stealing a number of articles, the property of the ordinary, it is sufficient to prove that any one of them was in the possession of the deceased at the time of his death. (*a*)

Where money was stolen from a box affixed to a pew in a parish church, it was held that the money was constructively in the possession of the vicar and churchwardens, who jointly are not a corporation, and that the property was rightly laid in the vicar by name 'and others.' (*b*)

**Of the ownership of goods of corporations and trustees.**—Property vested in a body of persons ought not to be laid as the property of

(*w*) *R. v. Smith*, 7 C. & P. 147, Bolland, B., and Coleridge, J.

(*x*) 1 Hale, 514.

(*y*) *R. v. Tippin*, C. & M. 545. The father of the deceased proved that he believed the deceased had left Gloucestershire with a view of coming and living with him in Worcestershire; but he did not know whether he had given up his lodgings in Gloucestershire.

(*z*) *R. v. Johnson*, D. & B. 340. It is perfectly clear that on such an indictment it is sufficient for the prosecution to prove the death, and it then lies on the prisoner to

prove a will or letters of administration. There is no presumption that either a will has been made or letters of administration taken out. In ejectment by the heir at law he has only to prove that he is heir, and then the defendant must prove a will, if he can. Roscoe, Evid. 200, 502, 8 Ed.

(*a*) *R. v. Johnson*, *supra*. The Court also held that the prosecutor was not bound to confine the case to the articles proved to have been in the possession of the deceased at the time of his death.

(*b*) *R. v. Wortley*, 1 Den. C. C. 162. See this case, *ante*, p. 56.

that body, unless such body is incorporated, but should be described as belonging to the individuals (or one of them by name, 'and others,' 7 Geo. 4, c. 64, s. 14) who constitute such body. The 7 Geo. 4, c. 64, s. 20, has, however, enacted that judgment shall not be stayed or reversed on the ground that any person or persons, mentioned in an indictment or information, is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names. (c)

In a case which occurred upon the 17 Geo. 3, c. 17, it was decided, that where an Act of Parliament gives a corporate capacity and a corporate name to any body of persons, and vests property in them, such property must be stated in the indictment to belong to them in their corporate name, and not in the names of the individual members. (d)

But where property was vested in certain trustees, under an Act of Parliament, who were not incorporated, nor had any public name given to them collectively, it was holden that the property should have been laid in the indictment as belonging to them in their individual names. (e)

The prisoner was indicted for stealing a parcel, the property of the London and North Western Railway Company. The parcel was stolen from the Lichfield station, which had been in the possession of the Company for three or four years, by means of their servants; but no statute was produced which authorised the Company to purchase the Trent Valley line: an Act incorporating the Company was, however, produced. It was held that as a corporation is liable in trover, trespass, and ejectment, they might have an actual possession, though it might be wrongful, which would support this indictment. (f)

It is not necessary to produce the certificate of the incorporation of a company when the existence of the company can be sufficiently proved by evidence that it had carried on business as such. (g)

The prisoner was indicted for embezzling the money of T. Bolland and others. T. Bolland was one of the partners in a coal company; there were eighty shareholders or partners in the company, and directors were appointed. Over the office door of the company was painted 'The Rotherham, Masbro', and Holmes Coal Company "Limited."' The directors appointed the officers of the company by resolutions, which were recorded in a minute book of the company. The prisoner was secretary and cashier of the company, and had given receipts which were headed, 'Dr. to the Rotherham, Masbro', and Holmes Coal Company Limited.' Shares were transferred by certificates, and a share ledger was kept. It was objected that this was not a private partnership, of which the prisoner was clerk or servant; but a corporate body or public company, of which the prisoner was secretary or public officer; and the Joint Stock Companies Acts 1856 and 1857 were cited; the Court overruled the objection on the ground that there was no sufficient evidence to prove that this was a body corporate or public

(c) See the section more fully stated, vol. i. p. 37.

(d) *R. v. Patrick*, 1 Leach, 253. 2 East, P. C. c. 22, s. 7, p. 1059. *R. v. West*, 1 Q. B. 826.

(e) *R. v. Sherrington*, 1 Leach, 513. *R. v. Beacall*, R. & M. 15.

(f) *R. v. Freeman*, Stafford Spr. Ass. 1851. Greaves, Q. C., after consulting Tal-  
fourd, J., MSS. C. S. G.

(g) *R. v. Langton*, 2 Q. B. D. 296.

company; and, on a case reserved, it was held that this ruling was correct. Colliery companies may lawfully be carried on in any county in England on the cost-book principle, without registration, and a mining company on that principle is declared to be lawful by the 7 & 8 Vict. c. 110: the evidence, therefore, did not necessarily lead to the inference that the company was such as suggested. It was the prisoner also who alleged that registration existed, and according to the general rule, it lay on him to prove it, either by producing the writing, or accounting for its absence. A company intending to be registered might fail to fulfil some of the conditions required for a valid registration, and though they would violate the Joint Stock Companies Act by carrying on business without registration, the directors and shareholders would not lose their legal rights as owners of property, neither would they be placed out of the protection of the law because the imperfect registration failed to make them a corporation. (*h*)

As to stating names of partners and ownership of property in indictments, see Vol. I. p. 26.

## SEC. XI.

### *Indictment, Trial, and Punishment.*

It is not intended to enter particularly upon the form of an indictment for larceny, concerning which ample information is given in those works which treat expressly upon the subject of criminal pleading. (*i*) It may be briefly observed, that the prisoner must be charged with the offence in the technical form, 'feloniously did steal, take, and carry away;' or, as it is said to be most proper, when cattle are the subject matter of the larceny, 'feloniously did steal, take, and *lead* away.' (*j*) It is not now necessary that the value or price of any matter or thing should be stated in any case where the value or price is not of the essence of the offence. (*k*) It has been abundantly shewn that the property must be laid in some person who has in legal consideration a sufficient ownership for that purpose. (*l*)

With respect to the proper description of the goods stolen, difficulties will sometimes occur. The general rule is given, that they should be described with such a certainty as will enable the jury to decide, whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and shew judicially to the Court that it could have been the subject

(*h*) *R. v. Frankland*, L. & C. 276. 9 Cox, C. C. 273.

(*i*) Stark. Crim. Plead. 192, *et seq.*, 449, *et seq.* 3 Chit. Crim. L. 944, *et seq.* Cro. Circ. Comp. p. 38, *et seq.*

(*j*) 2 Hale, 184. 2 East, P. C. c. 16, s. 159, p. 778. Stark. Crim. Plead. 78, 451. 3 Chit. Crim. L. 950. In Stark. Crim. Plead. 78, note (*u*), the learned author says, 'It has been said that for stealing a horse it

should be *cepit et abduxit*, for stealing a sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions.' See my note to the Crim. Acts, p. 159, 2nd Ed. C. S. G.

(*k*) 14 & 15 Vict. c. 100, s. 24, vol. i. p. 36.

(*l*) *Ante*, p. 252, *et seq.* *R. v. Ward*, 7 Cox, C. C. 421. *Sill v. R.*, Deara. C. C. 132. 1 E. & B. 553.

matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. (*m*) And it is quite necessary that it should appear, on the face of the indictment, that the thing taken is such whereof larceny may be committed.

The prisoner was indicted for stealing in the dwelling-house of Mary Johnson certain goods, her property; and it appeared that her real name was Davis, but that she had passed by the name of Johnson, without any purpose of fraud, for five years. Upon the point being saved, the judges were clear that the time she had been known by the name of Johnson warranted her being so called in the indictment. (*n*)

The property stolen must be accurately described; it is not therefore sufficient to say that the prisoner stole the goods and chattels of B., without shewing what goods and chattels in certain, as one horse, one ox, &c. (*o*) So an indictment charging the stealing of 'one hundred articles of household furniture' would be bad. (*p*) But an indictment charging the things stolen to be nine printed books would be good. (*q*) So in an indictment for stealing a handkerchief, it is not necessary to describe it particularly, as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. (*r*)

On an indictment for stealing 'one parcel of the value of,' &c. it appeared that the prisoner forced open a box in the hold of a vessel and carried off the parcel in question; no evidence of the contents of the parcel was given, and the prosecutors had no property in it except as carriers; and, upon a case reserved, it was held that the description was insufficient. (*s*)

Where the prisoner was indicted for stealing 'three eggs of the value of twopence of the goods and chattels of S. Harris,' Tindal, C. J., held the indictment insufficient; it should have stated what sort of eggs were stolen; for aught that appears on this indictment the eggs stolen might have been adder's eggs, or some other species of eggs which cannot be the subject of larceny. (*t*) But where the prisoner was convicted upon an indictment which charged him with stealing 'one ham of the value of ten shillings of the goods and chattels of T. Heighway;' it was objected that, for anything that appeared on the face of the indictment, it might have been the ham of an animal *feræ naturæ*, a wild boar, for instance, that had been stolen; the Court overruled the objection, and, upon a case reserved, the judges were unanimously of opinion that the conviction was right, and Patteson, J., said, 'I do not understand the objection. Supposing

(*m*) Stark. Crim. Plead. 193. 1 Ch. Cr. Law, 235.

(*n*) R. v. Norton, MS., Bayley, J., and R. & R. 510.

(*o*) 2 Hale, 182.

(*p*) R. v. Forsyth, R. & R. 274.

(*q*) Per Lord Ellenborough, and Bayley, J., and in R. v. Johnson, 3 M. & S. 540.

(*r*) Per Le Blanc, J., *ibid*.

(*s*) R. v. Bonner, 7 Cox, C. C. 13. This was a decision in Ireland, and Monahan, C. J., said, 'The truth is, the prisoner stole

something, but what it is nobody knows.' A very good reason for holding that the description was quite sufficient, as under the facts it clearly was. In R. v. Gallears, *infra*, Pollock, C. B., said, 'If a person were indicted for stealing "one box" of the goods, &c., that would be sufficient, although a small house in the country is sometimes called a box.' And see that case, *infra*, and R. v. Douglas, 1 Camp. 212, *post*.

(*t*) R. v. Cox, 1 C. & K. 494. *Sed quære*, see next note.

it turned out on proof to be the ham of a wild boar, why should the prisoner be at liberty to take it from the prosecutor without becoming criminally liable? The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcasses of dead animals, such as a boar's head.' (u)

Upon an indictment for stealing twenty-five pounds weight of tin, it appeared that the tin consisted of two pieces, which a witness called 'lumps of tin,' but afterwards admitted that they were called in the trade 'ingots;' but added that that term was applied as well to the pieces of tin, as to the mould in which they were cast, and was applied to the shape. The tin had been cast into these pieces for the purpose of being again melted up for use, in the manufacture of tin; and in the middle of each was an indentation for the purpose of breaking them in two when wanted to be melted up again. It was objected that the tin ought to have been described as two ingots; for whenever an article has obtained a name in the trade, it must be described by it. Coleridge, J., 'It seems to me that the description is sufficient to answer all the purposes which are required by law. First, it is the subject of larceny equally whether it be an ingot or so many pounds weight of tin. Secondly, as to the facility of pleading *autrefois acquit*, the prisoner stands in the same situation, whether it be one or the other, because there must be some parol evidence in all cases to shew what it was that he was tried for before, and it would be as easy to prove one as the other. The last question is, whether it is described with sufficient certainty, in order that the jury may be satisfied that it is the thing described. If this had been some article, that, in ordinary parlance, had been called by a particular name of its own, it would have been a wrong description to have called it by the name of the material of which it was composed; as, if a piece of cloth were called so many pounds of wool, because it had ceased to be wool, and nobody could understand that you were speaking of cloth. It would be wrong to say so many ounces of gold, if a man stole so many sovereigns; you would there mislead by calling it gold. If it were a rod of iron, it would be sufficient to call it so many pounds weight of iron. (v) And where the prisoner was indicted for stealing ten pounds of copper, and the articles stolen were copper nails; Erle, J., was inclined to hold that they should have been so described. (w)

Where a prisoner was indicted for stealing, *inter alia*, two shifts, and the only article identified by the prosecutrix was what she called a shirt, which had been made for a little girl six years of age, and the prosecutrix stated that she called such things shirts while girls were so young. Tindal, C. J., said, 'It must be shewn that the

(u) *R. v. Gallears*, 1 Den. C. C. 501. 2 C. & K. 981. Pollock, C. B., intimated a doubt as to the correctness of the ruling in *R. v. Cox*, *supra*.

(v) *R. v. Mansfield*, C. & M. 140. *R. v. Stott*, 2 East, P. C. c. 16, s. 144, p. 752, 753, was cited in support of the objection. There the indictment was for receiving stolen iron, described as so many 'pieces of iron, called strokes,' so many 'pieces of iron,' and so many 'pieces of iron, called horse-shoes;' and the only question seems to have

been whether the 29 Geo. 2, c. 30, related to metals in their raw state as contradistinguished from wrought goods, and no opinion was given; the counsel for the prisoner waiving the further prosecution of a writ of error, upon a doubt intimated by the Court of B. R., whether any other judgment could be passed than that of transportation, directed by the 29 Geo. 3, c. 30. C. S. G.

(w) *R. v. Christance*, 1 Cox, C. C. 143. The prisoners were acquitted, or the point would have been reserved.

article is generally known by the name laid in the indictment, and here the prosecutrix says she should call it a shirt. The prisoner, therefore, must be acquitted.' (x)

Upon an indictment against the prisoners for stealing six handkerchiefs, it appeared that the handkerchiefs were new and in one piece, but that the pattern designated each, there being a light coloured line between each; and it also appeared that the article was known in the trade as a piece of silk handkerchiefs, and that it was the custom to charge such an article as so many handkerchiefs. The point being saved, the judges held that the property was rightly described as six handkerchiefs, and that the conviction was right. (y)

It is also laid down as a rule that, when the subject matter is defined by a statute, the descriptive words contained in the Act should be also used in the indictment; and that where the Act uses several descriptive terms, one of which, being general, includes the more specific term, an indictment would be bad which used the more general instead of the more special description. (z) And an instance is given where an indictment under the statutes 14 Geo. 2, c. 6, and 15 Geo. 2, c. 34, for stealing a *cow*, was holden not to be sustained by the fact that the defendant stole a *heifer*; on the ground that those statutes mention both *heifer* and *cow*, they must be considered as having used one term in contradistinction to the other in describing the several animals they were intended to protect. (a) Where an article is described in a statute by a particular name, it is enough to describe it by that name in an indictment for larceny. (b)

An indictment charging the stealing of a 'brass furnace' is not supported by evidence of stealing the pieces of brass, into which the furnace has been broken up. (c) So where an indictment charged the prisoner with stealing a 'spade,' and it appeared that he only stole the bit or flat iron part of the spade, the handle being off at the time the iron was stolen, it was held a variance. (d) A prisoner was indicted for stealing 'one bushel of oats, one bushel of chaff, and one bushel of beans, of the goods and chattels of A. B., then and there found;' and the proof was, that these articles, at the time of the felonious taking, were mixed together; Bayley, J., held that the articles ought to have been described as mixed, thus, 'a certain mixture consisting of one bushel, &c.,' and he directed an acquittal on this count. (e)

By the 14 & 15 Vict. c. 100, s. 18, noticed Vol. I. p. 25, money or bank notes may be described simply as money, without specifying any particular coin or bank note.

(x) *R. v. Edward Fox*, Salop Sum. Ass. 1842, MSS. C. S. G.

(y) *R. v. Nibbs*, MS. Bayley, J., and R. & M. C. C. R. 25.

(z) Stark. Crim. Plead. 193.

(a) Cooke's case, 1 Leach, 105. But see *R. v. McCulley*, 2 M. C. C. R. 34, *post*, chap. xii.

(b) *R. v. Johnson*, 3 M. & S. 540.

(c) *R. v. Halloway*, 1 C. & P. 127, Hulloock, B.

(d) *R. v. Stiles*, Gloucester Sum. Ass. 1833, Gurney, B. MS. C. S. G.

(e) *R. v. Kettle*, 3 Chit. Cr. L. 947 *a*. On this case being cited in *R. v. Bond*, 1 Den. C. C. 517, Alderson, B., said, 'I should

question the correctness of that ruling if it came before me. A chemical mixture would make a total alteration in each article, and therefore no one would remain what it was before the mixture took place: but there the mixture was merely mechanical.' But, with all deference, what does it signify whether the mixture be mechanical or chemical, where the result is a mixture which is hardly capable of being divided into its separate ingredients, and where the specification of it as a mixture correctly describes the actual state at the time of asportation, and the description by such a quantity of each of its ingredients is calculated to mislead?

Before this Act an indictment for stealing £10 in moneys numbered was not sufficient; but some of the pieces of which that money consisted must have been specified. (*f*)

In a case before the above Act the indictment alleged that the prisoner stole in the dwelling-house of the prosecutors 70 pieces of the current coin called sovereigns; 140 pieces of the current coin called half sovereigns, and in like manner 500 crowns, 500 half crowns, 500 florins, 100 shillings and 100 sixpences. The prisoner was clerk in a bank, and there was evidence from which it might be inferred that he had on one day abstracted £70 in money from the bank; but there was no evidence to shew the nature of any one piece of the coin taken. It was objected that there was no evidence to shew that the prisoner had taken any particular description of coin, and that the jury could not find him guilty of stealing either the one or the other in the alternative. The learned judge told the jury that if they were satisfied that the prisoner had stolen a sum of money from his employers, consisting of some of the coins mentioned in the indictment, although they could not say which, they should find him guilty, which they did; and, upon a case reserved, upon the question whether this direction was correct, four of the judges (*g*) were of opinion that the direction was wrong, and their opinion was thus delivered by Alderson, B.: 'The count, including all the species of coin, must be treated exactly as if it was a set of counts, each charging one species alone. And if so, we think it clear that the jury could not find a man guilty, unless they could say affirmatively that he was guilty of stealing some definite thing described in one of the counts. And the same rule must, we think, apply if they are all included in one count. Suppose a conviction under this charge [to the jury], and a subsequent indictment for stealing sovereigns: how is the prisoner to plead and prove that he has been before convicted of that offence? All the proof he could then give, if this verdict stand, would be either that he has been convicted of stealing sovereigns, or half sovereigns, or crowns, or some other species of coin. (*h*) We think this cannot be just to a prisoner. On the other hand, if he has been convicted of the definite crime of stealing sovereigns, and acquitted of the rest of the charge, he has his future defence either on the plea of *autrefois acquit* or *autrefois convict*, as to the whole charge in this indictment. But on this charge [to the jury] and the verdict found thereon, it is impossible to say whether he is convicted or acquitted of any particular portion of this count or not. He is certainly not convicted of the whole. The fact that in embezzlement an Act of Parliament was found necessary, seems to us strongly to shew what but for that Act was the universal law on this subject, according to the text books and previous decisions. (*i*)

(*f*) *R. v. Fry*, MS. Bayley, J., and R. & R. 482.

(*g*) Wilde, C. J., Alderson, B., Wightman, J., and Cresswell, J.

(*h*) This rests on a misapprehension. The charge to the jury never appears on the record, and the verdict, as taken in this case, was a general verdict of guilty, which,

on the record, would be entered as a verdict of stealing all the moneys charged in the indictment; on a plea of *autrefois convict*, the record so drawn up would protect the prisoner from every larceny of which he was so convicted, and of course from a larceny of 70 sovereigns.

(*i*) *R. v. Bond*, 1 Den. C. C. 517, Erie.

The 14 & 15 Vict. c. 100, s. 5, noticed Vol. I. p. 25, states how an instrument may be described in an indictment for stealing it.

It is said to have been formerly the practice upon all indictments for stealing notes or other written securities, to set out the notes or other securities at full length; (*j*) but it was settled before the above Act that they might be described in a general manner, and need not be set out *verbatim*. (*k*) In a case before the above Act where a prisoner was charged with stealing 'a certain note commonly called a bank note,' of the value, &c., and convicted, an objection which was taken to this description of the note was referred to the judges, who all held the indictment ill-laid; as, in describing the property stolen to be a 'note commonly called a bank note,' it did not follow any of the descriptions of property in the statute, and that the addition 'commonly called a bank note' did not aid such original wrong description. (*l*) But if the indictment described the instrument in the words of the statute creating the offence, it was sufficient. (*m*)

In a case before the above Act where the indictment charged the stealing of 'one bank note for the payment of £10, and of the value of £10,' and the note was a £5 note; Maule, J., held the variance fatal. (*n*)

An indictment for stealing a promissory note was held good which described it as 'one promissory note for the payment of five guineas.' (*o*)

The necessary description of a bank note underwent considerable discussion before the above Act in the case of an indictment upon the Embezzling Act, 39 Geo. 3, c. 85, (now repealed). The indictment charged the prisoner with embezzling 'divers, to wit, nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £9 of lawful money of Great Britain, and of the value of £9 of like lawful money;' and, upon error to reverse the judgment, it was objected that none of the cases had determined that such an indictment containing no description of any particular note whatever was sufficient; but the Court held that this was a sufficient description.

J., dissentiente. This decision was right, 1st, On the ground that the jury could not convict on this indictment, unless there was proof of some specific coin stolen; 2ndly, On the ground that evidence of stealing one article does not warrant a verdict of guilty of stealing several articles; 3rdly, On the ground that the evidence at most only proved stealing £70, and the direction to the jury and the verdict was guilty of stealing not only 70 sovereigns, but all the other money mentioned in the indictment. And as the indictment was for stealing in a dwelling-house, the amount up to £5 was material; which raises 4thly, the objection that the jury were directed to convict if they were satisfied that the prisoner stole 'some of the coins,' which might be less than £5. In *R. v. Sharp*, 2 Cox, C. C. 181, where the indictment charged the stealing of ninety-two pennies and twenty-four halfpence, and the prosecutor was not certain whether the

coin was in pennies or halfpence; Rolfe, B., held that if there was certainty that any one of either description of coin had been taken, it would be sufficient: but his lordship recommended that in future so many 'pieces of copper coin,' or 'copper money' of the value of, &c., should be stated.

(*j*) 3 M. & S. 541.

(*k*) 2 East, P. C. c. 16, s. 159, p. 777. Milnes's case, 2 East, P. C. c. 16, s. 37, p. 602. Johnson's case, 2 Leach, 1103, note (*a*). Stark. Crim. Plead. 454, note (*k*).

(*l*) Craven's case, 2 East, P. C. c. 16, s. 37, p. 601, 602. R. & R. 14.

(*m*) *R. v. Newman*, Gloucester Spr. Ass. 1832, MS. C. S. G.

(*n*) *R. v. Jones*, 1 Cox, C. C. 105. Probably the ground was because the note was alleged to be for the payment of £10, which is a descriptive averment of the note itself.

(*o*) Milnes's case, 2 East, P. C. c. 16, s. 37, p. 602.



Lord Ellenborough, C. J., said, that he considered that after the statute had made bank notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel; that to describe them as bank notes for the payment of money seemed to be a larger description than the statute strictly required; and that the indictment in question had set forth number, value, and species, (bank note being the species, the value £9, and the number nine,) and thereby complied with the strict and technical rule of law. Le Blanc, J., said, 'Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny. For instance, it is not necessary in charging a larceny of sheep to describe it either as a wether, ewe, or lamb; yet, it cannot be doubted, if such an argument could prevail, that it would be of advantage to the prisoner that it should be described more particularly; because if it were, and the prosecutor, in such case, should fail to prove it to be of that particular description, the prisoner would thereupon be entitled to an acquittal. So also it may be said of bank notes; it is not necessary to describe a bank note particularly, as a bank note for the payment of £1, £5, or £20, because for whatsoever sum it may be payable it is still a bank note. In like manner, in an indictment for stealing a handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. The argument upon this part of the case has arisen from the practice that has prevailed of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or for another it is equally a bank note, and a bank note is the subject of larceny. Therefore, this is not a good objection, that the bank note is not sufficiently set out. No further description is necessary than is required for other chattels, which are the subject of larceny; and under the general name of bank note, the particular species, if the sum for which the note is payable can be said to constitute a species, may be proved.' (p)

It was holden before the 14 & 15 Vict. c. 100, that where the thing stolen was described as 'a bank post bill,' and was not set out, the Court could not take judicial notice that it was a promissory note, or that it was such an instrument as under the 2 Geo. 2, c. 25, might be the subject of larceny, though it were described as made for the payment of money. (q)

It appears to have been determined, that notes, bills, &c., within the 2 Geo. 2, c. 25, now repealed, should be laid to be the property of A. B., and ought not to be described as *chattels*; but it was also holden, that upon an indictment which laid them to be 'the property and chattels of S. S.,' the word *chattels* might be rejected as surplusage. (r)

In a case before the 14 & 15 Vict. c. 100, where shillings were described

(p) R. v. Johnson, 3 M. & S. 540, 552, 553.

(q) R. v. Chard, R. & R. 488. Bank post bills were not in use until two years after the 2 Geo. 2, c. 25, had passed, *ante*,

p. 244. A bank post bill cannot be described as a bill of exchange. Moor's case, 1 Lew. 90.

(r) R. v. Sadi, 2 East, P. C. c. 16, s. 37, p. 601.

as 'two pieces of the current coin of this realm called shillings, of the value of two shillings, of the goods and chattels of S. Fitch,' it was held that the indictment was inaccurate, as money does not fall within the legal technical definition of goods and chattels; but that the words 'of the goods and chattels' ought to be rejected as surplusage, and then the charge in the indictment sufficiently alleged that the coin was the property of S. Fitch. (*s*) So where a cheque was described as 'a cheque for the sum of £14 6s. 3d. of the moneys of' W. Willis, it was held that the indictment might be read as if the words 'of the moneys' were not there, and then it was sufficient. (*t*)

We have seen that re-issuable notes, which are stolen on their way from the bank in London, at which they have been paid, to the bankers in the country to be re-issued, may be described as so many pieces of paper stamped with stamps. (*u*) And that such re-issuable notes, if they cannot properly be described as 'valuable securities,' may be well laid as goods and chattels. (*v*) And that the halves of country bank notes may also be described as goods and chattels. (*w*) An indictment is good which charges the stealing of a certain valuable security (to wit) a cheque of the value specified without stating the drawees to be bankers. (*x*) A stamped receipt may be described as 'one piece of paper stamped with a certain stamp denoting the payment of a duty to our said Lady the Queen of sixpence, of the property, goods and chattels of A. B.,' or as 'one piece of paper of the value of one penny.' (*y*) So a memorandum of a sum of money due to the prosecutor may be described as 'one piece of writing paper, of the value of one penny, one other piece of paper of the value of one penny, and one written memorandum of the value of one penny, of the goods and chattels of J. A.' (*z*) So coalmeasures' printed certificates, before they are signed and filled up, may be described as 'pieces of paper.' (*a*) So a cheque which has been paid may be described as a piece of paper. (*b*)

If an instrument be both an order and warrant for the payment of money it may well be described as a warrant and order. (*c*)

Upon an indictment for stealing £95 in money it appeared that the National Provincial Bank of England at Boston sent in a letter by the post to the manager of the same bank at Wisbech nineteen £5 notes of the said bank, issued at Wisbech, which had been paid into the branch bank at Boston. The bank do not re-issue at one branch notes originally issued at another branch, but transmit them to the place where they were originally issued, to be there re-issued or otherwise disposed of. The prisoner was a clerk in the bank at Wisbech, and it was his duty to receive at the post-office at Wisbech all letters addressed to the bank there, and on the day the letter with the notes should have arrived he received the letters as usual at the post-office, but never

(*s*) *R. v. Radley*, 1 Den. C. C. 450. 2 C. & K. 974.

(*t*) *R. v. Godfrey*, D. & B. 426.

(*u*) *Clarke's case*, R. & R. 181, *ante*, p. 237.

(*v*) *R. v. Vyse*, R. & M. C. C. R. 218, *ante*, p. 239.

(*w*) *R. v. Mead*, 4 C. & P. 535, *ante*, p. 238. *R. v. Jones*, 1 Den. C. C. 551.

(*z*) *R. v. Heath*, 2 Moo. C. C. R. 83.

(*y*) *R. v. Rodway*, 9 C. & P. 784, *ante*, p. 186.

(*z*) *R. v. Bingley*, 5 C. & P. 602, *Gurney*, B.

(*a*) *R. v. Morris*, 9 C. & P. 349. See this case, *post*, p. 296.

(*b*) *R. v. Watts*, 2 Den. C. C. 14. See this case, *post*.

(*c*) *R. v. Gilchrist*, 2 Moo. C. C. 233, *ante*, p. 242.

delivered the letter in question, and disposed of the notes. It was objected, that as the notes were not at the time in circulation for value, but were in the hands of the bankers themselves, or in the course of transmission from one bank to the other, they were not in fact bank notes, and therefore could not be described in an indictment as money under the 14 & 15 Vict. c. 100, s. 18 (Vol. I. p. 25); but, upon a case reserved, it was held that the notes were properly described as money. (*d*)

An indictment for stealing a dead animal should state that it was dead. (*e*) The prisoners stole four live tame turkeys in Cambridgeshire; killed them there, and carried them dead into Hertfordshire. They were indicted in Hertfordshire for stealing four live tame turkeys; and upon a case reserved, the judges held that the word *live* in the description could not be rejected as surplusage, and that as the prisoners had not the turkeys in a live state in Hertfordshire, the charge, as laid, was not proved, and that the conviction was wrong. (*f*)

So it has been held upon indictment for sheep-stealing that a removal whilst the sheep is alive is essential to constitute the offence. (*g*)

But where an animal has the same appellation, whether it be alive or dead, and it makes no difference as to the offence, whether it were alive or dead; and the indictment uses such appellation, it is no variance if the animal was dead at the time the offence was committed. The prisoner was indicted for receiving a *lamb* knowing the same to have been stolen, and the lamb had been killed before it was received; upon a case reserved, the judges all agreed that the conviction was good, as it was immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same. (*h*)

The offence of larceny is transitory and not local, it is therefore immaterial whether there be any such parish in the county as that laid in the indictment. On an indictment for larceny 'at the parish of Hales Owen in the county of Worcester' it appeared that the parish of Hales Owen is partly in Worcestershire, and partly in Shropshire; and it was held that the indictment was sufficient. (*i*)

It should be observed, that although to some purposes the taking of divers articles at one and the same time may be considered as one entire felony, (*j*) yet to other purposes the taking of each article has been held to constitute a distinct felony. (*k*)

(*d*) *R. v. West*, D. & B. C. C. 109; decided on the authority of *R. v. Ranson*, R. & R. 232, *ante*, p. 243.

(*e*) By Holroyd, J., in *R. v. Edwards*, MS. Bayley, J., and R. & R. 497. In *R. v. Halloway*, 1 C. & P. P. 128, Hullock, R., held that an indictment for stealing 'two turkeys' was not supported by evidence of stealing two dead turkeys, as 'two turkeys' must be taken to mean live turkeys; but this case seems overruled by *R. v. Puckering*, *infra*. C. S. G.

(*f*) *R. v. Edwards*, R. & R. 497.

(*g*) *R. v. Williams*, R. & M. C. C. R. 107. See this case, *post*, chap. xii.

(*h*) *R. v. Puckering*, R. & M. C. C. R. 242.

(*i*) *R. v. Perkins*, 4 C. & P. 363. See *R. v. Woodward*, R. & M. 323, where there was no such parish as that laid in an indictment for burning a stack of beans, and it was held immaterial. If, however, the offence were local, as burglary, house-breaking, &c., a variance in the name of the parish would be fatal; or if it turned out to be part in and part out of the county, where it was described in the usual way, as the parish of A., in the county of B. *R. v. Brookes*, C. & M. 543. *R. v. Jackson*, MSS. C. S. G., *ante*, p. 45.

(*j*) 1 Hale, 531. 2 East, P. C. c. 16, s. 136.

(*k*) 2 Hale, 245.

By the 24 & 25 Vict. c. 96, s. 5, 'It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them. (l)

Sec. 6. 'If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings. (m)

An indictment charged the prisoner with stealing 1,000 cubic feet of gas on a particular day. The evidence connected the prisoner with the abstraction for several years of gas from the main of the prosecutors by a pipe which had been used for the purpose of partly lighting a factory by gas, without its passing through the meter: Held, that the circumstances attending the abstraction of gas by that means for the whole of that time were rightly given in evidence, and that the prosecutors were not called upon to elect to proceed on one particular act of taking, or on any three acts committed within the space of six months from the first to the last of such acts, under the 24 & 25 Vict. c. 96, s. 6, for the whole of the acts constituted one continuous taking and did not shew separate takings at different times. *Semble*. — That if the facts had amounted to proof of separate and distinct takings from time to time, though the prosecution might have been called upon to elect upon which taking or takings they would proceed, the evidence would have been equally admissible, as tending to shew the felonious nature of the one taking selected. (n)

Where an indictment contained a charge of stealing on the 13th of February, and another charge of stealing on the 15th of the same month, but did not aver that the larcenies were within six months; Pollock, C. B., put the prosecution to elect on which charge to proceed. (o)

An indictment contained nine counts, in all of which the property was described as 600 lbs. of cotton weft, 400 lbs. of cotton twist, and 1000 lbs. of cotton. The first count charged J. Heywood with larceny as a servant. The second count charged Heywood and four others with simple larceny. The third count charged all the prisoners with feloniously receiving. All these counts laid the offence on the 1st September, 1863. The fourth count charged Heywood with larceny as a servant. The fifth count charged all the prisoners

(l) This clause is taken from the 14 & 15 Vict. c. 100, s. 16.

(m) This clause is taken from the 14 & 15 Vict. c. 100, s. 17. The word 'months' in this clause means 'calendar months.'

(n) R. v. Firth, 38 L. J. M. C. 54. See R. v. Henwood, 11 Cox, C. C. 326.

(o) R. v. Lonsdale, 4 F. & F. 56.

with simple larceny. The sixth count charged all the prisoners with feloniously receiving. All these three counts laid the offence on the 2nd September in the year aforesaid. The seventh count charged Heywood with larceny as a servant. The eighth count charged all the prisoners with simple larceny. The ninth count charged all the prisoners with feloniously receiving. All these three counts laid the offence on the 24th September in the year aforesaid. Before pleading it was contended that the indictment ought to be quashed, as there was no allegation that the larcenies were committed within six months; but the sessions refused to quash the indictment; and, upon a case reserved; after a verdict of guilty against some of the prisoners of stealing, and against others of receiving, it was held that the conviction was good, but that the proper course in such a case is either to quash the indictment, or to put the prosecutor to his election, if there is reason to apprehend that the prisoners will be embarrassed. (*p*)

Larceny, like every other offence, must regularly be tried in the same county or jurisdiction in which it was committed: but it should be noted with respect to larceny, that the offence is considered as committed in every county or jurisdiction into which the thief carries the goods; for the legal possession of them still remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation. (*q*)

Therefore, if a man steal goods in the county of A., and carry them into the county of B., he may be indicted for the larceny in the county of B. But if a compound larceny be committed in one county, and the offender carry the property into another, though he may be convicted in the latter county of the simple larceny, he cannot be there convicted of the compound larceny. Thus where the prisoner robbed the mail of a letter either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted capitally in Middlesex on the 5 Geo. 3, c. 25, s. 7, and 7 Geo. 3, c. 40, the judges, upon a case reserved, held that he could not be convicted capitally out of the county in which the letter was taken from the mail. (*r*) So robbery can only be tried in the county where committed: the felony travels. (*s*) The larceny may, however, in some respects be considered as a new larceny, and as not necessarily including all the qualities of the original larceny: therefore, if the thing stolen is altered in character in the first county so as to be no longer what it was when stolen, an indictment in the second county must describe it according to its altered, and not according to its original state. (*t*) So where the prisoner was indicted for stealing 'a brass furnace' in Herefordshire, and it was proved that he stole the furnace in Radnorshire, broke it up there, and carried the pieces into Herefordshire, it was held that the prisoner must be acquitted, as he never had the 'brass furnace,' but merely certain pieces of brass in Herefordshire. (*u*) But a considerable space of

(*p*) *R. v. Heywood*, L. & C. 451.

(*q*) 3 Inst. 113. 1 Hale, 507, 508. 2 Hale, 163. 1 Hawk. P. C. c. 33, s. 52. 4 Blac. Com. 304. 2 East, P. C. c. 16, s. 156, p. 771.

(*r*) *R. v. Thomson*, Hil. T. 1795, MS. Bayley, J.

(*s*) 1 Hale, 536.

(*t*) See *R. v. Edwards*, MS. Bayley, J., and *R. & R.* 497, *ante*, p. 281.

(*u*) *R. v. Halloway*, 1 C. & P. 127, Hullock, B.

time intervening between the theft in one county and the carrying the stolen property into another county will not prevent the case from being considered as a larceny in the county into which the property is carried. Upon the 4th of November the prisoner stole a note in Yorkshire, and upon the 4th of March he carried it into Durham; and he was indicted for stealing it in Durham: and, upon a case reserved, the judges were clear that the interval between the first taking and the carrying it into Durham did not prevent it from being a larceny in Durham, and that the conviction in that county was right. (v)

The following case was ruled upon the principle that the larceny in the county into which a thief carries the goods may be in some respects of a different nature from the larceny in the county in which he first took them. Four prisoners were indicted for stealing a variety of articles of hardware in the county of *Worcester*. It appeared that the articles in question were made up into a package at Birmingham, and despatched by the canal from that place to Worcester, to be forwarded down the river Severn to Bristol. The package arrived safely at Worcester, where it was transferred from the canal boat to a barge called the *Blucher*, in which it was to be conveyed a great part of the way down the Severn; namely, to a place called *Brimspill*, in the county of *Gloucester*. The prisoners were bargemen on board the *Blucher*; and during the voyage from Worcester to *Brimspill*, the course of which was nearly equal in the two counties of *Worcester* and *Gloucester*, being about thirty miles in each, the articles in question were stolen from the package; but they were not missed till the barge arrived at *Brimspill*. At that place the cargo was unloaded, and put on board another vessel, to be carried onwards to Bristol; and the *Blucher* barge returned to Worcester navigated by the prisoners. Suspicion having fallen upon them, they were apprehended in the county of *Worcester*, when their respective bags were immediately searched, and a portion of the stolen articles was found in each of them. Upon their apprehension, and upon being required to account for the possession of the articles, they stated that the package was broken by accident while on board the *Blucher*, on the voyage from Worcester to *Brimspill*, when the articles fell out, and they took them and made a division of them immediately. They did not state at what part of the voyage this transaction took place; but it appeared probable that it took place in the county of *Gloucester*, and there was no evidence to rebut that probability. Upon these facts the learned judge ruled that the indictment could not be supported against the prisoners as for a joint larceny in the county of *Worcester*, and put the counsel for the prosecution to his election; who accordingly proceeded against one only of the prisoners. (w)

But if two persons be guilty of a felonious taking in one county,

(v) *R. v. Parkin*, MS. Bayley, J., and R. & M. C. C. R. 45.

(w) *R. v. Barnett, Smith, Burton, and Purser*, cor. Holroyd, J., Worcester Sum. Ass. 1818. Separate indictments were afterwards preferred against the three other prisoners (as the grand jury has not been discharged), to which they pleaded guilty. The learned

counsel (Sir Wm. Owen) who was retained to defend them, inclined much to put in a plea of *autrefois acquit* on their behalf; and only permitted them to plead guilty, on the prosecutor undertaking to recommend them strongly to mercy. And it should seem that such a plea *might* have succeeded. See *R. v. Dann*, R. & M. C. C. R. 424. C. S. G.

and one of them alone carry the property into another county, yet if the other afterwards concur with him in the second county in securing the possession, both may be jointly indicted in the second county. County and Donovan laid a plan to get some coats from the prosecutrix under pretence of buying them. The prosecutrix had them in Surrey at a public-house; the prisoners got her to leave them with Donovan whilst she went with County, that he might get the money to pay for them; in her absence Donovan carried them into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was laid against both in *Middlesex*; and upon a case reserved, the judges were unanimous that as County was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in *Middlesex*, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in *Middlesex*. They therefore held the conviction right. (x)

So if two jointly commit a larceny in one county, and one of them carry the stolen goods into another county, the other still accompanying him, without their ever being separated, they are both indictable in either county; the possession of one being the possession of both in each of the counties, as long as they continue in company. (y)

A count alleged that the prisoner did steal, take, and drive away a sheep in Essex; the sheep was last seen alive in the county of Hertford; but part of the carcase was found in the possession of the prisoner in Essex; there were marks of blood in the field where it had been last seen alive, so that it seemed that it had been slaughtered there; it was objected that the count charged a driving away in Essex, but as it was killed in Hertfordshire that was impossible; but Wilde, C. J., after taking time till the next assizes to consider the question, held that the prisoner might be convicted in Essex. (z)

On an indictment in Cork for stealing two cow-skins, it appeared that the prisoner had been acquitted of stealing the cows, as they were stolen in Limerick; but the skins were found in the prisoner's possession in Cork; Lefroy, B., doubted whether the indictment could be sustained, as he doubted whether the property in the skins had ever been in the prosecutor *quâ* skins. (a)

The prisoner must have the stolen property under his control in the

(x) *R. v. County*, East. T. 1816, MS. Bayley, J.

(y) *R. v. M'Donagh*, Carr. Supp. 2nd edit. 23.

(z) *R. v. Newland*, 2 Cox, C. C. 283. The indictment had no *contra formam*, and Wilde, C. J., held that this made the offence not punishable under the statute; but this is a mistake; see *Williams v. R.*, 7 Q. B. 250. *R. v. Andrews*, 1 C. & K. 81 (a). No point was raised in this case on the sheep being wrongly described, which (as the punishments for stealing a live sheep and a dead sheep essentially differ) it seems clearly to have been. See *R. v. Puckering*, R. & M. 242, ante, p. 281, C. S. G.

(a) *R. v. Barry*, 2 Cox, C. C. 294, Lefroy, B., said he would reserve the point; the prisoner was convicted, but it is not stated whether anything further was done. It is quite clear that there was no foundation for the doubt. No alteration in the character of the chattel stolen ever divests the property in it, or in any parts of it, out of the owner; and see *R. v. Cowell*, 2 East, P. C. c. 16, s. 48, p. 617, post, chap. xxviii., which is an authority expressly in point; for the receiver could not be guilty of receiving part of the sheep unless the principal had been guilty of stealing that part.

second county to render him liable to be indicted there, and it is not enough that he has the mere possession of it, he being in the custody of the constable who apprehended him. On an indictment for stealing two geldings in Kent, the only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon, in Surrey, he said he had been at Dorking to fetch them, and that they belonged to his brother, who lived at Bromley. The police officer offered to go to Bromley. They took the horses, and went as far as Beckenham Church, when the prisoner said he had left a parcel at the Black Horse in some place in Kent. The police officer accordingly went thither with him, each riding one of the horses; when they got there the officer gave the horses to the ostler. The prisoner made no inquiry for the parcel, but made his escape, and afterwards was again apprehended in Surrey. And, on a case reserved, the judges were unanimously of opinion that there was no evidence to be left to the jury of stealing in Kent. (*b*)

If the original taking be such whereof the common law cannot take cognisance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry them. (*c*) But the 24 & 25 Vict. c. 96, s. 115, noticed Vol. I. p. 15, states where the thief is to be tried in such a case.

If a larceny be committed out of the kingdom, though within the king's dominions, bringing the stolen goods into this kingdom will not make it larceny here. The prisoner stole a quantity of wearing apparel at St. Helier's in Jersey, and it was shortly afterwards found in his possession in the county of Dorset; upon a case reserved, it was held that this was not larceny in Dorsetshire, and that the case did not fall within the 7 & 8 Geo. 4, c. 29, s. 76, as Jersey could not be considered as part of the United Kingdom. (*d*) So if a larceny be committed in France the party cannot be tried in England, though the thief bring the goods here. (*e*)

A similar exception prevailed formerly where the original taking was in Scotland or Ireland. And it appears to have been holden, that a thief who had stolen goods in Scotland could not be indicted in the county of Cumberland, where he was taken with the goods. (*f*) But now by the 24 & 25 Vict. c. 96, s. 114, 'If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or

(*b*) R. v. Simmonds, R. & M. 408.

(*c*) 3 Inst. 113. 1 Hawk. P. C. c. 33, s. 52.

(*d*) R. v. Prowes, R. & M. 349. See R. v. Debruell, 11 Cox, C. C. 207.

(*e*) R. v. Madge, 9 C. & P. 29, Parke, B.

(*f*) R. v. Anderson, 2 East, P. C. c. 16, s. 156, p. 772.



otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.' (g)

A chattel was stolen in Liverpool, and was consigned thence as a parcel by the thief in the ordinary course through a railway company, and was delivered by them to the receiver in London for the purpose of being sold and disposed of by him there, and there was no evidence of any possession by the thief in Middlesex, unless either the possession by the railway company or of the receiver could be deemed his possession:—Held, that the thief retained control over the article in Middlesex, and was therefore liable to be tried there. (h)

We have seen that the stealing of things affixed to the freehold was not a larceny at common law, (i) and although it was made felony by the 7 & 8 Geo. 4, c. 29, s. 44, still the prisoner could not be indicted in any county except the one in which the fixtures were first taken. The prisoner was indicted at common law for stealing lead in Middlesex; the lead had been stolen from a church at Iver, in Buckinghamshire, and the prisoner was found in possession of it at Southall, in Middlesex, a place within the jurisdiction of the Central Criminal Court, which Iver was not; and it was held that the prisoner could not be convicted within the jurisdiction of the Central Criminal Court. (j)

Upon an indictment for stealing a horse, the prosecutor proved that he had put the horse to be agisted with a person who resided twelve miles distant from his own residence, and, in consequence of hearing of its loss from that person, he went to the field where the horse had been put, and discovered that it was gone. Gurney, B., 'I think you should prove the loss more distinctly, because *non constat* but the prisoners might have obtained possession of the horse honestly. I do not see how we can get at that without the person with whom it was put to agist, or his servant. It is perfectly consistent with what has been proved that the horse might have got out of this person's possession in some other way, and not by felony.' (k) So where, on a similar indictment, it appeared that a servant was sent to turn out a horse in a field, and was sent to fetch it up again the next morning, when it was missed, but the servant was not called as a witness, and the prisoner was found in possession of the horse the next day; it was held, that there was not sufficient proof given of the loss; and that the servant ought to have been called to prove what he did with the horse, as for anything that appeared to the contrary, the servant might have delivered the horse to the prisoner. (l)

**Recent possession.**—With regard to the evidence in cases of lar-

(g) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 76. The corresponding clause in the 9 Geo. 4, c. 55, s. 75 (1.), had 'unlawfully taken' instead of 'feloniously taken.'

(h) *R. v. Rogers*, 37 L. J. M. C. 88.

(i) *Ante*, p. 222.

(j) *R. v. Millar*, 7 C. & P. 665, Park, J. A. J., Alderson, B., and Patteson, J.

(k) *R. v. Yend*, 6 C. & P. 176, and MSS. C. S. G.

(l) *R. v. Fellows*, MSS. C. S. G. Stafford Sum. Ass. 1830, Bosanquet, J.

ceny<sup>1</sup> it generally consists (unless the prisoner is detected in the fact) of proof of the felony having been committed, and of the goods stolen having been found shortly afterwards in the possession of the prisoner; and upon such proof the general rule will attach, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. (*m*) This rule, founded on the necessity of the case, which cannot admit offences of this kind to go unpunished, wherever positive and direct evidence is wanting of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances, by which such presumption may be weakened, or entirely destroyed. (*n*) Amongst the most prominent of these will be the length of time which elapsed between the loss of the property and the finding of it in the possession of the prisoner; the probability of the prisoner's having been, at the time of the theft, near the place from which the property was taken; and more especially the conduct of the prisoner from first to last, with respect to the property found in his possession, and the charge brought against him of having obtained it by stealing.

It has been held that the possession of stolen property sixteen months, (*o*) or six months, (*p*) or three months (*q*) after it was lost, is not such a recent possession as to put the prisoner upon shewing how he came by it, unless there be evidence of something more than the mere fact of possession at such a distance of time after the loss.

Where a prisoner was indicted for stealing two sacks, which had been found about twenty days after they were missed, Coleridge, J., told the jury, 'If I was now to lose my watch, and in a few minutes it was found to be on the person of one of you, it would afford the strongest ground for presuming that you had stolen it; but if a month

(*m*) 2 East, P. C. c. 16, s. 93, p. 656. Phil. on Evid. 168, 7 Edit.

(*n*) That it will sometimes, like every other rule of human institution, fail to guide rightly must be admitted. Lord Hale mentions a case, which he says was tried before a very learned and wary judge where a man was condemned and executed for horse stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief being closely pursued, had overtaken the poor man upon the road, and asked him to walk the horse for him while he turned aside upon a necessary occasion, upon which the thief made his escape, and the man was apprehended with the horse. 2 Hale, 289. And it is probable that, upon

this rule, receivers of stolen goods are frequently convicted of stealing them.

(*o*) R. v. —, 2 C. & P. 459, Bayley, J. It is not stated what the goods were.

(*p*) R. v. Cooper, 3 C. & K. 318. Maule, J. Nothing but possession of a horse. R. v. Harris, 8 Cox, C. C. 333. S. P., as to a sheep, though the prisoner had made contradictory statements when it was found. Channell, B. R. v. Hall, 1 Cox, C. C. 231. Pollock, C. B., and Coleridge, J. S. P.

(*q*) R. v. Adams, 3 C. & P. 600, Parke, J. The goods found in the possession of the prisoner were an axe, a saw, and a mattock. See R. v. Hewlett, *post*, vol. iii., *Of Presumptive Evidence*.

#### AMERICAN NOTE.

<sup>1</sup> See *S. v. Merrick*, 19 Maine, 398. *S. v. Bennett*, 3 Brev. 514. *Warren v. S.*, 1 Iowa, 106. *S. v. Floyd*, 15 Mo. 349. *S. v. Brady*, 27 Iowa, 126. *P. v. Chambers*, 18 Cal.

382. *Jones v. S.*, 26 Miss. 247. *C. v. Mil-lard*, 1 Mass. 6. *Graves v. S.*, 12 Wis. 591. *S. v. Johnson*, 1 Wina. 238.

hence it were to be found in your possession, the presumption would be greatly weakened, because stolen property usually passes through many hands.' (r)

The prisoner was charged in one count with stealing a riddle on the 20th September, 1862, and in another with stealing five shovels on the 16th of January, 1863, the property of his masters. He had been in their employ some years; the riddle and shovels were found in his possession; the riddle in his back yard, one shovel in his coal-house, another in his garden covered with ashes, and three others in a distant pigsty of the prisoner's, and a witness proved that in the beginning of January the prisoner brought some tools to his yard where the pigsty was, and stated he had brought them to put at the top of the pigsty to be out of the way. The brand mark had been erased from some of the shovels, and the prisoner's initials substituted. The prosecutor's foreman stated that it was impossible to say when the articles were taken; but a witness had seen a riddle similar to the one in question on the prosecutor's premises in the summer of 1862. It was on the 21st January, 1863, that the riddle and shovels were found. It was objected that the riddle not being proved to have been in the possession of the prosecutors for upwards of eighteen months, and the shovels for not less than eight months, there was no sufficiently recent possession by the prisoner proved; the objection was overruled, and, on a case reserved it was held that it was rightly overruled. (s)

The prisoner had two sons, one aged eight, the other twelve, and his servant proved that in the week before Christmas his master and his sons went in a car to Sticklepath, and he went thither with them to open the gates. Another witness proved that she saw a flock of sheep driven through Sticklepath early in the morning, when it was bright moonlight, by two boys, and it was her impression that they were the prisoner's boys. Sticklepath is seventeen or eighteen miles from Exeter; the prosecutor's farm was twenty-two miles from Exeter, and the prisoner's farm was about a quarter of a mile from the prosecutor's. The servant of Smith, a cattle dealer, went on the 23rd of December to Little John's Cross Inn by his master's direction. This inn was a mile from Exeter; and seeing that no sheep had passed, he went half a mile on the road, and then met one of the prisoner's boys with twenty-one sheep, and returned with him and the sheep to the inn, where he saw the prisoner and his other boy. The sheep seemed weary with travelling, and it was about half-past eight when they were first met. The prisoner and the two boys went with the man to put the sheep in a field. The prisoner came to the inn at eight o'clock with his youngest boy in a car. He said he had sheep coming along the road, and he wished to stop them in the yard till he got keep for them. The cattle dealer proved that he had received a letter from the prisoner on the 22nd December, stating that he should have some sheep coming on, and that he would be early at Little John's Cross Inn, and that if the cattle dealer could not be there to deal for them, he was to send some person to shew where to put the sheep in his

(r) Cockin's case, 2 Lew. 235.

(s) R. v. Knight, L. & C. 378. It is im-

possible to ascertain the correct dates in this report.

field: and he accordingly sent his man, and in the evening, after a long bargaining, he bought the sheep of the prisoner. The sheep of the prosecutor were proved to have been among these sheep. The prisoner had said that he had bought a portion, or all of the sheep, but did not say from whom, or when. In his letter he said he had bought a small lot of sheep, and he would have them driven to Exeter on the 23rd. The jury found the prisoner guilty of receiving the sheep knowing them to have been stolen; it was then urged that there was no evidence to support that count, and that the jury ought to have been so directed; but, upon a case reserved upon the question whether, upon the whole case, the jury should have been directed that they could not lawfully find the prisoner guilty upon the second count, the conviction was affirmed. Pollock, C. B., 'If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except indeed where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence, which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution.' Byles, J., 'There are three ways in which the prisoner may have received these sheep with a guilty knowledge. First, the boys may have stolen them independently of their father, who may have received the sheep from them. Secondly, the father may have sent the boys as innocent agents to receive the sheep from the actual thief, in which case the father would have been guilty of receiving as a principal, the boys being, as it were, merely the long arms with which he took the sheep. Thirdly, he may have sent the boys for the same purpose as guilty agents, in which case, although the boys would be the principals in the felony (of receiving), yet the father would be an accessory before the fact, and might be convicted as a principal.' Blackburn, J., 'When it has been shewn that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, according to the circumstances. If he had been seen near the place where the property was kept before it was stolen, they may fairly infer that he was the thief. If other circumstances shew that it is more probable that he was not the thief, the presumption would be that he was the receiver. The jury should not convict the prisoner of receiving unless they are satisfied that he is not the actual thief.' (t)

Upon an indictment for stealing two ends of woollen cloth, which were about twenty yards each in length; it appeared that the cloth

(t) *R. v. Langmead*, L. & C. 427. A clearer case than this there never was: the sheep were proved to have been in the possession of the son on the road, and the prisoner received them at the inn, and there was abundant evidence of guilty knowledge, and

was missed on the 23rd of January, when it was in an unfinished state, and that part of it was left on the 21st of March by the prisoner at the house of one Porter, and that on the 30th of the same month, the prisoner sent the residue to be shorn. It was submitted that the length of time since the loss was so great, that no presumption of guilt was raised against the prisoner by the possession of it. Patteson, J., 'I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time, but here that is not so: it is a question for the jury.' (u)

A knife, candlestick, watch, eyeglass, and muffineer were burglariously stolen on the 27th of March, 1843, and all found in the prisoner's house on the 18th March, 1844, when he stated that he had had some of them in his possession more than a year. Tindal, C. J., told the jury that, 'If there had been nothing found but the knife, as that might change hands frequently, it would be too strong to infer that the prisoner must have been the thief; a small thing that would change hands very easily would be too little after so long a time: but then again it cannot be concealed that if, instead of one, there are several articles that are not likely to have changed from hand to hand, and then to have come together into the custody of the same person, that takes off from the effect that would be produced by the lapse of time.' (v)

Where on an indictment for stealing two post-letters, containing a bank note for £500 and a Crystal Palace dividend warrant, it appeared that the prisoner was a letter-sorter and letter-carrier in the London Post Office, and that he had been employed as a sorter on the 17th January, 1861, in sorting letters for the East Central District, and a bank note for £500 had been sent, with the warrant specified in the indictment, from Huddersfield to a firm in the East Central Division, in a letter which ought to have arrived on the 17th in London, but the letter was never delivered. In June, 1862, whilst he was still a sorter of letters, the prisoner was apprehended on another charge of abstracting other notes from letters, and asked if he had any other notes at home, and he replied he had one for £500, cut in halves, in a cash-box at his residence: and in that box the note was found, and on its being produced, the prisoner volunteered a statement that he had picked it up on Finsbury Pavement, in a pocket-book, ten months before, and in his defence he repeated that statement, and added that he had kept it all this time in expectation of seeing a reward offered for it. He admitted his guilt as to the other notes, but declared his innocence as to this note. Bramwell, B., told the jury that 'the possession of stolen property shortly after it has been stolen is strong evidence, in the absence of explanation, against the person charged; but here that is not the case; for the note was lost

it was perfectly immaterial whether the prisoner had previously stolen them; for a man may be a thief and a receiver as well. There was also evidence that he either stole, or was an accessory before the fact to the stealing, for the letter appointing the meet-

ing with the cattle dealer proves the previous intention, and supports one or other of these views. C. S. G.

(u) *R. v. Partridge*, 7 C. & P. 551.

(v) *R. v. Dovey*, Worcester Sum. A. 1844, MS. C. S. G.

many months before, and although, no doubt, the prisoner had had the note for months in his possession, yet it must be remembered that he volunteered the statement that he had found it in a pocket-book at the spot mentioned. You may have a shrewd suspicion as to how he became possessed of it, but suspicion is not sufficient to convict. If you only entertain a suspicion, acquit the prisoner.' (*w*)

On an indictment for stealing a beetle-head, it appeared that the prosecutor had not seen it for fifteen months before it was missed and traced to the possession of the prisoner, who claimed it as his own property, and said he had bought it eight years ago at a sale. It was contended that the time was too long to make it necessary for the prisoner to account for the possession. Alderson, B., 'I would so direct the jury but for the statement of the prisoner, who, in giving an account of how he became possessed of the article, tells a lie, if it be the property of the prosecutor. If he had rested his case upon the position you now take for him, when the property was found and claimed by the prosecutor, he would have been exempt from the charge of stealing it, on the ground stated by you. He would then have admitted the beetle to be the property of the prosecutor; but he denies that by his statement, while he, at the same time, admits that he had this thing in his possession at a time immediately after its loss, and therefore there is a recent possession.' And the jury were told that 'in cases where property of such insignificant value as that laid in this indictment is shewn to have been stolen so long as fifteen months before it is discovered in the possession of a stranger, that person ought not to be called on to answer for that possession, on a charge of felony; for it might reasonably be inferred that he came honestly by it in that long interval. If the prisoner had said in the first instance, "Why, really I can't tell where or how I got this beetle," I should have said that that was a reasonable statement, and that he ought not to have been indicted for stealing it; in that case, it being assumed that the prisoner does not deny that the article might once have been the property of the prosecutor. Where, however, the prisoner is shewn to have claimed the thing so found as his property by right of a purchase made eight years ago, and a continued possession to the present time, I should say that that was not so reasonable an account of his possession as to exempt him from the necessity of accounting for it to the satisfaction of a jury; for, if it be true, the prosecutor is wrong and the identity of the thing with that found is disputed. If the prosecutor should satisfy the jury that the beetle was his, then the statement of the prisoner, accounting for his possession of it, must be false, and he must be presumed to have stolen it, though it was not found in his possession for fifteen months after the loss. The question, therefore, is simply one of identity.' (*x*)

Cases frequently occur where property is found in a house in which several persons reside, any of whom might have stolen it: upon such cases Mr. Starkie observes, 'It is also to be carefully observed, that the mere finding of stolen goods in the house of the prisoner where

(*w*) *R. v. Smith*, 3 F. & F. 123. The note had been lost seventeen months; the prisoner's statement puts it in his possession ten months before it was found, and therefore

the possession is seven months after the loss.

(*x*) *R. v. Evans*, 2 Cox, C. C. 270.

there are other inmates of the house capable of stealing the property is insufficient evidence to prove a *possession* by the prisoner.' (y)

Where goods were found in the house of a blind man, and the prisoner, his wife, said she had purchased them a long time before; Erle, J., held that as she said she bought the goods, it must be left to the jury to decide whether the goods were in her possession without the consent and control of her husband, and if they were, the jury ought to find her guilty. (z)

Where two brothers, aged fourteen and eleven, were found, the night after a burglary, concealed in a corn-bin in an open gig-house, and some of the property hid in some rubbish near the bin, and some more hid in a loft over the gig-house, and the boys said they went there to sleep out of the cold, and they did not make any claim to the property; Pollock, C. B., held that, though there might be grounds of suspicion, there was no possession of the property by the prisoners proved. (a)

On an indictment for stealing four sacks of barley, it appeared that the prisoners and a girl were employed by the prosecutor in his barn to winnow some barley with which he had mixed some canary-seed. One of the prisoners fetched several sacks from the house into the barn, and he and the girl filled them with barley. The prisoners then sent the girl home, though before the usual time. At twelve o'clock the same night the prosecutor saw the prisoners go into the stable, and three minutes afterwards he entered the stable and no one was there; but he found the prisoners concealed under some straw in a loft over the stable. Neither barley nor sack was found in the loft; but in a bin, which was in an aperture of the wall between the stable and the barn, the prosecutor found three sacks full of barley, and the barley had canary-seed mixed with it, and the prosecutor swore that he believed the barley was his property. It was no part of the prisoners' duty to place the barley in sacks, or to put the sacks in the bin; and, upon a case reserved, it was held that there was overwhelming evidence against both prisoners. (b)

On an indictment for stealing a quantity of robes, silk, and other articles, it appeared that the prisoner was the servant of the prosecutors, and nothing was missed till just before his apprehension, nor had he been seen to take anything out of the house, but after he was apprehended, he admitted having taken a great variety of things, some of which he had sent to one Smith; the prosecutor swore that he had no doubt that the articles were taken at different times, and it appeared probable that that was the case, from the great variety of the articles, and from its appearing that Smith had been in the habit of pledging several articles, at different times during a period of between four and five months. Gazelee, J., held that he could not compel the

(y) 2 Stark. Evid. 614, note (g), 3rd Edit. It must be observed, however, that learned judges have generally considered such evidence as sufficient to call upon the occupier of the house to account for the possession; on the ground that the house being in his occupation, the property was found in his possession, and there seems good reason for this course, because, as master of the house, he must be presumed

to have the control over it, and to permit nothing to come into it without his sanction; at the same time it is for the jury, under all the circumstances, to say whether the master stole the property, or any of the other inmates of the house. C. S. G.

(z) R. v. Banks, 1 Cox, C. C. 238.

(a) R. v. Coots, 2 Cox, C. C. 188.

(b) R. v. Samways, Dears. C. C. 371.

prosecutors to elect what sort of goods they relied upon; and that though it was probable the goods were taken at different times, it was not impossible that they had been all taken at one time; and, on a case reserved, the judges were unanimously of opinion that the learned judge was right in not requiring an election to be made. (c) So where seventy sheep were put on Thornley Common on the 18th of June, and were not missed till November, and the prisoner was in possession of four of those sheep in October, and of nineteen others of them on the 23rd of November, Bayley, J., allowed evidence of both to be given. (d) But where two horses were stolen from different persons at different times, but were taken at the same time by the prisoner into a different county and it was submitted that the felonies were distinct, and the prosecutor should elect on which he would proceed; Littledale, J., said, 'If you could confine your evidence entirely to a single felony in this county, you need not elect; but this you cannot do; for you must prove that the horses were originally stolen in another county. The possession of stolen property soon after a robbery is not itself a felony, though it raises the presumption that the possessor is the thief; it refers to the original taking with all its circumstances. I think, therefore, that you must, in this instance, make your election.' (e)

Where all that can be proved concerning property found in the possession of a supposed thief is that it is of *the same kind* as that which has been lost, this will not in general be deemed sufficient evidence of its having been feloniously obtained, and some proof of identity will be required. But where the fact is very recent, and the property consists of articles, the identity of which is not capable of strict proof, from the nature of them, the conclusion may be drawn that the property is the same, unless the prisoner can prove the contrary. (f) Thus, if a man be found coming out of another's barn, and upon his being searched corn be found upon him, of the same kind as that in the barn, the evidence of the guilt will be pregnant; and cases have frequently occurred where persons employed in carrying sugar and other articles from ships and wharfs have been convicted of larceny, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could no otherwise be proved. (g)

Where the prosecutor kept a large toy-shop, and the prisoner, a little boy, came into the shop dressed in a smock frock, and after remaining there some time, from suspicion excited, he was searched, and under his smock frock were found concealed a doll, six toy houses and such other things, and the prosecutor swore that he believed the six toy houses to be his property, because they exactly resembled other toy houses of the same sort which he had in his shop, and he gave the same evidence with regard to all the other articles except the doll, and he swore that the doll had been his, as he found upon it his

(c) *R. v. Dunn*, R. & M. C. C. R. 146, and see *R. v. Hunt*, Hindmarch's Supp. to Deacon's Cr. L. 1588. *Rosc. C. E.* 217. *R. v. Bleasdale*, 2 C. & K. 765. *R. v. Johnson*, D. & B. 340.

(d) *R. v. Dewhirst*, 2 Stark. Ev. 614, 3rd Edit.

(e) *R. v. Smith*, R. & M. N. P. 295.

(f) 2 East, P. C. c. 16, s. 93, p. 657.

(g) *Id. ibid.* See note (j), *infra*.



private mark; but he could not say that he had not sold it, and he had not missed, and could not miss, from the nature of the stock, any of the articles which the prisoner was charged with stealing. Erle, J., said, 'It seems to me that you have failed to establish in this case the *corpus delicti*. It is true the prosecutor swears that the doll was once his, but he cannot state that it was taken from him; and, for aught that appears to the contrary, the prisoner may have come by it in an honest manner.' And an acquittal was directed. (*h*)

Upon an indictment for stealing a quantity of pepper it appeared that the prisoner was seen coming out of the lower room of a warehouse in the London Docks, in the floor above which a large quantity of pepper was deposited, some in bags and some loose on the floor. The person having the charge of the warehouse stopped him, and said, 'I think there is something wrong about you.' The prisoner said, 'I hope you will not be hard with me,' and threw a quantity of pepper out of his pocket on the ground. The witness stated that no pepper was missed, and he could not say from the large quantity of pepper that was in the warehouse that any had been stolen; but the pepper found on the prisoner was of the like description with the pepper in the warehouse. The prisoner had no business in the warehouse. It was contended that the *corpus delicti* must be proved; and that there was no evidence to go to the jury; but the objection was overruled, and, upon a case reserved, it was held that the conviction was right. The offence must be proved; but there is no authority that the *corpus delicti* must be expressly proved in every case. The distinction between this case and *R. v. Dredge* (*i*) is plain. There the little boy asserted that the doll was his own, and conducted himself like an honest person; here the prisoner did not say the pepper was his own property, but 'Don't be hard on me.' (*j*)

So where the prisoner was indicted for stealing coal, and it appeared that it was his duty to convey a ton of coal from his master's premises to those of a customer, and he left with the coals in a cart at 12 o'clock and delivered them at 1 o'clock; and at 12½ o'clock he sold 190 lbs.; but there was no evidence of the quantity delivered at the customer's being less than a ton, or of any other coal having been missed. Willes, J., left the question to the jury whether the 190 lbs. weight sold by the prisoner were not part of the ton. (*k*)

(*h*) *R. v. Dredge*, 1 Cox, C. C. 235. The report of this case is anything but satisfactory, and in *R. v. Burton*, *infra*, Maule, J., stated that the boy asserted that the doll was his own, and conducted himself like an honest person, of which there is no mention in this report, which therefore cannot be considered as accurate, and certainly does not warrant the marginal note that 'in a charge of larceny, if the prosecutor cannot swear to the loss of the article, said to be stolen, the prisoner must be acquitted.' In *R. v. Burton*, 6 Cox, C. C. 293, Maule, J., said, 'The offence with which the prisoner is charged must be proved, and that involves the necessity of proving that the prosecutor's goods have been taken; but why is that to be differently proved from the rest of the case? If the circumstances satisfy the

jury, what rule is there which renders some more positive and direct proof necessary?' In these cases, it is plain, the proper course is to leave the evidence to the jury. C. S. G.

(*i*) *Supra*.

(*j*) *R. v. Burton*, Dears. C. C. 282, Maule, J., 'If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed.'

(*k*) *R. v. Hooper*, 1 F. & F. 85. *R. v. Mockford*, 11 Cox, C. C. R. 16.

Evidence that the property stolen is of some *value* will also be material, as if it be of no value, it is not a subject in respect of which larceny can be committed. (*l*) But property may be of value to the owner though not of general value. Thus, where the indictment was for stealing pieces of paper with available stamps thereon, and it appeared that the pieces of paper were re-issuable notes of a country bank which had been paid, and were *in transitu* for the purpose of being re-issued, it was decided that they were the valuable property of the country bankers, (though not promissory notes within 2 Geo. 2, c. 25) and subjects of larceny. (*m*)

So a memorandum of a sum of money which a person owed the prosecutor has been held to be the subject of robbery. (*n*) But although the chattel must be of some value, it need not be of the value of some known coin, as of a farthing at least. (*o*)

With respect to those larcenies, which are aggravated by the amount of the property stolen, as in the case of stealing in a dwelling-house to the value of £5, it must appear that the property, the value of which is taken into computation, was all stolen at the same time. For, in fact, where things are stolen at different times, there are different acts of stealing. (*p*) But it seems that if the property of several persons lying together in one bundle or chest upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony. (*q*) And we have seen that where a servant steals several articles at different times, but carries them out of his master's house at the same time, he may be convicted of stealing in a dwelling-house to the value of £5, if all the articles amount to that value, although he never took to that amount at any one time. (*r*)

In a case where the prisoner was indicted upon the 12 Anne, c. 7, (now repealed) for stealing in a dwelling-house to the amount of forty shillings, and the goods found were not proved to amount to forty shillings; the Court left it to the jury to consider, upon the facts of the case, whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (*s*)

By the 7 & 8 Geo. 4, c. 28, s. 5, 'Where any person shall be indicted of treason or felony, the jury impanelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.'

By the 24 & 25 Vict. c. 96, s. 4, 'Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, [at the discretion of the Court,] (*t*) to be kept in

(*l*) *Phipoe's case*, *ante*, p. 244. Com. Dig. Ind. G. 2. Stark. Crim. Plead. 450.

(*m*) *Clarke's case*, 2 Leach, 1036. *Ante*, p. 225.

(*n*) *R. v. Bingley*, 5 C. & P. 602. Gurney, B.

(*o*) *R. v. Morris*, 9 C. & P. 349. Parke, B.

(*p*) 1 Hawk. P. C. c. 33, s. 50, 51. 2 East, P. C. c. 16, s. 136, p. 740. Petrie's case, 1 Leach, 294. Farley's case, *cor.* Ash-

hurst, J., Surrey Lent Ass. 1786. 2 East, P. C. *ibid*.

(*q*) 1 Hale, 531. 2 East, P. C. c. 16, s. 136, p. 740, 741.

(*r*) *R. v. Jones*, 4 C. & P. 217, *ante*, p. 66.

(*s*) *Hamilton's case*, 1 Leach, 348, *ante*, p. 65. The jury found the prisoner guilty of stealing to the value of forty shillings.

(*t*) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (*o*).

penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and if a male under the age of sixteen years, with or without whipping.' (u)

As to the punishment for larceny after a previous conviction for felony, &c., see ss. 7, 8, 9, and 116 of this Act, Vol. I. pp. 67, 68; and see in general as to punishment for a subsequent felony, and as to the form of the indictment and proof of the previous conviction, &c., Vol. I. pp. 68, 71.

As to sentencing a person in prison under sentence for another crime, see 7 & 8 Geo. 4, c. 28, s. 10; noticed, Vol. I. p. 85.

As to the owner of property stolen, &c., being entitled to restitution of it on the conviction of the offender, see 24 & 25 Vict. c. 96, s. 100, Vol. I. p. 86.

(u) This clause is taken from the 7 & 8 Geo. 4, c. 29, ss. 3, 4; 9 Geo. 4, c. 55, ss. 3, 4 (1.); and 12 & 13 Vict. c. 11, s. 1.

## CHAPTER THE ELEVENTH.

### OF STEALING FROM THE PERSON.<sup>1</sup>

WITH respect to such stealing from the person as does not amount to robbery, by the 24 & 25 Vict. c. 96, s. 40, 'Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]. (b)

Upon the 48 Geo. 3, c. 129, s. 2, it was holden that the indictment need not negative the force or fear necessary to constitute robbery, and that, though it should appear upon the evidence that there was such force or fear, the punishment imposed by that statute might be inflicted. (c)

To constitute a stealing from the person, the thing taken must be completely removed from the person. Where it appeared that the prosecutor's pocket-book was in the inside front-pocket of his coat, and the prosecutor felt a hand between his coat and waistcoat attempting to get the book out, and the prosecutor thrust his right hand down to his book, and in doing so brushed the prisoner's hand; the book was just lifted out of the pocket, an inch above the top of the pocket, but returned immediately into the pocket; it was held by majority of the judges, that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor; but the judges all agreed that the simple larceny was complete. (d)

(a) The words in brackets are repealed but the punishment remains the same. See *ante*, p. 50, note (c).

(b) This clause is taken from the 7 Will. 4 & 1 Vict. c. 87, s. 5.

(c) *R. v. Pearce*, MS. Bayley, J., and R. & R. 174. *R. v. Robinson*, R. & R. 321.

(d) *R. v. Thompson*, R. & M. 78.<sup>2</sup>

#### AMERICAN NOTES.

<sup>1</sup> Most of the American States have provisions as to stealing from the person very similar to the English enactment; but where these do not exist, it would appear that the old statute of 8 Eliz. c. 4, s. 2, will prevail to interpret the common law of America. That statute speaks of stealing from the person of another "privily without his knowledge." The old English cases

(such as *Brown's case*, 2 East, P. C. 702. *Branny's case*, 2 East, P. C. 704. *R. v. Gribble*, 2 East, P. C. 706. *Huckley's case*, 2 Leach, 789) will be applicable in such States. *Moye v. S.*, 65 Ga. 754. *C. v. Dimond*, 3 Cush. 235. *Hall v. P.*, 39 Mich. 717.

<sup>2</sup> In Texas this was held to be a larceny. *Flynn v. S.*, 42 Tex. 301.

Although to constitute the offence there must be a removal of the property from the person, yet a hair's breadth will do. (e) Upon an indictment for stealing a watch from the person it appeared that the watch was carried by the prosecutor in his waistcoat pocket, and the chain, which was attached to the watch at one end, was at the other end passed through a button-hole of his waistcoat, where it was kept by the watch-key turned, so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain out of the button-hole; but his hand was seized by the prosecutor's wife; and it then appeared that, although the chain and watch-key had been drawn out of the button-hole, the point of the key had caught upon another button and was thereby suspended. It was contended that the prisoner was guilty of an attempt only; but the Court thought that, as the chain had been removed from the button-hole, the felony was complete, notwithstanding a subsequent detention by its contact with the button; and, upon a case reserved, it was held that the conviction was right. This case was in no respect like *R. v. Wilkinson*; (f) for in that case there was at no moment the slightest severance from the person; but this was precisely similar to *Lapier's case*. (g) The ear in that case is like the button-hole in this, and the curl is like the button below. The watch was no doubt temporarily, though but for a moment, in the possession of the prisoner. (h)

We have seen that where a man went to bed with a prostitute, leaving his watch in his hat on the table, and the woman stole it whilst he was asleep, it was held not to be stealing from the person, but stealing in the dwelling-house. (i)

Upon the trial of any indictment for stealing from the person, if no asportation be proved, the jury may convict the prisoner of an attempt to commit that offence, under the 14 & 15 Vict. c. 100, s. 9, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt.

(e) Per Alderson, B., in *R. v. Simpson*, *infra*.

(f) *Ante*, p. 126.

(g) *Ante*, p. 82.

(h) *R. v. Simpson*, Dears. C. C. 421. Jervis, C. J., said he thought the minority of the judges in *Thompson's case*, *supra*,

were right; but the majority might have thought that the outer coat which covered the pocket formed a protection to the pocket-book.

(i) *R. v. Hamilton*, 8 C. & P. 49, *ante*, p. 64, and see other cases there.

## CHAPTER THE TWELFTH.

### OF STEALING HORSES, COWS, SHEEP, &c.<sup>1</sup>

WE have already seen that larceny may be committed of such domestic creatures as are fit for food; and it remains only to notice in this place the statutable provision, which, for the better protection of some of the more valuable domestic animals, makes persons, found guilty of stealing them, liable to transportation.

By the 24 & 25 Vict. c. 96, s. 10, 'Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court], (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]. (b)

**Killing animals with intent to steal the carcase, &c. — Sec. 11.** 'Whosoever shall wilfully kill any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony. (c)

By Sec. 98, principals in the second degree and accessories before the fact are punishable like principals in the first degree, and accessories after the fact, (except receivers) are liable to be imprisoned for any term not exceeding two years. (d)

The various points upon the definition of larceny, which have been considered in the chapter treating generally of that offence, (e) relate as well to the stealing of horses as of other property; and we may remember a case where, upon a finding by the jury that the prisoners took some horses, merely with intent to ride, and afterwards to leave them,

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(b) This clause is framed from the 7 & 8 Geo. 4, c. 29, s. 25; 9 Geo. 4, c. 55, s. 25 (1); 2 & 3 Will. 4, c. 62, s. 1, &c.

(c) This clause is framed from the 7 & 8 Geo. 3, c. 29, s. 25, and 9 Geo. 4, c. 55, s. 25 (1) so far as it relates to the animals

mentioned in the preceding section; but it is extended to the killing of any other animal with the like intent, provided the stealing of such animal would be felony. This clause, therefore, will include the killing of asses, pigs, &c., with intent to steal, &c.

(d) As to the proceedings against accessories, see vol. i. p. 161, *et seq.*

(e) *Ante*, p. 121, *et seq.*

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#### AMERICAN NOTE.

<sup>1</sup> As in England, so also in America, there are many provisions for the punishment of persons convicted of stealing certain specified sorts of property. The American

provisions are so numerous and different in the various States that it is impossible to notice them in the present work.

and not to return, or make any further use of them, it was holden that such taking amounted to a trespass only, and not to larceny. (f)

The doctrine that any the least removal of the thing feloniously taken, will constitute larceny, (g) applies to the stealing of sheep, though part of the animal only be taken. The prisoner was indicted for stealing six lambs, without any count for killing with intent to steal the carcase or any part thereof, the evidence was that the carcasses of the lambs without their skins, were found upon the premises where they had been kept, and that the prisoner had sold the skins on the morning after the offence was committed; upon which the jury were directed to find the prisoner guilty, on the ground that the lambs must have been removed from the fold. But a doubt having occurred whether, as the 14 Geo. 2, c. 6 (now repealed), specified feloniously driving away and feloniously killing with intent to steal the whole or any part of the carcase, as well as feloniously stealing in general, (although there must, in such cases, be some removal of the thing), it did not intend to make these different offences, the case was submitted to the consideration of the judges, who held the conviction right, as 'any removal of the thing feloniously taken constitutes larceny.' (h)

But this decision has been questioned, if not overruled, in the following case, where it was held that upon a count for stealing a sheep it must be shewn that the sheep was removed whilst it was alive, and that upon a count for killing a sheep with intent to steal the whole of the carcase, evidence of killing with intent to steal part of the carcase, was sufficient. The first count charged the prisoner with stealing three sheep, and the second with killing the sheep with intent to steal the whole of the carcasses. It appeared that the sheep were found killed and cut open, and the inside and entrails taken out, and the tallow and inside fat taken away, and the fat cut off the backs of two of them, and also taken away, but the fat on the back of the third was left. The carcasses of the sheep were left, and were found lying in the gripe of the hedge, in the same field where the live sheep had been; the entrails and guts, which remained after the tallow and inside fat had been cut out were also left, and were found in the adjoining field. There was evidence to satisfy the jury that the prisoner had killed the sheep and stolen the fat; but as the carcasses of the sheep, and the entrails and guts, after cutting away the tallow and fat, were left, the learned judge thought the second count, which was for killing the sheep with intent to steal the whole of the carcasses, could not be supported, and that the intent ought to have been stated to steal part of the carcasses; inasmuch as the 14 Geo. 2, c. 26, specified both intents, *i. e.*, stealing the whole of the carcasses, or any part of the carcasses; and the cutting out the inside fat was one of the offences stated in the recital of the clause in the statute. (i) The count for stealing, the learned judge also, in the absence of any case to the contrary, was disposed to think

(f) *R. v. Phillips*, 2 East, P. C. c. 16, s. 98, p. 662.

(g) *Ante*, p. 121.

(h) *Rawlins's case*, 2 East, P. C. c. 16, s. 48, p. 617.

(i) *Vide R. v. M'Dermot*, R. & R. 356. R.

*v. Duffin*, R. & R. 365, and *R. v. Horwell*, R. & M. 405, that if a statute uses words in the alternative, so as to distinguish between them, the distinction must be attended to in the indictment.

was not supported; for the statute having taken away clergy from such as steal sheep, and having, in the same clause, made it a capital offence to kill sheep with intent to steal any part of the carcass, the driving away or stealing, mentioned in the statute, did not appear to be such a removal of the sheep as was made merely for the purpose of killing on the spot, but it must be such a removal as was made for the purpose of actually getting the sheep in a live state into a man's complete dominion; for if it were otherwise, the clause in the Act of Parliament about killing would have been quite unnecessary. In the cases in which a slight removal of the article had been held to amount to larceny, there had always been an intent to steal the article itself, but the thief had been prevented from getting the complete dominion over it. But here there was no intention in the removal to steal the living sheep; but the intent in the removal was to commit another offence of which the thief might be capitally convicted, and there would be no failure of public justice, if persons were not held to be guilty of stealing the live animal, because if the indictment was properly prepared they might still be convicted of a capital offence. In all the cases where a slight removal had been held larceny, there was evidence given of an actual removal, and how it was done; but here there was no evidence of the removal of the sheep in a live state, and the removal after their death would not support a count for stealing sheep, which must be intended to be live sheep. (j) As there was very sufficient evidence of the killing with intent to steal the fat, the learned judge directed the jury to find the prisoner guilty, but desired them to say, whether they were of opinion that he killed the sheep with intent to steal the whole, or part of the carcasses; and the jury found him guilty, and that he killed the sheep with intent to steal part of the carcasses only. But the question of removal under the first count was not put to the jury to find particularly. As the doctrine in *Rawlins's case*, (k) as applicable to sheep killed with the intent mentioned in the Act of Parliament, was not satisfactory to his mind, the learned judge reserved the points upon both counts of the indictment for the consideration of the judges; who were of opinion that the second count was supported, and not the first; a removal whilst alive being essential to constitute larceny; and nine of the judges held that the offence of intending to steal a part, was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole or only to part. (l)

(j) *R. v. Edwards*, R. & R. 497.

(k) *Ante*, p. 301, note (h).

(l) *R. v. Williams*, R. & M. 107. In *R. v. Marley*, Monmouth Spring Ass. 1842, Cresswell, J., held on the authority of this case that proof of stealing part of the carcass supported an indictment for killing with intent to steal the whole carcass. MSS. C. S. G. Upon an indictment for stealing a lamb, it should seem that it must be proved that the lamb was alive when it was stolen, in order to warrant the statutory punishment; for although it has been held that upon an indictment for receiving a lamb, it is no variance if the proof is that the lamb was dead when it was received, *R. v. Puck-*

*ering*, R. & M. 242, yet that decision proceeded on the special ground that the punishment was the same whether the lamb was alive or dead when it was received; but in the case of stealing a live lamb the punishment may be fourteen years' penal servitude, &c., while it can be only three for stealing a dead lamb. But, as stealing a lamb is felony at common law, it should seem that if it appeared on such an indictment that the lamb was dead, the prisoner might be convicted and punished for the common law felony. See the observation of Patteson, J., in *R. v. M'Culley*, 2 Moo. C. C. R. 34, and *R. v. Beane*, R. & R. 416. And it should seem that punishment would be under the



It was decided upon the 14 Geo. 2, c. 6, that cutting off part of a sheep whilst it was alive with intent to steal such part would support an indictment for killing with intent to steal, if the cutting off must occasion the death of the animal, especially if the offender hid the part cut off, and meant to fetch it away at a future time. The indictment was for killing a lamb with intent to steal part of the carcase; and it appeared that the prisoner cut off a leg from the animal whilst it was alive, and carried it away before the animal died; but that the cutting necessarily caused the death of the animal. Bayley, J., thought the giving the death wound before the larceny sufficient, and that the animal might be considered as killed by relation from that time, or if not, that the intention to fetch away the leg was an intent to continue the larceny thereof; but he saved the point for the opinion of the judges, who were unanimous, principally upon the first point, that the conviction was right. (*m*)

Upon an indictment for killing a sheep with intent to steal the carcase, it appeared that the prisoner was interrupted by the prosecutor while in the act of killing the sheep, which was wounded in the throat, the jugular vein being cut on one side, but not altogether through. The wound was sewn up, but the sheep died in two days. The jury having found that the prisoner gave the sheep a deadly wound, of which it died, with intent to steal the carcase, were directed to find the prisoner guilty; and, upon a case reserved, the judges were unanimously of opinion that the prisoner was rightly convicted. (*n*)

A number of cases were set out in the last edition in which mis-descriptions of the animal stolen (*e. g.* as where a cow was described as a heifer or a sheep as a lamb) were held to be fatal. In such cases the Court would now certainly allow the indictment to be amended under the large powers of amendment given by 14 & 15 Vict. c. 100, s. 1, and it is therefore unnecessary to cite them.

A count for killing a sheep with intent to steal the carcase can only be tried in the county where the sheep was killed. A count, found in Essex, charged the prisoner with killing a sheep with intent to steal the carcase; the sheep was last seen alive in a field in the county of Hertford, and there were marks of blood in that field, as if the sheep had been killed there, but part of the carcase was found in the prisoner's possession in Essex; and Wilde, C. J., held that the count could not be supported. (*o*)

Upon an indictment which charged the prisoner with stealing one mare, one saddle, and one bridle, without any allegation that the offence was against the form of the statute, the prisoner was convicted, and sentenced to be transported beyond the seas for fifteen years; and upon error it was objected that no part of the charge warranted the sentence, which was entirely statutable; but the Court of Queen's Bench held, that as the stealing the mare, as well as stealing the saddle and bridle, was a felony at common law and not created or altered in its nature by the 7 & 8 Geo. 4, c. 29, s. 25, the 2 & 3 Will. 4, c. 62,

7 & 8 Geo. 4, c. 28, ss. 8 & 9, and 1 Vict. c. 90, s. 5. C. S. G.

(*m*) *R. v. Clay*, MS. Bayley, J., and R. & R. 337.

(*n*) *R. v. Sutton*, 2 Moo. C. C. R. 29, 8 C. & P. 291.

(*o*) *R. v. Newland*, 2 Cox, C. C. 283. See this case, *ante*, p. 285, as to the trial in Essex for stealing the sheep.

s. 1, and the 1 Vict. c. 90, s. 1, the offence was correctly described in the indictment, and the sentence of 'fifteen years' transportation right. (p)

As the 26 Geo. 3, c. 71, was passed in order to remedy the facilities afforded to the stealing of cattle by persons of low condition, who kept houses or places for the purpose of slaughtering horses and other cattle, its provisions may be shortly mentioned in this place. It contains many enactments for the regulation of slaughter-houses; requires persons keeping them to take out a licence, and to give notice, previous to the slaughtering and flaying of any cattle, to an inspector appointed as mentioned in the Act, and to kill and flay the cattle only within certain hours. The eighth section enacts, that if any person keeping or using any slaughtering-house or place mentioned in the Act, shall slaughter any cattle for any other purpose than for butcher's meat, or shall flay any cattle brought dead to such slaughtering-house or other place without a licence, or without giving notice, or shall slaughter or flay at any time except within the hours limited by the Act, or shall not delay slaughtering or killing according to the direction of the inspector properly authorised, such person so offending in either of these cases and being convicted shall be adjudged and taken to be guilty of felony, and shall be punished by fine and imprisonment, and such corporal punishment by public or private whipping, or shall be transported for any term not exceeding seven years, (q) as the Court before whom the offender shall be tried and convicted, shall direct. (r) The ninth section enacts, that persons keeping or using such slaughtering-house or place, and throwing into lime, and rubbing therewith or with any other corrosive matter, or destroying, or burying hides of cattle slaughtered or flayed by them, shall be guilty of a misdemeanor, punishable by fine, imprisonment, and whipping. The statute also creates other offences of a smaller degree, and imposes penalties recoverable by summary proceedings before justices of the peace. The fourteenth section provides that the Act shall not extend to any currier, felt-maker, tanner, or dealer in hides, who shall kill any distempered or aged cattle, or purchase any dead cattle for the *bona fide* purpose of selling, using or curing the hides thereof, in the course of their respective trades; nor to any farrier employed to kill aged and distempered cattle; nor to any person who shall kill any of their own or other cattle, or purchasing any dead horse or other cattle, to feed their own hounds or dogs, or giving away the flesh for the like purpose. But it is further enacted, that if any collar-maker, currier, &c. or other person shall, under colour of their trades, knowingly or willingly kill any sound or useful horse, gelding, mare, foal or filly, or boil or otherwise cure the flesh thereof for the purpose of selling it, such person shall be deemed an offender within the meaning of the Act, and for every offence, forfeit any sum not exceeding twenty, nor less than ten pounds. (s)

(p) *Williams v. R.*, 7 Q. B. 250, A. D. 1845. In *R. v. Newland*, 2 Cox, 283, A. D. 1847, *Wilde, C. J.*, expressed a contrary opinion, but no authority was cited.

(q) Now penal servitude. As to the term of penal servitude, see vol. i. p. 79.

(r) See a precedent of an indictment against the keeper of a slaughter-house, for slaughtering a horse without giving the proper notice, 3 Chit. Crim. L. 721.

(s) 26 Geo. 3, c. 71, s. 15. The 7 & 8 Vict. c. 87, which recites the preceding Act,

Upon the trial of any felony mentioned in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

contains many additional provisions for regulating places kept for slaughtering horses; and the 12 & 13 Vict. c. 92, repeals the 5 & 6 Wm. 4, c. 59, which related to the same

subject, and contains many regulations on the same subjects: but none of them falls within the scope of this work.

## CHAPTER THE THIRTEENTH.

### STEALING DOGS.<sup>1</sup>

By the 24 & 25 Vict. c. 96, s. 18, 'Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.' (a)

**Possession of stolen dogs.** — Sec. 19. 'Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.' (b)

**Taking money to restore dogs.** — Sec. 20. 'Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor and being convicted thereof shall be liable,' as in Sec. 19. (c)

Upon the trial of any misdemeanor mentioned in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(a) This clause is taken from the 8 & 9 Vict. c. 47, s. 2. There was a similar provision in the 14 & 15 Vict. c. 92, s. 5 (1).

(b) This clause is taken from the 8 & 9 Vict. c. 47, s. 3. There was a similar provision in the 14 & 15 Vict. c. 92, s. 5 (1).

(c) This clause is taken from the 8 & 9 Vict. c. 47, s. 6, and extended to Ireland. Secs. 21, 22, and 23 create offences punishable summarily.

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#### AMERICAN NOTE.

<sup>1</sup> In New York and in some other States dogs are the subject of larceny. See *P. v. Maloney*, 1 Parker, C. C. 503. *P. v. Campbell*, 4 Parker, C. C. 386. *Mullaley v. P.*,

86 N. Y. 365. *Haywood v. S.*, 41 Ark. 479. *Norton v. Ladd*, 5 N. H. 203. *Ward v. S.*, 48 Ala. 161. *S. v. Lymus*, 26 Ohio, 400. *C. v. Hazelwood*, 84 Ky. 681.

## CHAPTER THE FOURTEENTH.

### OF STEALING AND DESTROYING DEER.

THE former statutes upon this subject are repealed, but by the 24 & 25 Vict. c. 96, s. 12, 'Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; (a) and whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act of Parliament, shall afterwards commit any of the offences herein-before enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, [and with or without solitary confinement,] (b) and if a male under the age of sixteen years, with or without whipping.' (c)

The word 'deer' in the 7 & 8 Geo. 4, c. 29, s. 26, was held to be a general term, including all kinds, both sexes, and all ages. Upon an indictment for stealing 'one deer,' it appeared that the animal in question was a fawn, recently fawned, and that the young of deer are known by the name of fawn till a year old, and are not called deer before that time; but Maule, J., held that the stealing this animal was within the statute, as the term deer was the most general term, and included all kinds of deer, all ages, and both sexes. (d)

Where a prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 26, for a second offence, and the previous conviction was made by two justices, it was held good. And where such a conviction, after stating the venue in the margin in the usual way, set forth that on a certain day at a certain place in the county of Oxford, the prisoner was convicted for that he did on a certain day unlawfully use an engine for the purpose of killing deer in the forest of Wychwood, but omitted to state where or in what county the offence was committed, but proceeded to direct the penalty to be paid to the overseers of D. in the said county, 'where the said offence was committed,' it was held that this sufficiently shewed the offence to have been committed in the county of Oxford. (e)

(a) See *R. v. King*, 1 D. & L. 721, as to the form of a commitment in these cases.

(b) These words are repealed by the Statute Law Revision Act, 1893, No. 2, 56 & 57 Vict. c. 54, and the punishment of solitary confinement can no longer be inflicted.

(c) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 26, and though it is extended to Ireland, it will probably have no

operation there, as it may be doubted whether there be in Ireland any place which is in point of law a 'forest, chase, or purlieu.'

(d) *R. v. Strange*, Gloucester Sum. Ass. 1843, MSS. C. S. G. 1 Cox, C. C. 58.

(e) *R. v. Weale*, 5 C. & P. 135, J. A. Park, J. The second point decided in this case is directly contrary to the decision in *R. v. Johnson*, 1 Str. 261, and seems to have been wrongly decided. C. S. G.

Upon an indictment for a second offence against the 42 Geo. 3, c. 107, by killing deer, objections might be taken to the validity of the previous conviction. An indictment on that statute stated that the prisoner was convicted by a justice for the county of Essex for unlawfully carrying away a deer, and that afterwards he feloniously and unlawfully did offend a second time by feloniously aiding in killing a deer. The conviction was made by a magistrate of Essex at a place in Middlesex, and was a conviction of the prisoner and three other persons. The offence was committed in Essex. It was objected, 1st, that the indictment did not state that the prisoner was duly convicted; 2ndly, that he was not duly convicted, as the conviction was in Middlesex; 3rdly, that the conviction was of four, whereas it was stated in the indictment as of the prisoner only. And, on a case reserved, the judges held that the prisoner ought not to have been convicted of the felony. (*f*)

By the 24 & 25 Vict. c. 96, s. 13, 'Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, [and with or without solitary confinement,] (*g*) and, if a male under the age of sixteen years, with or without whipping.' (*h*)

An inclosure in the Forest of Dean, made under a statute of Chas. 2, for the protection of timber, and surrounded by a ditch and bank, which were sufficient to prevent cattle from getting into it, but over which the deer could pass in or out at their free will, was held by Erle, J., to be an inclosed part of a forest within the 7 & 8 Geo. 4, c. 29, s. 26; and the words 'wherein deer shall be usually kept,' were held to refer to 'inclosed land' only. (*i*)

Sec. 16. 'If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person entrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, firearms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act, every such offender

(*f*) *R. v. Allen*, Russ. & Ry. 513. The reporters add, the second objection was probably considered fatal. As to the third objection, see *R. v. Page*, vol. i. p. 245.

(*g*) See note (*b*), *ante*, p. 307.

(*h*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 26. There was a similar

clause in the 14 & 15 Vict. c. 92, s. 5 (1), as to coursing, &c., deer in any park, paddock, or inclosed land, wherein deer shall be usually kept. Ss. 14 & 15 create offences punishable summarily.

(*i*) *R. v. Money*, Gloucester Sum. Ass. 1847. MSS. C. S. G.

shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, [and with or without solitary confinement,] (j) and, if a male under the age of sixteen years, with or without whipping.' (k)

By the express words of this section, a demand must be made of the gun, &c., before a seizure; the 16 Geo. 3, c. 30, s. 9, authorised persons entrusted with the care of deer to seize any gun, &c., brought by any person with intent unlawfully to shoot deer, without making a previous demand necessary; but it was held upon that statute that an assistant keeper had no right to seize the person of one so armed, in order to get his gun, without having first demanded the gun. (l)

On an indictment against the prisoner for having unlawfully beaten and wounded an assistant keeper of the Forest of Dean, it appeared that, the prisoners being found in the forest with a gun, the keeper demanded the gun, and, not receiving a reply, collared one of them for the purpose of taking the gun, when the others seized the keeper, and pulled him off the other prisoner, pulled him to the ground, and there held him until the other prisoner had escaped: no other violence was used, nor was the keeper otherwise beaten than by the force necessary to hold him to the ground; and Maule, J., held that the 7 & 8 Geo. 4, c. 29, s. 29, was not satisfied by a mere battery in point of law; it contemplated a beating in the popular sense of the word; and that pulling a man to the ground, and there holding him, was not a beating within the Act. (m)

By 24 & 25 Vict. c. 96, s. 103, a general provision is made for the apprehension and discovery of offenders punishable under this Act, and the 105th and following sections regulate the proceedings in respect of a summary conviction.

By Sec. 98, principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are, on conviction, liable to be imprisoned for any term not exceeding two years, and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By Sec. 99, abettors in offences punishable on summary conviction are made punishable as principal offenders.

(j) See note (b), *ante*, p. 307.

(k) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 29, and extended to Ireland.

(l) *R. v. Amey*, R. & R. 500. A further question, not decided, was whether an assistant keeper, not appointed or confirmed by the owner of the chase, had authority to

seize guns unless the head keeper were present: the words 'any of his assistants, whether in his presence or not,' in sec. 16, seem introduced to meet this point. C. S. G.

(m) *R. v. Hale*, 2 C. & K. 326.

## CHAPTER THE FIFTEENTH.

### OF TAKING OR KILLING HARES OR CONIES IN A WARREN, ETC. (a)

THE statutes formerly existing upon this subject are repealed. But by the 24 & 25 Vict. c. 96, s. 17, 'Whosoever shall unlawfully and wilfully, *between the expiration of the first hour after sunset and the beginning of the last hour before sunrise*, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be enclosed or not, shall be guilty of a misdemeanor. (b)

With respect to what shall be deemed a *taking* of a hare, &c., in a case upon the 5 Geo. 3, c. 14, in which the prisoner was indicted for entering a warren in the night-time, and there *taking* a coney against the will of the occupier of the warren, it appeared that he set wires in the warren at about six o'clock in the evening, and a coney was caught in one of the wires; and that he came again before six o'clock the next morning, when he was seized by the warrener just as he was about laying hold of the wire in which the coney was caught; the coney being then alive: and, upon a case reserved, the judges thought that the taking by the wire was a taking by the prisoner within the meaning of the statute, and that he had been properly convicted. (c)

Sec. 103 of 24 & 25 Vict. c. 96, contains a general provision for the apprehension and discovery of offenders punishable under the Act, and the 105th and following sections regulate the proceedings in respect of summary convictions.

By sec. 98, abettors in misdemeanors are liable to be indicted and punished as principal offenders; and by sec. 99 abettors in offences punishable on summary conviction are made punishable as principal offenders.

On an indictment under a repealed Act for destroying conies in the night-time in a ground lawfully used for breeding them, it appeared that the prosecutor kept rabbits, which ran about loose in his rick yard, and that the rabbits were destroyed by poison in the night-time; it was submitted that the statute only applied to warrens, and to places similar to warrens, but which could not legally be called warrens. Patteson, J., 'This place was not used exclusively for rabbits; and it appears that the prosecutor merely kept some rabbits in his rick yard. If the yard had been kept exclusively for rabbits, I should

(a) See other offences against the Game Laws. Vol. i. p. 944. As to the right of occupiers to kill hares and rabbits, see Ground Game Act, 1880, 43 & 44 Vict. c. 47.

(b) This offence is punishable like other misdemeanors, by imprisonment or fine, or both. See vol. i. p. 193. This clause is

taken from the 7 & 8 Geo. 4, c. 29, s. 30. The words in *italics* are substituted for 'in the night-time.' The offence of killing rabbits in the day-time is by the same section punishable summarily. See vol. i. p. 947.

(c) Glover's case, MS. Bayley, J., and R. & R. 269.



have doubted it; but I think that this case is clearly not within the Act of Parliament. The Act applies to places commonly called rabbit-warrens, and not to places where a few rabbits may be kept.' (d)

Upon the trial of any misdemeanor mentioned in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(d) *R. v. Garratt*, 6 C. & P. 369. See note to vol. I. p. 947.

## CHAPTER THE SIXTEENTH.

### OF UNLAWFULLY TAKING OR DESTROYING FISH.

**Offence at common law.** — It is admitted that larceny at common law may be committed of fish, when confined in a trunk or net; (a) but doubts have been raised whether it may be committed in like manner of fish in a pond. It should seem, however, upon principle, and according to the better opinions, that larceny may be committed of fish in a pond, if the pond be private inclosed property, and of such kind and dimensions that the fish within it may be considered as restrained of their natural liberty, and liable to be taken at any time, according to the pleasure of the owner. (b) But clearly larceny at common law cannot be committed of fish at their natural liberty in rivers or great waters. (c)

**Offences by statute.** — By the 24 & 25 Vict. c. 96, s. 24, 'Whosoever shall unlawfully and wilfully take (d) or destroy any fish in any water which shall run through or be in any land adjoining, (e) or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; (f) and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, (g) but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: Provided that nothing hereinbefore contained shall extend to any person angling *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*; but whosoever shall by angling *between the beginning of the last hour before sunrise and the expiration of the first*

(a) *Ante*, p. 246; 2 East, P. C. c. 16, s. 43, p. 610.

(b) Staundf. 25 b. 3 Inst. 109. Lamb. 274. 1 Hawk. P. C. c. 33, s. 39. 2 East, P. C. c. 16, s. 43, pp. 610, 611. But the indictment should describe the pond, so that it may appear on the face of it, that taking fish out of such a pond is felony, 2 East, P. C. 611.

(c) 3 Inst. 109. 1 Hawk. P. C. c. 33, s. 39.

(d) If fish were inclosed in a net, or hooked on a line, it would seem that the case would come within this clause by analogy to Glover's case, *ante*, p. 310, although there had been no actual removal of them by the hands of the prisoner. C. S. G.

(e) See R. v. Hodges, *ante*, p. 223, as to the meaning of the term adjoining.

(f) This offence is punishable, like other

misdemeanors, by imprisonment or fine, or both.

(g) Where a summary conviction on the 7 Geo. 4, c. 29, s. 34, negatived that the water ran through land adjoining or belonging to the dwelling-house of the complainant, it was held sufficient, and that it need not negative that the water ran through land adjoining or belonging to the dwelling-house or any other person being the owner or having the right of fishing therein. Fuller v. Brown, 3 Sess. C. 603. Where on the hearing of an information under this clause a claim of right is set up by the defendant, such claim, if made *bona fide* and with some shew of reason will oust the jurisdiction of the justices. R. v. Stimpson and R. v. Peak, 9 Cox, C. C. 356, 4 B. & S. 301. Hudson v. Macrea, 9 L. T. 678, 4 B. & S. 585.

*hour after sunset* unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds, and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.' (*h*)

Sec. 25. 'If any person shall at any time be found fishing against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant, or any person authorised by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish which shall then be in his possession, and in case such offender shall not immediately deliver up the same, may seize and take the same from him for the use of such owner: Provided, that any person angling against the provisions of this Act, *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*, from whom any implement used by anglers shall be taken, or by whom the same shall be so delivered up, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling.' (*i*)

Sec. 26. 'Whosoever shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; (*j*) and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster *bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such*, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding three months, with or without hard labour, and

(*h*) This section is taken from the 7 & 8 Geo. 4, c. 29, s. 34, and extended to Ireland. The words in *italics* are introduced instead of 'day-time' in the former enactment, in order to remove any doubt as to what is the beginning and end of day-time.

(*i*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 35, and extended to Ireland. A similar substitute for 'day-time' is made in this clause to that in the preceding clause.

(*j*) By 29 & 30 Vict. c. 85, s. 1, this Act may be cited as 'The Oyster and Mussel Fisheries Act, 1866.' By s. 2, in this Act the words 'oysters' and 'mussels' respectively include the brood, ware, halfware, spat, and spawn of oysters and mussels re-

spectively. By sec. 16, all oysters or mussel being in or on an oyster or mussel bed within the limits of any such several fishery shall be the absolute property of the grantees, and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of the grantees. By sec. 20, the portion of the sea-shore to which an order of the Board of Trade under this Act relates (as far as it is not by law within the body of any county) shall for all purposes of jurisdiction be deemed to be within the body of the adjoining county, or to be within the body of each of the adjoining counties if more than one.

(*j*) See *ante*, p. 296, for the punishment.

with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: Provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only.' (k)

Sec. 103 contains a general provision for the apprehension of offenders punishable under the Act, except only as to the offence of angling in the day-time; and the 105th and following sections regulate the proceedings in respect of summary convictions.

Sec. 98 makes principals in the second degree and accessories before the fact punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are liable to be imprisoned for any term not exceeding two years; and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By Sec. 99, abettors in offences punishable on summary conviction are made punishable as principal offenders.

**Indictment.**—Where an indictment charged the prisoner with unlawfully entering a garden adjoining a dwelling-house, and with a certain net stealing out of a pond in the said garden a certain quantity of live gold and silver fish of the goods and chattels of S. T.; the judges held the indictment good, the case being brought within the 5 Geo. 3, c. 14, without the allegation that the fish were the goods and chattels of any person, and therefore that part of the indictment was surplusage. (m)

An indictment on the same statute was good, although it did not state the means by which the fish were taken or stolen, and although it alleged them to have been feloniously stolen. (n)

Upon a case reserved upon an indictment for stealing oysters in a tidal river, Cockburn, C. J., in delivering the judgment of the Court said, 'This case is free from any doubt. The prisoner was caught stealing oysters from an oyster bed, by his own acknowledgment. At the trial the prosecutor proved by oral evidence that from the year 1815 to the present time he and his father had been in the possession and enjoyment of the oyster bed, and had asserted an exclusive right thereto; that their exclusive right to this oyster bed was challenged, and that in 1846 an action was brought to try the right, and a verdict given in favour of the prosecutor, and that since then, down to this time, the prosecutor's right had not been challenged. It was said that this evidence was not sufficient, and that the prosecutor's right ought to have been proved by deed. It is quite true that this oyster bed was in a navigable river, where the public had *prima facie* a right to fish; but it is equally true that by ancient grant or prescription a private

(k) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 36. There were similar clauses in the 5 & 6 Vict. c. 106, ss. 11, 12 (I); 8 & 9 Vict. c. 108, s. 18 (I); and 13 & 14 Vict. c. 88, s. 42 (I). The words in *italics* were introduced to remove a doubt as to whether 'oyster fishery' was co-extensive with the words in the beginning of the clause.

(m) *Hudson's case*, 2 East, P. C. c. 16, s. 43, p. 611.

(n) *R. v. Carradice*, R. & R. 205. The judges held the conviction wrong on the ground that the fish were not 'bred, kept, or preserved' in the river, as the river ran in its natural course, and there was nothing to keep or preserve the fish within the park.

person may have an exclusive right to a separate fishery therein. Then the only question is, can such an exclusive right be proved by parol. It is clear that prescriptive rights may be proved by parol evidence. Indeed, what better proof can there be against a wrongdoer than that of an uninterrupted user or enjoyment of the right for forty or fifty years? And in such a case a jury would be told that a claimant, from such long continued uninterrupted enjoyment of the right claimed, would have the right. In the present case the evidence was abundantly sufficient to establish the right.' (o)

Upon the trial of any indictable offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(o) *R. v. Downing*, 11 Cox, C. C. R. 580.<sup>1</sup>

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AMERICAN NOTE.

<sup>1</sup> As to oysters in America, see *Fleet v. Hegeman*, 14 Wend. 42. *S. v. Taylor*, 3 Dutcher, 117; 72 Am. D. 347.

## CHAPTER THE SEVENTEENTH.

### OF STEALING IN ANY VESSEL IN PORT, OR UPON ANY NAVIGABLE RIVER, &C., OR IN ANY CREEK, &C., AND OF PLUNDERING SHIPWRECKED VESSELS.

As to larceny in ships, wharves, &c. by the 24 & 25 Vict. c. 96, s. 63, 'Whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever *in any haven*, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such *haven*, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such *haven*, port, river, canal, creek, or basin, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](b)

Sec. 64. 'Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]; and the offender may be indicted and tried either in the county or place in which the offence shall have been committed or in any county or place next adjoining.' (c)

Sec. 65. 'If any goods, merchandise, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken or *summoned* before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender shall, on conviction of such offence before the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from 7 & 8 Geo. 4, c. 29, s. 17, and the 9 Geo. 4, c. 55, s. 17 (1), with the addition in *italics*.

(c) The first part of this clause is taken from the 7 Will. 4 & 1 Vict. c. 87, s. 8; the last part from the last part of the 7 & 8 Geo. 4, c. 29, s. 18, and the 9 Geo. 4, c. 55, s. 18 (1).

term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds as to the justice shall seem meet.' (d)

Sec. 66. 'If any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or shall be reasonably suspected so to have been taken, from any ship or vessel in distress, or wrecked, stranded, or cast on shore, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender shall, on conviction of such offence by the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds as to the justice shall seem meet.' (e)

Sec. 103 contains a general provision for the apprehension and discovery of offenders punishable under the Act; and the 105th and following sections regulate the proceedings in respect of summary convictions.

By Sec. 98, (f) in cases of felony, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are on conviction liable to be imprisoned for any term not exceeding two years; and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By Sec. 99, abettors in offences punishable on summary conviction, are made punishable as principal offenders. (g)

In a case upon the 24 Geo. 2, c. 45, the words 'goods, wares, and merchandise' were considered as restrained to such goods, &c. as were usually lodged in vessels, or on wharfs or quays. (h) So that where the prisoner was indicted upon that statute for stealing a considerable sum of money out of a ship in port, the case was holden not to be within the statute, though great part of the money consisted of Portugal money not made current by proclamation, but commonly current. (i)

(d) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 19. There was a similar clause in the 14 & 15 Vict. c. 92, s. 4 (1).

(e) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 20. There was a similar clause in the 14 & 15 Vict. c. 92, s. 4 (1).

(f) Vol. 1. p. 190.

(g) As to offences committed on the sea, see sec. 115, vol. i. p. 15.

(h) 2 East, P. C. c. 16, s. 85, p. 647.

(i) Grimes's case, Post. 79, in the note. S. P. in Leigh's case, 1 Leach, 52.

The luggage of a passenger going by a steamer was within the words 'goods or merchandise' in the 7 & 8 Geo. 4, c. 29, s. 17. (*j*)

We have seen that where the master and owner of a ship took some of the goods delivered to him to carry, it was held not to be larceny, as he did not take the goods out of their package; (*k*) and it was also held that even if under the circumstances it had amounted to larceny, it would not have been an offence within the 24 Geo. 2, c. 45. (*l*)

Where the prisoner was indicted for stealing a quantity of deals 'in a certain barge on the navigable river Thames,' and it appeared that the barge had been brought into Limehouse dock, and there moored; and by the efflux of the tide it was left aground, and in the night the deals were stolen; it was held that the offence laid was not proved within the meaning of the 24 Geo. 2, c. 45, as the evidence proved that the offence was not committed on the navigable river Thames, but upon the banks of one of its creeks. (*m*)

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 536, imposes pecuniary penalties on every person who wrongfully carries away or removes any part of any ship or boat stranded or in danger of being stranded, or otherwise in distress, on or near the shore of any sea or tidal water, or any part of the cargo or apparel thereof, or any wreck, or endeavours in any way to impede or hinder the saving of such ship, boat, cargo, apparel, or wreck, or secretes any wreck, or obliterates, or defaces any marks thereon.

By Sec. 535, 'If any person takes into any foreign port or place, any ship or boat stranded, derelict, or otherwise in distress on or near the coasts of the United Kingdom, or of any tidal water, within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck found within those limits, and there sells the same, that person shall be guilty of felony, and on conviction thereof shall be liable to be kept in penal servitude for a term not less than three years and not exceeding five years.' (*n*)

Upon an indictment for any offence mentioned in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(*j*) *R. v. Wright*, 7 & P. 159. J. A. Park, J., and Alderson, B.

(*k*) But see now 24 & 25 Vict. c. 96, s. 3, *ante*, p. 133, which would apply to such a case.

(*l*) *R. v. Madox*, R. & R. 92.

(*m*) *Pike's case*, 2 East, P. C. c. 16, s. 85, p. 647.

(*n*) By sec. 684, 'for the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed, or arose, or in any place, in which the offender, or person complained against may be.'



## CHAPTER THE EIGHTEENTH.

### OF LARCENY BY SERVANTS, AND PERSONS WHO HAVE THE CUSTODY OF GOODS AS SERVANTS, AND NOT THE LEGAL POSSESSION.<sup>1</sup>

**Larceny by clerks or servants.** — By the 24 & 25 Vict. c. 96, s. 67, 'Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years, [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping.' (b)

**Offences at common law.** — Some statutes upon this subject were repealed by the 7 & 8 Geo. 4, c. 27, having been for a long time but little resorted to, as the common law applies to the fraudulent conversion by a servant, to his own use, of the goods of his master. The punishment for a felonious stealing by a servant from his master, is made more severe than in an ordinary case of larceny by the 24 & 25 Vict. c. 96, s. 67.

The clear maxim of the common law established by a variety of cases, is, that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. (c) And this rule appears to hold universally in the case of servants, whose possession of their master's goods, by their delivery or permission, is the possession of the master himself. (d)

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 46, and the 9 Geo. 4, c. 55, s. 39 (1). The words in *italics* are taken from the next section in each of those Acts; and their insertion makes this clause and

the next co-extensive as to the persons to whom they apply. The word 'employer' is taken from the 9 Geo. 4, c. 55, s. 39 (1).

(c) 2 East, P. C. c. 16, s. 14, p. 564, *et seq.*, and the authorities there cited. And see as to a bare charge or custody, *ante*, p. 131.

(d) 2 East, P. C. *ibid.* *Ante*, p. 131.

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#### AMERICAN NOTE.

<sup>1</sup> The possession of a servant is different from that of a bailee. That of the former is mere custody, but that of the latter is a real possession. See *U. S. v. Glen*, 4 Wash. C. C. 700. *Walker v. C.*, 8 Leigh, 743.

*C. v. Davis*, 104 Mass. 548. *P. v. Belden*, 37 Cal. 51. *S. v. Fann*, 65 N. C. 317. *C. v. King*, 9 Cush. 284. *Marcus v. S.* 26 Ind. 101. *S. v. Jarvis*, 63 N. C. 556. *Ennis v. S.*, 3 Greene (Iowa), 67.

In support of this maxim of the common law here laid down, it will be proper to cite some cases in which it has been recognised. The 24 & 25 Vict. c. 96, s. 3, noticed, *ante*, p. 133, as to bailees being found guilty of larceny, would apply to some of the cases, though it must be remembered that the punishment is more severe where a person, being a servant, steals his master's property than in a case of simple larceny.

The prisoner, a sheriff's officer, under a writ of *feri facias* against one Bell, seized the goods in Bell's house, amongst which were some engravings in a locked closet. He removed a bead from the door of that closet, took out the engravings, and sold them for his own use. Upon an indictment against him for larceny, it was urged that this was a breach of trust only; but, upon the point being saved, the judges held it a larceny; on the ground that the officer had the custody of the goods only, like a servant, and not the legal possession. (*e*)

A carter going away with his master's cart was holden to have been guilty of felony. (*f*)

The prisoner who was servant and porter in the general employ of the prosecutor, was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. Instead thereof the prisoner sold the goods, and converted the money to his own use. All the judges, on a case reserved, held this to be felony, on the ground that the possession of the goods still remained in the master. (*g*)

In a case where the master of a captured vessel got property from the vessel clandestinely under particular circumstances, it seems to have been held not to amount to larceny. The vessel was Prussian, sent in by a British cruiser, and at first ordered to be restored, but afterwards, hostilities breaking out with Prussia, condemned as prize to the king, as having been taken before hostilities. The captain of the vessel lodged on shore, but went occasionally to the ship; the ship-keeper, who was appointed when the ship was brought in, kept the keys of the hatches, and two custom-house officers and nine of the original crew remained on board. The property in question was secretly conveyed from the ship, and found at the master's, or at a place to which he had sent it, and it appeared that a bulk-head had been broken to get at part of such property. But Chambre, J., doubted whether this regaining the possession of what had belonged to the master's owners and had been entrusted to his care, amounted to a larceny, and saved the point. And ultimately the prisoner was recommended for a pardon. (*h*)

In a case where the prisoner had been convicted for stealing forty bushels of oats, a question, whether the facts amounted to felony, was reserved for the opinion of the judges. The prosecutors [who were cornfactors, had purchased a cargo of oats on board a ship lying in the river Thames; and they] sent the prisoner [who was employed in their

(*e*) R. v. Eastall, Mich. T., 1822. MS. Bayley, J.

(*f*) Robinson's case, 2 East, P. C. c. 16, s. 15, p. 565. Paradice's case, 2 East, P. C. c. 16, s. 15, p. 565.

(*g*) Bass's case, 1 Leach, 251, 524. 2 East, P. C. c. 16, s. 15, p. 566.

(*h*) R. v. Vanmuyer, MS. Bayley, J.,

and R. & R. 118. In MS. Bayley, J., it is observed that there was no evidence to shew that the master took the property for *himself* in opposition to the intention of his owners; and that most of the judges seemed to think it would have been larceny if he had, and *contra* if he had not.

service as a lighterman,] with their barge, to Wilson, a corn-meter, for as much oats as the barge would carry, and which were to be brought in loose bulk. The prisoner [proceeded to the ship, and] received from Wilson two hundred and twenty quarters of oats in loose bulk, and five quarters in sacks. The five quarters were put into sacks by order of the prisoner; and were afterwards embezzled by him. The question submitted to the judges was, whether this was felony, as the oats had never been in the possession of the prosecutors; or whether it was not like the case of a servant receiving charge of, or bringing, a thing for his master, but never delivering it. And the judges held that it was larceny in the prisoner; and a taking from the actual possession of the owner, as much as if the oats had been in his granary. (i)

On an indictment against the prisoner for stealing coals the property of Newton, his master, it appeared that Newton directed the prisoner, his servant, to go to a station with his cart for ten cwt. of coals, and to bring the coals to his house; and the prisoner accordingly went to the station with the prosecutor's cart, and received from the wharfinger of the Medway Company, with whom the prosecutor dealt, ten cwt. of coals, which were put in the cart; and part of which the prisoner fraudulently disposed of from the cart. It was objected that the possession of the coals had never been in Newton; but the Court held that there was a constructive possession in the master; and, upon a case reserved, it was held that the prisoner was properly convicted of larceny. Lord Campbell, C. J.: 'There can be no doubt that, in such a case, the goods must have been in the actual or constructive possession of the master, and that if the master had not otherwise the possession of them than by the bare receipt of his servant, upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet, in respect of the servant himself, this will not support a charge of larceny; because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continue with the prisoner down to the time of the conver-

(i) Spear's case, 2 Leach, 825. 2 East, P. C. c. 16, s. 16, p. 568. See in *R. v. Reed, Dears. C. C.* at p. 263, a copy of this case from the Black Book, which omits the parts between brackets in the text, and referred to Dy. 5, and 1 Show. 52. The

ground of the determination mentioned by Heath, J., in Walsh's case, 4 Taunt. 276, was that the corn was in the prosecutor's barge, and it was a taking from the master's possession as much as if it had been from the master's granary.

sion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. (j) The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it, and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny. (k) There seems considerable difficulty in contending that if the master was in possession of the cart, he was not in the possession of the coals which it contained, the coals being his property and deposited there by his orders for his use. It was argued that the goods received by a servant remain in the exclusive possession of the servant till they have reached their ultimate destination, but no definition of "ultimate destination," when so used, could be given. It was admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or the charge of the coals, as a butler has of his master's plate, or a groom of his master's horse. To this conclusion I should have come upon principle, and I think that *Spear's case* (l) is an express authority in support of it.' After stating that case from the Black Book, his lordship proceeded:— 'In that case the question was whether the corn, while in the prosecutor's barge, in which it was to be brought by the prisoner to the prosecutor's granary, was to be considered in the prosecutor's possession, and the judges unanimously held that from the time of its having been put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met by a suggestion that the whole cargo of corn might have been purchased by the prosecutor, (m) so that he might have had a title and constructive possession before the delivery to the prisoner: but the very statement of the case in the Black Book, and the authorities there referred to, shew that the judges turned attention to the question whether the exclusive possession of the servant had not been determined before conversion. (n)

The following is a case of a similar nature. The prisoner was indicted (as in *Spear's case*) upon the 24 Geo. 2, c. 45, for stealing five quarters of oats from a vessel on the navigable river Thames. The prosecutors, in whom the property was laid, were cornfactors; and the prisoner was their servant; and had been employed by them many years in superintending the unloading of their corn vessels. The prosecutors had purchased two hundred and forty quarters of oats, on

(j) There is no statement in the case that warrants the position that the coals had ever been in the prisoner's possession at all; but it is said by counsel, p. 174, 'The coals were in sacks, and then placed in the master's cart;' but it is not stated whose the sacks were, or who placed them in the cart. If they were placed in the cart by the vendor's men, they clearly never were in the prisoner's possession.

(k) *Robinson's case*, *ante*, p. 320.

(l) *Supra*, p. 321.

(m) It is so stated in 2 Leach, 825.

(n) *R. v. Reed*, Dears. C. C. 168, 257. Parke, B., would have differed in opinion, but yielded to *Spear's case* as directly in point. See *R. v. Norval*, 1 Cox, C. C. 95. *R. v. Hayward*, 1 C. & K. 518.

board a Dutch vessel, lying in the river Thames; and while the corn-meters were in the act of unloading the oats from the Dutch vessel into the prosecutors' barge, the prisoner, with another person, came alongside in a boat, handed ten empty sacks on board the Dutch vessel, and desired that the sacks might be filled with oats, and tied, as they were going to be put into an up-country lug-boat. He also desired that the account of the oats, put into the sacks, might be carried to the score, and no separate account be made of them. The whole of the two hundred and forty quarters of oats, excepting the five quarters put into the sacks by the prisoner's desire, were loaded, in loose bulk, into the prosecutors' barge. After the sacks were filled, a person, by the prisoner's direction, took them away from the vessel to a place where they were delivered to the person who purchased them of the prisoner. The prisoner had never been employed by the prosecutors to sell corn for them; nor was he authorised so to do. The jury found the prisoner guilty; and, upon a case reserved, the judges were of opinion that the conviction was right. (o) It is observed that in this case there appears to have been a tort committed by the servant in the very act of the taking; that the property of his masters in the corn was complete before the delivery to him; and that, after the purchase of it in the vessel, they had a lawful and exclusive possession of it as against the world, but the owner of the vessel. (p)

Where property which the prosecutors had bought was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart, and dispose of the property for his benefit jointly with that of the other persons, the carter's servant, as well as the other persons, was held to be guilty of larceny at common law. [Upon an indictment for larceny of barilla, laid in one count as the property of J. Bryant, in another as that of the prosecutors, it appeared that] the prosecutors contracted for some barilla lying at the London docks; their clerk went to see it weighed, and after having been weighed in his presence, it was delivered to one of the prisoners, Harding, a carman's man, to cart [in the cart of Bryant, who was his master]. By contrivance between Harding and the other prisoners, he left the cart on his way to the prosecutors' and the others drove it away and disposed of the barilla. Lawrence, J., told the jury that if Harding was to receive any benefit from the disposition, he was equally guilty with the other prisoners; and the jury found all the prisoners guilty; and, upon the point being saved, whether as the barilla was delivered to Harding to cart, the taking amounted to larceny, the judges held that it did [whether the goods were considered as the property of the prosecutors or of Bryant]. (q)

So if the money had been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and embezzles it, this is larceny. (r)

(o) *Abrahat's case*, 2 Leach, 824. 2 East, P. C. c. 16, s. 16, p. 569. Although it is not expressly so stated in the reports, yet it is clearly to be inferred that the sacks of oats were not put into the prosecutor's barge, and the marginal note in Leach shews that this was the case. C. S. G.

(p) 2 East, P. C. c. 16, s. 16, p. 570.

(q) *R. v. Harding*, MS. Bayley, J., and R. & R. 125. I have inserted the words between brackets from R. & R., as they seem to me important to be added. C. S. G.

(r) *R. v. Murray*, R. & M. C. C. R. 276, 5 C. & P. 145. *Ergo*, it was larceny. C. S. G. See *R. v. Cooke*, 40 L. J. M. C. 68, per Willea, J.

Upon an indictment for stealing a heifer it appeared that the prosecutor hired the prisoner to take a heifer from York to Kirby Misterton; the prisoner was to receive two shillings for taking the heifer the same day to Spittle Beck, ten miles from York, which was paid when he took the heifer in charge, and he was to receive two shillings more for taking her to Kirby Misterton, where the prosecutor lived, the next morning. The prisoner having received the heifer, soon after and without authority sold the heifer as his own, and embezzled the proceeds. The jury negatived the existence of any fraudulent intention previous to the delivery of the heifer to the prisoner, but found him guilty; and, upon a case reserved, the judges held the conviction right, the possession of the prisoner being that of a servant only. (s)

But where the indictment alleged that the prisoner, whilst the servant of the prosecutors, stole ten pigs, it appeared that the prosecutors, having purchased pigs, which they knew would suit Goose, a pig dealer at Leeds, engaged the prisoner, a butcher and drover at Newcastle, to go with the pigs by railway from Newcastle to Leeds, and there deliver them to Goose, and bring back to the prosecutors such sum in post-office orders or a banker's cheque as Goose should give him on being shewn a paper which the prosecutors gave to the prisoner for that purpose, the contents of which were not in evidence. The prisoner had no authority to sell the pigs, nor to do anything with them but deliver them to Goose, and no instructions were given to him as to what he was to do with them should Goose refuse to accept them. The prisoner took the pigs to Leeds, and went with them to Goose's house in the morning whilst all the inmates were in bed. Goose himself was from home, and though his wife was awake by the prisoner, no attention was paid and no directions given to him. The prisoner then took the pigs to the Leeds pig market, and sold them to a pork butcher the same morning, received the price, and absconded with it. The prisoner had been frequently employed by the prosecutors, in the capacity of a butcher, to slaughter and cut up pigs, &c., for which he was paid by the job; but he had never before been employed by them as drover. He had two pounds given him for expenses, for which he was to account; nothing was said as to the manner in which he was to be paid for his trouble, but there was an established custom in the trade to remunerate drovers for such services, by a payment of a sum *per diem* for the number of days occupied; nothing was expressed on the subject of the prisoner's being at liberty to drive cattle for any other person at the same time, but by the usage of the trade he was at liberty to do so. There was no evidence of any intention on the part of the prisoner to steal the pigs at the time of their being delivered to him. The assistant barrister doubted whether the prisoner was a servant, and also whether there was a taking by him which amounted to larceny. *R. v. Goodbody.* (t) But *R. v. Hughes* (u) being cited, he felt bound by that case, and

(s) *R. v. Jackson*, 2 Moo. C. C. R. 32. This case was decided before the 24 & 25 Vict. c. 96, s. 3, noticed *ante*, p. 138. This, and similar cases, if not larceny at common law, would be so under this enact-

ment. See the following cases decided before the Act. *R. v. Stock*, R. & M. 87. *R. v. M'Namee*, R. & M. 368.

(t) *Post*, p. 328.

(u) R. & M. 370.

directed the jury that if they believed the witnesses, the prisoner was the servant of the prosecutors, and that the taking amounted to larceny, if the prisoner sold the pigs for the purpose of appropriating the money to his own use, and not for the benefit of his employers, on what he considered an emergency not provided for by his instructions. The jury found the prisoner guilty, and, upon a case reserved, after consideration, but without argument, Parke, B., thus delivered judgment, after stating that Lord Denman, C. J., did not agree with the rest of the Court. (v) 'The only question is, whether on the facts stated the prisoner received the custody of the pigs as a servant of the prosecutors or as a bailee; in the latter case he could not be guilty of larceny, unless he had intended to appropriate them to his own use at the time of the receipt, which was not the case; in the former he would be guilty of larceny according to the finding of the jury, as to which they were properly directed. There are several reported cases bearing upon the question whether a person is a mere servant or bailee; there are none precisely like the present, though the case of *R. v. M'Namee* (w) nearly approaches it. In this case, on the one hand, the circumstance that the prisoner was paid the expenses of the cattle, and also that the customary mode of payment of his remuneration was by the day, tend to shew that he was a mere servant; on the other, the fact of his being a drover by trade, and also of his having the liberty to drive the cattle of any other person by the general usage with respect to drovers, raise an inference that he was not a servant. The learned deputy recorder felt himself bound by the decision in *R. v. Hughes*; (x) but that case was under the 7 & 8 Geo. 4, c. 29, s. 47, which makes embezzlement by a servant or person employed in the capacity of a servant to receive money, felony; (y) and the recorder of London referred the question to the judges, whether the prisoner fell under either description, though, if the indictment had been referred to, it was necessary to prove that he was a servant. The judges decided that the prisoner was properly convicted, and consequently that he was a servant or person employed in that capacity, and authorised as such to receive money, so that his receipt would be a discharge to the debtor. This is not exactly the same question; it is whether the prisoner had the custody of the cattle as a servant to the prosecutors at the time of the receipt of them; and we think he could not be so considered unless in driving the cattle to the market he was their servant, and the prosecutors responsible for any negligent act of his in so driving them. This subject has undergone much discussion of late, and has been placed on its proper footing by the case of *Quarman v. Burnet*, (z) and other cases, one of which is that of a general drover, who was held in *Milligan v. Wedge* (a) not to be a servant, so as to make the owner of the cattle responsible for his negligence. After the full consideration which this subject has undergone, we doubt whether *R. v. M'Namee* would be now decided in the same way. Upon the whole, we think

(v) Parke and Alderson, BB., Coltman and Coleridge, JJ.

(w) *Supra*, note (s).

(x) *Supra*, note (u).

(y) See 24 & 25 Vict. c. 96, s. 67, *ante*, p. 319.

(z) 6 M. & W. 499.

(a) 12 A. & E. 737.

it was not proved in this case that the prisoner was a mere servant, and the conviction was improper.' (b)

The distinction between a servant and bailee is still material; for although in all such cases as the preceding one the drover would now be punishable under the 24 & 25 Vict. c. 96, s. 3, (c) yet he would only be punishable as for a simple larceny, whereas a servant is much more severely punishable under sec. 67. (d)

On an indictment for horse-stealing, it appeared that the prisoner was in the employment of a horse-dealer who sent him to deliver a horse to the prosecutor; when he arrived he found the prosecutor on horseback leading a pony, which he intended to offer for sale. The prosecutor permitted the prisoner, at his request, to ride the pony some distance, and on their way they met A., to whom the prosecutor offered the pony for £5, which he declined. They then rode to the house of C. for the purpose of offering the pony for sale there; but C. was not at home, and the prosecutor, being unable to stay, requested the prisoner to remain at the door until C. returned, and then to offer him the pony for £5, and not for less, and if C. would not buy it, to bring it back to him. As soon as the prosecutor was gone the prisoner took the pony to A., and said he was authorised by the prosecutor to sell it to him for £3, which A. gave him, and with it the prisoner absconded; and it was held that the prisoner was acting in the capacity of a servant, and not of a bailee, and that therefore it was immaterial whether the *animus furandi* existed at the moment of acquiring possession or arose afterwards. (e)

Upon an indictment for stealing a pig, it appeared that the prosecutor had employed the prisoner, on the 18th of December, to drive six pigs from Cardiff to Usk fair on the 20th, and paid him six shillings for so doing; the prisoner had never before been employed by the prosecutor, and had no authority to sell any of the pigs. On the 19th of December the prisoner left one of the pigs in his way at Mr. Matthews', of Coedkernew, to be kept till the night of the 20th, saying it was too tired to walk any further. On the 20th the prisoner met the prosecutor at Usk fair with the other five pigs, and told him that he had left the pig with Matthews because it was tired; the prosecutor then desired him to call at Matthews', and ask him to keep the pig for him till the Saturday following, and he would pay him for the keep. The prisoner called at Matthews' on the 21st, but instead of asking him to keep the pig for the prosecutor, he sold it to him for a guinea; and on the Thursday following told the prosecutor he had seen the pig at Matthews', and that he would keep it till the Saturday; and it was held that the prisoner was not guilty of larceny, on the ground that the prosecutor had consented to Matthews being the keeper of the pig, and therefore his custody was the custody of the prosecutor. (f)

Where, before the 24 & 25 Vict. c. 96, s. 3, noticed *ante*, p. 133, a

(b) *R. v. Hey*, 1 Den. C. C. 602; 2 C. & K. 983. Pollock, C. B., after hearing the judgment delivered, said he entirely concurred in it. See *R. v. Harvey*, 9 C. & P. 353.

(c) *Ante*, p. 133.

(d) *Ante*, p. 319.

(e) *R. v. Stanbury*, 2 Cox, C. C. 272. Williams and Cresswell, JJ.

(f) *R. v. Charles Jones*, Monmouth Spr. Ass. 1842, Cresswell, J. MSS. C. S. G. S. C. C. & M. 611.



person sent some pigs to a lady to be looked at, and the prisoner sold the pigs, and did not take them to the lady, we have seen that the first question left to the jury was, whether the prisoner had a felonious intent from the commencement of the transaction; the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant the prisoner to leave the pigs, and bring back the money or make a bargain for the sale of them, then he would be in the situation of a bailee, and not guilty of larceny; but if they were delivered to the prisoner simply that he should shew them to the lady, and bring them back bodily, then he had only the custody and not the possession, and was guilty of larceny. (g)

Upon an indictment before the above Act for stealing six oxen, it appeared that the prosecutor had employed the prisoner once or twice as a drover, and that he put eight oxen into the hands of the prisoner to drive to London; the prosecutor's directions to the prisoner were, if he could sell them on the road he might, and those he did not sell on the road he was to take to the prosecutor's salesman in Smithfield, for him to sell for the prosecutor there; the prisoner was at liberty to drive other cattle as well as the prosecutor's on this occasion; there is a regular charge for drovers, so much a head; so much for cattle driven and so much for cattle sold. The prisoner sold two of the oxen in his way to London, and took the other six to Smithfield, where he sold them; the money was paid into a bank in Smithfield for the prisoner, and he received it there. A witness stated that the prisoner was a salesman as well as a drover; and the prosecutor's salesman proved that he never received the beasts. That when a person was employed to bring beasts to him, he sometimes deposited them at Islington at the layer's at the Goose yard, or somewhere. That it was the duty of the drover to deliver them to the salesman's drover in the evening, and next morning to come and give him information, and see that he had them; that it was no part of his duty to sell them in Smithfield. The prisoner had brought beasts from the prosecutor before, and delivered them to the salesman's drover. It was submitted that there was no felonious taking in the first instance; that the prisoner was not the servant of the prosecutor at all; and that the prosecutor had parted with the right of possession as well as the custody of the cattle, by giving the prisoner the right of selling them if he pleased. It was answered that, although the original ownership of the prisoner was a lawful one, yet that ownership ended as soon as he reached the layer's at Islington, and that his driving them beyond that place was exceeding his commission, and such an illegal assumption of the property as would support the charge of felony. The prisoner was also guilty in another view of the case, as the servant of the prosecutor, having after his arrival in London only the custody, and not the property of the cattle, and having therefore no right to dispose of them. But it was held that there was no proof that the prisoner was the servant of the prosecutor, and that there was no felonious taking in the first instance, as

(g) *R. v. Harvey*, 9 C. & P. 353. This case would be within the 24 & 25 Vict. c. 96, s. 3, noticed *ante*, p. 133.

the prosecutor had given the prisoner a lawful ownership for a particular purpose. (*h*)

A servant going off with money, given to him by his master to carry or pay to another, and applying it to his own use, was before the above Act held guilty of larceny. (*i*)

Where before the above Act the prisoner was indicted for stealing ten guineas, it appeared that she was the menial servant of the prosecutor, who was a manufacturer, and frequently in want of silver to pay his workmen; she went to the wife of the prosecutor, and told her that she was acquainted with a person who could give her ten guineas' worth of silver, upon which the wife of the prosecutor gave her ten guineas for the purpose of getting them changed into silver by the person she had mentioned, when, instead of getting the guineas changed, she immediately ran away with them, and never returned; and it also appeared that her clothes had been previously taken away. Upon this evidence she was found guilty of larceny. (*j*)

It was the duty of the prisoner, as confidential foreman of the prosecutor over the workmen, to enter weekly on a pay-sheet the amount due to each workman for the week's wages, and having presented this

(*h*) *R. v. Goodbody*, 8 C. & P. 665. Littledale, J., and Parke, B., who observed, 'If the case had rested on the question of whether the prisoner was the servant of the prosecutor in the first instance, I should have reserved it for the further consideration of the judges, as I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent. There is one case in which it was held that a man may be the servant of several at one time, but I wish to have that question further considered by the judges.' In a note the reporters say, 'We presume his lordship referred to the case of *R. v. Carr*, R. & R. 198, *post*. If the prisoner had merely been employed by the prosecutor to drive the oxen to London, instead of having the authority to dispose of them by sale on the road, the question mentioned by Parke, B., would have arisen in the case, *viz.*, whether the fact of his being at liberty in the regular exercise of his business, to drive for other graziers as well as the prosecutor, would not place him rather in the character of an agent than a servant. But as the delivery of the oxen in the first instance was accompanied by a power of sale, and was made to the prisoner to a certain extent, in the character of a salesman, which business it appeared from the evidence he carried on, the judges were both of opinion that he was not a servant, so as to make him responsible in a criminal point of view, but that his conduct amounted only to a breach of trust. This decision, though questioned by some at the moment, appears to be quite consistent with the modern doctrine upon the subject. It was said, "If a man sends his servant with his horse from the country to London, and directs him to sell it if he can upon the road, but if he cannot to leave it at a particular place in London, and the servant, in-

stead of doing either, sells the horse in London and absconds with the money, is he not guilty of larceny?" The answer is, undoubtedly, "Yes;" but the distinction is, that in the case supposed the relation of master and servant existed at the time when the horse was delivered, whereas in the present case there was nothing else to create that relation but the fact of the delivery, accompanied by a power of sale. And with respect to the argument used by the counsel for the prosecution, that it was larceny in the prisoner to drive the cattle beyond the place at which he ought to have left them, after the authority to sell was at an end; whatever might have been the case formerly on the subject, such is not the state of the law now.' *R. v. Banks*, R. & R. 441. See *R. v. Hey*, *ante*, p. 326.

(*i*) *Lavender's case*, 2 East, P. C. c. 16, s. 15, p. 566. In this case all the judges also held that the last point in *Watson's case*, 2 East, P. C. p. 562, was not law. See *R. v. Metcalf*, R. & M. 433. *R. v. Heath*, 2 M. C. C. R. 33, and *Paradice's case*, 2 East, P. C. c. 16, s. 15, p. 565, *ante*, p. 320. *R. v. Beaman*, C. & M. 595. S. C. as *R. v. Beavan*, MSS. C. S. G. *R. v. Goode*, C. & M. 582.

(*j*) *R. v. Atkinson*, 1 Leach, 302, note (*a*). There is subjoined, *sed quære*, if the case was not saved? The doubt in this case would be whether the property in the guineas was not so parted with by the wife of the prosecutor, as to exclude the idea of felony (*ante*, p. 141). But it should seem that it might be well contended that the property in the guineas was not parted with to the prisoner; and that she had only the possession of them upon a bare charge, or special trust, to get them changed. *Ante*, p. 131, *et seq.*

book to the cashier, and the total amount due to the several workmen having been reckoned up, he would obtain the total amount from the cashier to pay thereout the amount due respectively to the workmen. The prisoner, intending at the time to defraud his master, falsely represented on the pay-sheet that £1 10s. 4d. was due to a certain workman, whereas, in truth, a sum of £1 8s. was due to him, and having obtained the total amount for the week from the cashier, which included such larger sum, fraudulently appropriated the difference of 2s. 4d. to his own use:—Held, that he was guilty of larceny of the 2s. 4d. (*k*)

In a case before the above Act the indictment against the prisoner was for stealing a bill of exchange for one hundred and twenty-two pounds twelve shillings, the property of the prosecutors; it appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns, that he received bills and money remitted to them, took bills to be discounted whenever he wanted cash, made payments for freight and other things of a similar nature, and settled the balance with the prosecutors at the end of every week. On the 14th September, 1795, the bill in question was remitted to the prosecutors, by the post, when one of them opened the letter, and gave the bill, which was not due till the 17th September, to a clerk to get it accepted, which the clerk accordingly did, and then laid it amongst other bills on the desk of the prosecutors. On the 16th September the prisoner carried the bill in question, together with another bill, to the prosecutors' bankers, when the bankers' clerk, observing that neither of them were indorsed by the prosecutors, asked him whether they were to be entered short or discounted; upon which he said that he wanted small notes and money for them, and that the money must be full weight, and good, as it was for the particular use of the prosecutors. On the same day he absconded with the moneys he had so received. It was contended, on behalf of the prisoner, that the bill having come legally into his possession like any other bill of the prosecutors over which he had a disposing power, he had a right to receive the money for it, though not to convert the money, when received, to his own use; and that, the first taking of the bill not being tortious, his receiving the money for it at the bankers, and going away with the money, was a mere breach of trust, and no felony. But Heath, J., was clearly of opinion that this was felony, the bill having been once decidedly in the possession of the prosecutors, by the clerk, who got it accepted, putting it amongst the other bills on the prosecutors' desk, and the prisoner having feloniously taken it away from that possession. (*l*)

The indictment in some counts charged the prisoner with embezzlement, and in others with stealing a piece of paper, the property of E. Goldsmid and others, his masters. The prisoner was employed as a salaried clerk in the office of the Globe Insurance Company, and he was also a shareholder in the concern. The affairs of the company, which was an unincorporated copartnership, were managed by a body of directors, chosen out of the shareholders; and at the time when the offence was committed E. Goldsmid was chairman of the directors.

(*k*) R. v. Cook, 40 L. J. M. C. 68; L. R. 1 Q. C. R. 295.

(*l*) Chipchase's case, 2 Leach, 699, 2 East, P. C. c. 16, s. 15, p. 567.

The directors appointed and dismissed clerks and other servants, fixed their salaries, and the particular duties to be discharged by them; and the directors had the charge and custody of all books and papers belonging to the company. The salaries of the clerks were paid out of the funds of the company. The company had a drawing account at the bank of Glyn & Co., and were in the habit of sending their pass-book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned, together with the cheques and bills paid during the preceding week. The prisoner was the person whose duty it was to receive the pass-book and vouchers from the messenger, and it was his duty upon receiving them to compare the entries in the pass-book with the books of the company, and to preserve the vouchers for the use of the company, if wanted on any future occasion. On the 26th of February, the prisoner paid into the London and Westminster Bank for his own account which he kept there, a cheque for £1,400, purporting to be drawn by the Globe Insurance Company on Glyn & Co. [It was cashed by Glyn & Co. (m)] together with other cheques for the London and Westminster Bank, entered to the debit of the Globe Insurance Company in their pass-book, and delivered, together with the book on the following Wednesday to the messenger of the company, who delivered the book and cheque to the prisoner in the usual way. On the 4th of March, in consequence of some suspicion, a search for the cheque for £1,400, was made during his absence amongst the vouchers in his keeping, and it could not be found. The pass-book was examined, and there the entry of the cheque for £1,400 had been erased, and the cheque was never found. There was no evidence to shew that any person on behalf of the company had ever drawn the cheque in question, or that it had been drawn on paper stolen from the company. (n) It was contended for the prisoner that there was no evidence of any property in the parties from whom the cheque was alleged to have been stolen, except as shareholders, and that the prisoner being also a shareholder could not be indicted for stealing the property, of which he was a joint owner. Cresswell, J., thought the charge of embezzlement failed; but with regard to the charge of stealing a piece of paper, he told the jury that if the cancelled cheque was returned to the prisoner, and he received it in the usual manner to be kept by him for the use of the directors, and afterwards abstracted or destroyed it, they should find him guilty; the jury found him guilty of stealing a piece of paper; and, upon a case reserved, upon the question whether this direction was right, it was contended, 1st, that if there was any offence proved it was embezzlement and not larceny, *R. v. Masters*. (o) The prisoner's duty was merely to keep the cheque in his own possession, and to produce it when called upon by his masters; and that was not a possession by the masters. Assuming it to have been the prisoner's duty to put it in a place of deposit, the case did not find that he ever put it in such place, but only that he

(m) The words between brackets are from 4 Cox, C. C. 338.

(n) In the argument the Attorney-General said, 'It was on the paper of the Globe cheque book.' Alderson, B., 'There were

missing pages in the cheque book, but no evidence that this cheque came from the missing pages.'

(o) 1 Den. C. C. 332.

destroyed it. Thus it was at most only a case of embezzlement. 2dly, he could not commit larceny; for he had a joint interest in the cheque. Besides, here the prisoner had the present right of possession. In no instance had it been held that where another party has merely a future right to possession, an appropriation by a party having the actual right to the possession is a stealing. Lastly, he was not the servant of the directors. He was the servant of the company. On the part of the Crown it was contended that this was exactly the same case as *R. v. Murray*. (p) There as here the property was received not from the master, but from another clerk. In *R. v. Masters* there never was such a possession by the master as to make the taking a trespass, and none of the servants there had a duty to hand the money to the master; but only to pass it on to the other servants. 2dly, a man may steal property, in which he has a joint interest — a clerk of a friendly society may rob the society, *R. v. Hall*, (q) *R. v. Jenson*. (r) If the members of a company delegate to certain individuals a special right to the custody of the documents of the company, any member wrongfully appropriating such documents is guilty of larceny, though he may have a joint interest in the thing taken. Thirdly, the prisoner was a servant of the directors. The jury expressly found that he was so. He was employed by the directors and paid by them; the source of the salary cannot affect the case. Wilde, C. J., 'We have considered this case, and are all of opinion that the counts which charge the stealing of a piece of paper, the property of Goldsmid and others, the masters of the prisoner, are supported by the evidence. By the statement of the case it appears that Goldsmid and others are the directors of the company, and that by its constitution they have the appointment and dismissal of the servants in the employ of the company; that they fix and pay their salaries, and also fix the duties they have to perform. The prisoner was a salaried clerk in the office, and therefore he was their servant. They have also the ultimate charge and custody of the documents of the company; and by the course of business between the company and its bankers, the paid cheques were returned to the directors, were part of the company's documents, and became the vouchers of the directors, and their property as such directors. The paper in question was one of these. One of the prisoner's appointed duties was to receive and keep for his employers such returned cheques; any such paper, therefore, in his custody would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger, and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them; as a butler, who has the keeping of his master's plate, would be guilty of larceny, if he should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use before it had in any other way than by his act of receiving come to the actual possession of the master. (s) This case is distin-

(p) R. & M. 276, *post*.

(q) R. &amp; M. 474.

(r) *Ibid.* 434.

(s) This dictum goes much further than

any case warrants. It has always been held that if a shopman receives money for his master in his master's shop, and embezzles it before it reaches the till or other repository,

guishable from those in which the goods have only been in the course of passing towards the master; as in *R. v. Masters*, where the prisoner's duty was only to receive the money from one fellow-servant, and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping, being for his master's made his possession theirs. In this view of the case no difficulty arises as to part ownership, from the fact that the prisoner was a shareholder in the company; as such he had no property in this paper.' (t)

The prisoner was indicted for stealing two bank notes of fifty pounds each, in the dwelling-house of the prosecutors. The prisoner

the offence is not larceny, but embezzlement. Bazeley's case, 2 Leach, 835. Bull's case there cited. *R. v. Grove*, R. & M. C. C. R. 447, shew that there must be a possession in the master other than the mere corporeal possession by the prisoner as his servant.

(t) *R. v. Watts*, 2 Den. C. C. 14. 4 Cox, C. C. 336. The decision as to the property being in the directors is right but on wrong grounds. The moment the messenger received the cheque for his masters the property vested in them. The universal rule is so where the servant receives anything in the due discharge of his duty. If goods are received in the waggon or boat of a master, the property in such goods vests in the master. Abrahams' case, 2 Leach, 824; *R. v. Harding*, R. & R. 125, and *R. v. Reed*, ante, p. 322; and so where the living instrument—the servant—receives. *R. v. Remnant*, R. & R. 136, per Graham, B., 2 East, P. C. c. 16, s. 16, p. 568. In the course of the argument, Coleridge, J., said, 'Suppose my servant goes to a silversmith to get some plate for me; he gets it, and deposits it in the plate chest, and then appropriates it; is not that a stealing?' Cresswell, J., 'Supposing my footman gives to my butler a new piece of plate, and the butler appropriates it: is not that a stealing?' Alderson, B., 'Whose property is the cheque when at Glyn's?' Cockburn, 'It is Glyn's. But that is often made matter of convenience and arrangement. If it is considered to belong to the customer it is merely by the concession of the banker.' Wilde, C. J., 'I apprehend that the banker has no more right to it than the payee to a bill of exchange has to the bill when paid. It is true that an acceptor may keep it, because it is his voucher, and he can charge no one with it.' Cockburn, 'Bankers are acceptors. The cheque is a voucher; it is the bankers' only discharge.' Wilde, C. J., 'It is always considered that the cheque is the property of the drawer when paid.' Alderson, B., 'If it was the property of the master when in the bankers' hands, then it was in the master's possession at the time.' Cockburn, 'The bankers have a special property in it certainly till the account is settled.' Alderson, B., 'But if he has only a special property, and a right to keep it *pro tempore*, then he only holds it as agent for

the customer.' It may deserve consideration whether the proper view is not this. The paper, on which a cheque is written, originally belongs to the drawer, and when he delivers the cheque, he expects ultimately, when the cheque has been paid, to receive that paper again; just in the same way as when a railway ticket is given to a passenger it is expected that it will be returned at the end of the journey. In each case the delivery is for certain purposes only, and when they have been accomplished, the thing itself is intended to be returned. Is it not then correct to hold that the property in the paper remains in the drawer, from first to last, subject to these purposes? Suppose a cheque were paid, but the banker did not get possession of it; would not detain or trover lie for it at the suit of the drawer? If this view be right, the general property in this cheque was in the prosecutor's whilst in their bankers' hands, and the property and possession also was in them the instant the book was delivered to the messenger. But if this view be not correct, then by payment of the cheque it became the property of the prosecutors, subject to the rights of the bankers; and as soon as the cheque was delivered to the messenger the property and possession of the cheque were in the directors. But the facts do not shew that the cheque was genuine; and Alderson, B., asked, 'Suppose the prisoner to have forged the cheque, and then to have done with it all that this case supposes, would it have been larceny? That supposition meets all the facts of this case.' Assuming the forgery to have been committed upon paper belonging to the directors, of which there was some evidence, the property in the paper would have been all along in the directors; as the fraudulent use of the paper by the prisoner would not have altered the property and the rights of Messrs. Glyn would not have been different on this supposition from what they would have been if the cheque had been genuine. But supposing the cheque to have been forged on paper not belonging to the prosecutors, when Messrs. Glyn paid the cheque they paid it as agents for the directors, and it may well be urged that they purchased the paper on behalf of the directors. C. S. G.

was a clerk in the banking-house of the prosecutors, and was intimate with a gentleman named Vale, whom he had induced to open his cash account at the house. On the 19th December, 1811, he made a fictitious entry in the banking book of Mr. Vale, to his credit, for two hundred pounds, which sum he told Mr. Vale that he had that morning paid in on Mr. Vale's account. On the belief that this false entry and false assertion were true, Mr. Vale, on the 10th January, 1812, gave him a cheque on the prosecutors dated, by the prisoner's desire, on the day before, for one hundred pounds; for payment of which the prisoner, under colour of serving at the counter, took out of the prosecutors' bank-note drawer, in the shop, the two notes stated in the indictment, depositing the cheque among the other paid cheques of the day, and making in the waste-book an entry of such payment. By this contrivance and other previous practices of the like kind, Mr. Vale's real balance, was turned against him to the amount of several hundred pounds; and in order to prevent the discovery which must have immediately ensued if the accounts had been suffered to continue in this state, the prisoner made other false entries, to the credit of Mr. Vale, in the ledger of the house. The jury found the prisoner guilty, (u) and that at the time he made the false entries in the ledger, and in the customer's book, he did it fraudulently, with the design of enabling himself to get the money of the prosecutors. And, on a case reserved on the question whether the offence was a felony, or amounted only to a fraud, the judges held that the taking was felonious, and that the depositing the cheque was not intended to pledge Vale's security, but to prevent detection, as Vale did not give the cheque to pledge his own credit, or to enable the prisoner to get money of his, Vale's, but to enable the prisoner to get away (as he supposed) money of his own. And Grose, J., in delivering their opinion, said, 'The true meaning of larceny is the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker.(v) The facts of the case answer every part of this definition. The taking of the property is clear, and that it was taken against the will of the owner, and with a felonious intent, is equally clear, from the circumstance of the prisoner's having fraudulently made these *false entries* with a view to conceal the means he had artfully made use of to obtain it.' (w)

By the cases which have been now cited, the maxim of the common law, already mentioned, relating to the fraudulent conversion by a servant to his own use of the goods of his master, appears to be sufficiently explained and established. But it should be observed that in all these cases it was considered that the property stolen was sufficiently received into the possession of the master before the taking by the servant. And this leads to the consideration of a material distinction respecting the possession of the master, namely, that the property was not considered as sufficiently received into his posses-

(u) The jury said that as the prisoner had the cheque he had a right to pay himself; but Bayley, J., before whom the prisoner was tried, told them that this was matter of law. Their opinion, however, was stated in the case MS. Bayley, J.

(v) *Ante*, p. 121.

(w) *Hammon's case*, 2 Leach, 108. S. C. 4 Taunt. 304, MS. Bayley, J., and R. & R. 221. Lawrence, J., who was absent, doubted.

sion, where it had merely been delivered to the servant for the master's use. Upon which subject it was well laid down that 'if the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common law, in converting such goods to his own use.' (x)

Upon this principle, in a case prior to the 15 Geo. 2, c. 13, s. 12, where it appeared upon an indictment for stealing East India bonds, the property of the governor and company of the Bank of England, that the bonds in question, having been taken to the bank for the purpose of being deposited there, were not carried to the usual place for such deposits, namely, a chest in the cellar of the bank, but were received by the prisoner, who was a cashier there, and placed by him in his own desk, it was ruled that the prisoner was not guilty of larceny in afterwards selling the bonds, and putting the money into his own pocket. And the ground of the decision appears to have been that as the bonds were never put into the cellar in the usual course, the governor and company of the bank had no possession of them, but the possession remained always in the prisoner. (y)

In another case where the prisoner was indicted for stealing a half-crown and three shillings, the property of his master, the same principle was recognised. The master of the prisoner was a confectioner; and the prisoner was his servant, employed to attend the shop. The master, having some suspicion that the prisoner had occasionally purloined the money paid by persons dealing at the shop, procured a customer to come there on pretence of buying something, having previously given to such customer some marked silver of his own. The customer accordingly came to the shop in the absence of the master, and bought some articles of the prisoner, paying for them with the marked silver. Soon afterwards the master came in and examined the till, in which the prisoner ought to have deposited the silver when it was received; and finding only some of the marked silver there, he procured the prisoner to be immediately apprehended and searched, when the rest of the marked money was found upon him. The jury found the prisoner guilty; but, upon a case reserved, the judges were of opinion that the prisoner was not guilty of larceny, but only of a breach of trust; the money never having been put into the till, and, therefore, not having been in the possession of the master, as against the prisoner. (z)

In consequence of a decision upon this subject, (a) the 39 Geo. 3, c. 85, was passed, and now the 24 & 25 Vict. c. 96, s. 68, provides for the

(x) 2 East, P. C. c. 16, s. 16, p. 568.

(y) Waite's case, 1 Leach, 28. 2 East, P. C. c. 16, s. 17, p. 570. Carter and Dennison, JJ. Dennison, J. said, that though this might be such a possession in the bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution.

(z) Bull's case, Heath, J., O. B., Jan.

1797; Hil. Term, 1797, cited in Bazeley's case, 2 Leach, 841. 2 East, P. C. c. 16, s. 17, p. 572.

(a) Bazeley's case, 2 Leach, 835. 2 East, P. C. c. 16, s. 17, p. 571. See also *R. v. Sullens*, R. & M. C. C. R. 129, and *R. v. Hawtin*, 7 C. & P. 281. *R. v. Wright*, D. & B. 431; *R. v. Betts*, Bell, C. C. 90; *R. v. Brackett*, 4 Cox, C. C. 274.



punishment of such embezzlements, as felonies, and will be considered in the succeeding chapter.

A count charged the prisoner with embezzling twenty shillings, and it appeared that the prisoner was a clerk of the prosecutor, and his business was to attend certain markets for the purpose of buying skins and other things for his master, for which it was his duty to pay ready money. Before going to market, the prosecutor was in the habit of giving the prisoner either money or a cheque on his bankers to defray the expenses of the day, and it was the prisoner's duty either to deliver what goods he had purchased, or to account for the money so received the same evening or the next morning, in a book kept for that purpose. On the 8th of October, 1852, the prisoner having an admitted balance of cash belonging to the prosecutor in his hands of £11 11s. 1d., received a cheque for £10 from the prosecutor to expend in the course of his employment, which cheque was cashed by the prisoner. The prisoner entered in his book,

‘Richard, 5 sheep, 4s. . . . . £1,’

and debited the prosecutor with this payment to Richard, and with several other sums paid to different butchers, amounting to £13 8s. 4d.; he had not, however, paid Richard any money, but had agreed to pay him for the skins at the end of the quarter. (b) In consequence of the prisoner being back in his accounts, he was to receive no salary from the previous Lady-day. It was objected that the case neither amounted to embezzlement nor larceny; but the sessions held that it amounted to larceny, and, under their direction, the jury found the prisoner guilty of larceny as a servant, but not of embezzlement; and, upon a case reserved, the conviction was held wrong. (c) So where on an indictment for larceny as a servant, it appeared that the prisoner was bailiff to the prosecutor, and it was his duty to receive and make payments on his behalf, and an account of these receipts and payments was kept in a book in the prisoner's custody, which was examined by the prosecutor at intervals, and in this book were several entries of payments made to workmen in the employ of the prosecutor, five of which were proved to be 4s. and two others 3s. 6d., more than had in fact been paid; and, upon examining the account, it appeared that there was a balance of £2 due to the prisoner, which the prosecutor paid him. It was objected, that the offence was neither larceny nor embezzlement; the sessions, however, held that the deduction of the several sums of 4s. and 3s. 6d. amounted to larceny; but, upon a case reserved,

(b) Two precisely similar transactions, which formed the subject of two other counts took place on the 13th and 20th of October.

(c) *R. v. Goodenough*, Dears. C. C. 210. There was no argument, and no ground stated for the decision; but the decision is clearly right; for the only evidence against the prisoner was a false entry, and the only thing received from the prosecutor, on the occasion in question, was a cheque, and that had been cashed, and there was no evidence that any part of the balance in his hands had ever been money in the hands of the prosecutor. Now, the marginal note is, ‘The evidence shewed that the prisoner received at different times several sums of money from

the prosecutor for the purpose of purchasing skins. The prisoner obtained the skins on credit, and applied the money to his own use,’ &c.; held that the conviction for larceny was wrong. This is a clear mis-statement of the facts; and, if the facts were as stated in the marginal note, it is clear that the case would have been larceny; nor must it be assumed that the case amounted to embezzlement; for the Court came to no decision on that point, and it should seem that the case failed both as to embezzlement and larceny, for want of evidence to prove what money the prisoner misappropriated and whence he received it. C. S. G.

it was urged that there was no evidence that the prisoner received any money from his master except the £2. Maule, J., 'For aught that appears, the payments may all have been out of his own money.' Wightman, J., 'The evidence is, that he entered the money as paid which he had not paid.' Jervis, C. J., 'And that he did so for the purpose of obtaining thereby a portion of the sum of £2. We are all of opinion that the offence of which the prisoner was guilty was not larceny, whatever else it may have been.' (d)

Upon an indictment for larceny, it appeared that the prisoner, being in the employ of the prosecutors, had been from time to time entrusted by them with money for the purpose of paying the wages of their work-people, and it was his duty to keep an account in a book of the moneys which he so disbursed. This book was produced at the trial, and it was proved to contain three entries made by the prisoner, in each of which he had charged his employers with more money than he had paid on their account. The book had been balanced by the prisoner; but there was no evidence that he had actually accounted with his employers. Wightman, J., stopped the case. 'The question here is, did the prisoner in fact deliver this account to his employers? True it is that here are certain entries, made by the prisoner, which are incorrect; but they are entries which perhaps he never intended to deliver, or, if he did deliver them, to deliver them with explanations. But this was no accounting; and there must in this case have been an accounting in order to fix the prisoner with larceny.' (e)

On an indictment for larceny of divers quantities of yarn against the prisoner and G., it appeared that G. was foreman of the prosecutor, who was a canvas manufacturer, and G. had no authority to sell any yarn, but only to give it out for the purpose of being worked up into canvas at the manufactory. The prisoner had on two occasions sent his servant to the prosecutor's warehouse for yarn and on the former of these occasions G. had delivered with the yarn an invoice made out in the prosecutor's name. On the latter occasion the prisoner sent two of his men to get yarn, and they found the prisoner and G. at the warehouse, and they carried away, in the presence of the prisoner and G., certain parcels of yarn, which were pointed out to them as the yarn they were to take to the prisoner's premises. No invoice was shewn to have passed on this occasion, and it did not appear whether the prisoner was or was not aware that G. had no authority to sell; but when the prisoner was charged with having been concerned with G. in the above transactions, he produced the invoice G. had given him on the first occasion, and stated that, except on that occasion, he had had no dealings with him; and Coltman, J., told the jury that if the prisoner knew that, in the transaction in question, G. was in fact committing a felony, he as well as G. was guilty of a felony, and that, therefore, the question for them to consider was, whether at the time of the pretended sale by G., the prisoner did or did not know that G. was exceeding his authority, and defrauding his employers. Had the transaction been accompanied by

(d) *R. v. Green*, Dears. C. C. 323. The prisoner might have been indicted for obtaining the £2 by false pretences; see *Witchell's case*, *post*, *False Pretences*.

(e) *R. v. Butler*, 2 C. & K. 340.

an invoice, as it was on the former occasion, it would have been much less suspicious; because the fact of an invoice being given might easily have misled the prisoner, supposing him to have been ignorant of G.'s real authority. But the absence of an invoice altered the case materially. It is a suspicious circumstance for any one to buy goods to a considerable amount from the servant of a tradesman, without having an invoice in the regular way; and where we find, as in this case, that the transaction is afterwards denied, this suspicion is increased.' (f)

On an indictment for larceny as a servant, it appeared that the prisoner lived in the house of the prosecutor, and acted as nurse to his sick daughter, and had board and lodging in the house, but no wages, the wife of the prosecutor occasionally making her presents of money as a reward for her services. While the prisoner was so residing, the wife of the prosecutor gave her the money charged to have been stolen to pay a coal bill, but instead of doing so the prisoner kept the money, and brought back the bill with a forged receipt upon it, and four shillings and sixpence as change. And Coleridge, J., held that the prisoner was not the servant of the prosecutor, but that there was evidence of the larceny. (g)

Upon an indictment, under the 7 & 8 Geo. 4, c. 29, s. 46, charging the prisoner as the servant of the prosecutrix with stealing her purse containing forty sovereigns, it appeared that the prisoner was the driver of a glass coach, which had been hired by the day by the prosecutrix, and that he stole her purse from the coach: it was held that the relation of mistress and servant did not exist between the prosecutrix and the prisoner, and that he could only be convicted of simple larceny. (h)

Although it was doubted whether a person could be the servant of several persons at the same time, it is now settled that he may. (i)

**Servants of the Crown.** — The prisoner, who was indicted as a clerk to the Queen for stealing her money, and also for embezzlement under the 2 Wm. 4, c. 4, was the first clerk to the collector of customs at the port of Falmouth, and as such it was his duty to receive and place in the collector's box each day moneys received in payment of customs; the facts were clear to prove that he had taken money out of the box. The prisoner was appointed by the commissioners of customs under the 3 & 4 Wm. 4, c. 51. It was objected that the 7 & 8 Geo. 4, c. 29, s. 46, did not extend to public servants. Coleridge, J., 'The great doubt I have had is, whether or no the 7 & 8 Geo. 4, c. 29, s. 46, was meant to include public servants of the Crown such as the prisoner. It would seem intended to protect private dealings of the subjects only against their clerks and servants, and the terms of the 2 Wm. 4, c. 4, seem to confirm this view of it, by specially providing for such a case as this.' (j)

(f) *R. v. Hornby*, 1 C. & K. 305. The marginal note to this case in the report is erroneous.

(g) *R. v. Smith*, 1 C. & K. 423.

(h) *R. v. Haydon*, 7 C. & P. 445. *Paterson, J., and Gurney, B.* See *Quarman v. Burnett*, 6 M. & W. 499.

(i) *Parke, B.*, in *R. v. Goodbody*, 8 C. & P. 665. *R. v. Batty*, 2 M. C. C. R. 257.

(j) *R. v. Lovell*, 2 M. & Rob. 286. The prisoner was convicted on the counts for embezzlement, so that it became unnecessary to decide this point. See 24 & 25 Vict. c. 96, ss. 70, 71, *post*, p. 347.

**Indictment.** — An indictment charged that Mary Somerton, on the 1st of March, 1827, 'being then and there the servant of J. Hellier' on the same day and year, one ring of the said J. H. did steal; and it was objected, first, that there was no positive averment that the prisoner was the servant of J. H.; 2ndly, that it was not sufficiently averred that she was his servant at the time she stole the goods; but it was held, 1st, that 'being the servant of J. H.,' was a description of the person of M. S., and that that was a sufficient allegation that she bore that character; 2ndly, that reading and understanding the language used in the indictment as the rest of mankind would understand the same language, if it were used in other instruments, there could be no doubt that it imported that M. S. was the servant of J. H. at the time she stole the property. (*k*)

An indictment alleged that the prisoner was the servant of Edward Sanders, and while such servant stole the money of the said E. Sanders, his master; E. Sanders was the agent of Mrs. Sanders, and the prisoner was her servant, and the money was in the possession of E. Sanders as her agent at the time it was taken. It was objected that the prisoner could not be convicted either of larceny as a servant or of larceny; but the sessions held that the averment of the prisoner being the servant of E. Sanders might be rejected as surplusage, and that he had a special property in the money; and, upon a case reserved, it was held that the conviction was right. Proof of the allegation in the indictment that the prisoner was the servant of E. Sanders, would only be necessary for the purpose of convicting the prisoner of the compound offence; but it was quite unnecessary to support the charge of simple larceny. E. Sanders had a special property in the money as agent of Mrs. Sanders, and therefore the property was well laid in him. (*l*)

By 24 & 25 Vict. c. 96, s. 98, principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree, and accessories after the fact (except receivers) are liable to imprisonment for any term not exceeding two years.

Upon the trial of any indictment for any offence in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and, thereupon, he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

Where a count charged the prisoner with an attempt to steal 45 lbs. of meat of A. Cheeseman, it appeared that Cheeseman was the contractor who supplied meat to a camp, and the course of business was for him each morning to send by his servants meat to the quartermaster-sergeants at the camp, and a soldier from each mess attended. The quartermaster-sergeant had his own scales and weights, and with these he and Cheeseman's servant together weighed out to each soldier in attendance the proper quantity of meat for each mess. The amount of the whole thus delivered was credited to Cheeseman as supplied to the Queen, and the surplus of the meat remaining after

(*k*) *R. v. Somerton*, 7 B. & C. 463. The See *R. v. Page*, 9 C. & P. 756, vol. i. p. indictment was on the 3 Geo. 4. c. 38, s. 2. 240. *R. v. Silversides*, 3 Q. B. 406.

(*l*) *R. v. Jennings*, D. & B. 447.

all the messes had been supplied was taken away by his servants on his account; the prisoner, his servant, came one day in charge of the meat, and he and the quartermaster-sergeant proceeded to weigh out the meat to the different messmen with the quartermaster-sergeant's weights, the prisoner putting the weights in the scale. Before the weighing was complete, one of the messmen brought back his portion, with a complaint that it was short weight. He was desired to wait, and the weighing proceeded till thirty-four messes were weighed, which were supposed to be in the whole  $512\frac{1}{2}$  lbs.; about 60 lbs. of meat remained over, which in the course of business would have been removed by Cheeseman's man. It was discovered, on investigating the complaint, that the 14 lbs. weight of the quartermaster-sergeant had been removed, and concealed under a bench, and a false 14 lbs. weight had been substituted for it, and used in weighing the thirty-four messes, and all the messes being re-weighed, it was found that the weight delivered was  $467\frac{1}{2}$  lbs., instead of  $512\frac{1}{2}$  lbs., as in the first weighing it appeared to be; and after the true weight was supplied to the different messes, the surplus was about 15 lbs. instead of 60 lbs., as it had appeared to be. The prisoner absconded on the commencement of the investigation. It was objected that there was no overt act so proximately connected with an attempt to steal as to justify a conviction; but the case was left to the jury, who found that the prisoner fraudulently substituted the false for the true weight with intent to cheat; that his intention was to steal the difference between the just surplus for which he would have to account to his master and the apparent surplus remaining after the false weighing, and that nothing remained to be done, on his part, to complete his scheme, except to carry away and dispose of the meat, which he would have done if the fraud had not been detected; and, upon a case reserved, it was urged that nothing was done by the prisoner with reference to stealing the meat; all that he did was to put a false weight into the scale; but that act was too remote. Secondly, that the property in the meat as soon as it was put in the scale became the property of the Queen. But it was held that the conviction was right. If the prisoner had actually moved away with any part of the meat the larceny would have been complete. The meat was in the prisoner's custody and under his control. He had almost the manual comprehension of it, and had all but begun the asportation. The preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat, were several overt acts, which brought the attempt close to completion; and if the actual transaction has commenced, which would have ended in the offence if not interrupted, there is clearly an attempt to commit the offence. As to the second point, the property was in the vendor until it passed out of him to the vendee by delivery. (*m*)

As to the prisoner not being entitled to be acquitted where the evidence proves an embezzlement, and not larceny, see 24 & 25 Vict. c. 96, s. 72, *post*, p. 349.

## CHAPTER THE NINETEENTH.

### OF EMBEZZLEMENT BY CLERKS AND SERVANTS.<sup>1</sup>

#### SEC. I.

##### *Statutes now in Force. (a)*

By the 24 & 25 Vict. c. 96, s. 68, 'Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant,<sup>2</sup> shall fraudulently embezzle any chattel, (c) money, or valuable security,<sup>3</sup> which shall be *delivered to or* received or taken into

(a) The decisions on repealed statutes which are still of value will be found in the appendices to this volume. As to the meaning of clerk or servant, Appendix A. As to the meaning of receipt, Appendix B. As to what amounts to embezzlement, Appendix C. And as to indictment, trial, &c., Appendix D.

(c) It is reported to have been held in Ireland that a cow was not a 'chattel' within the meaning of the repealed Act 9 Geo. 4, c. 55, s. 40. *R. v. Deneney*, Jebb, C. & P. C. 255; cited 2 Hayes' Dig. C. L. I. 485. This decision is clearly erroneous. The words 'chattel, money, or valuable security,' were advisedly inserted in Peel's Acts, 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55 (1), in order at least to include every kind of personal property that was the subject of larceny at common law. Now chattels by the common law 'comprehend all goods movable and immovable, except such as are in the nature of freehold or parcel of it.' *Jac. L. D. Co. Litt.* 118, b.

'Goods or chattels are either personal or real; personal, as horses and other beasts.' *Co. Litt.* 118, b. And the decision is the more strange, because 'chattel' is derived from *catalla*, and so is 'cattle'; and *catalla* 'primarily signified only beasts of husbandry, or (as we still call them) cattle; but in its secondary sense was applied to all movables in general.' 2 Bl. C. 385, citing 2 Dufresne, 409. Every indictment for stealing a cow alleges it to be of the goods and chattels of the prosecutor, and I have a record of a conviction for horse-stealing in 1307, on an indictment alleging that the prisoner 'equum phaleratum de bonis et *catallis* Adæ de Prestwood felonice furatus est;' which I notice as well for the purpose of shewing the ancient mode of laying the property, as that in those times 'steal' alone was sufficient, and it was due to a later age to add 'take, carry, drive, and lead away.' C. G. S. See *R. v. Scott*, *post*, *False Pretences*.

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#### AMERICAN NOTES.

<sup>1</sup> See *C. v. Davis*, 104 Mass. 545. *S. v. Healy*, 48 Mo. 531. *P. v. Stern*, 1 Parker, C. R. 202. *P. v. Burr*, 41 How. Pr. 293. All the States of America have statutes dealing with the crime of embezzlement. These statutes are by no means alike, and they differ from any of the English statutes. The decisions of the American and English Courts, therefore, must receive careful attention before applying the law as stated in one country to the facts of a case arising in the other country.

<sup>2</sup> The American statutes use the word "agent" as well as "clerk or servant," and some of them apply to "bailees" and to "officers," and even to "watermen." In Massachusetts there is a clause of a statute which enacts that "if any person to whom

any money (&c.) shall have been delivered, shall embezzle or fraudulently convert to his own use such money (&c.) he shall be deemed to have committed the crime of simple larceny;" but it was held that this did not apply to a cashier paying over an excess of a deposit, and the depositor fraudulently converting the excess, because there was no trust reposed in the depositor by the cashier. *C. v. Hayes*, 14 Gray, 62; 74 Am. D. 662. Mr. Bishop doubts the correctness of this decision. Vol. ii. s. 355. See also *C. v. Young*, 9 Gray (Mass.), 5. *P. v. Allen*, 5 Den. N. Y. 76. *C. v. Stearns*, 2 Met. (Mass.) 343. *C. v. Libbey*, 11 Met. (Mass.) 64.

<sup>3</sup> Some of the American statutes use the words "property" or "effects."

possession by him for or in the name or on the account of his master,<sup>1</sup> or employer, (d) or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, [at the discretion of the Court,] (e) to be kept in penal servitude for any term not exceeding fourteen years, [and not less than three years,— or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping.' (f)

The words of the former enactments were, 'shall by virtue of such employment,'<sup>2</sup> receive or take into his possession any chattel, &c., for or in the name or on the account of his master.' In the present clause the words 'by virtue of such employment' are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The clause is so framed as to include every case where any chattel, &c., is delivered to, received, or taken possession of by the clerk or servant for or in the name or on account of the master. If therefore a man pay a servant money for his master, the case will be within the statute, though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession just as much as if it were in my house, or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of this clause, so as to make him guilty of embezzlement if he converts it to his own use. (g)

(d) See *R. v. Gourlay*, Jebb, C. & P. C. 82, cited 2 Hayes' Dig. C. L. I. 485

(e) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(f) This clause is framed from the 7 & 8 Geo. 4, c. 29, s. 47, and the 9 Geo. 4, c. 55, s. 40 (1).

(g) The cases of *R. v. Snowley*, 4 C. & P. 390; *Crow's case*, 1 Lew. 88; *R. v. Thorley*, R. & M. C. C. 343; *R. v. Hawtin*, 7 C. & P. 281; *R. v. Mellish*, R. & R. 80, and similar cases, are consequently no

authorities on this clause. These cases and the words of the former and present clauses were brought before the Select Committee of the Lords, and they unanimously agreed that the law ought to be altered, and that the present clause did alter it effectually. The change in the terms in this clause, render it no longer necessary to prove that the property was received by the defendant by virtue of his employment; in other words that it is no longer necessary to prove that the defendant had authority to receive it.

#### AMERICAN NOTES.

<sup>1</sup> Some of the American statutes (*e. g.* New York and Alabama) do not contain the words "for or on account or in the name of his master" so that any agent or servant to whom his employer entrusts money and who fraudulently converts it may be found guilty of embezzlement, contrary to the English law. Bishop, ii. 366, 367, 367 (a).

<sup>2</sup> Most of the American statutes have the words "by virtue of his employment" following the old English statutes. Mr. Bishop says that according to the principle

of the law of estoppel the defendant cannot be heard to say that he did not receive the money "by virtue of his employment," and he even goes so far as to suggest that he ought not to be permitted to say that he is not a "servant;" but this appears a strange thing to say, for surely the prosecutor must prove the defendant was a "servant." The mere fact that he took some money as if he might be a servant, or even that he said he was a servant, cannot be sufficient. Bishop, ii. s. 364. See *Ex parte Hedley*, 31 Cal. 108.

In a recent case, however, the prisoner was nominated by the inhabitants of a township as an assistant overseer, the nomination not specifying that one of his duties would be to collect and receive money. The prisoner did collect and receive money for the township, and converted it to his own use. The Court, on a case reserved, held, that he could not be convicted of embezzling such money. (*h*)

This enactment of the 24 & 25 Vict. c. 96, s. 68, like the repealed statutes, has the effect it should seem of constituting the offence described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offence a larceny, and under which circumstances the offender shall be deemed to have *feloniously stolen*. First, he must be a clerk or servant; then he must receive or take into his possession some chattel, money, &c., for or in the name or on the account of his master; and he must fraudulently embezzle the same. (*i*)

The prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary, but was paid by commission. The prisoner might get orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time — the whole of every day — to their service. Held, that the prisoner was a clerk and servant within the above 68th clause. (*k*)

A prisoner was indicted for embezzlement as a servant. He was employed as a traveller of Richard Edwards. Lush, J., in summing up, said, 'Now, was the prisoner a "clerk or servant" within the meaning of the statute? That depends on the terms of his employment. If a person says to another carrying on an independent trade, "If you get any orders for me I will pay you a commission," and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a "clerk or servant;" but if a man says, "I employ you and will pay you, not by salary, but by commission," then the person employed is a servant. And the reason for such distinction is this, that the person employing has no control over the person employed, as in the first case; but where, as in the second

(*h*) *R. v. Coley*, 16 Cox, C. C. 226. Lord Coleridge, C. J., Pollock, B., Denman, Hawkins, and Stephen, JJ. The decision seems to turn on the fact that under 59 Geo. 3, c. 12, s. 7, an assistant overseer can only be appointed for such purposes as are specified in the nomination. It is difficult to reconcile this case with the decision of the Court in *R. v. Hall*, R. & M. C. C.

474. And *R. v. Carpenter*, 1 C. C. R. 29, and these cases were not cited.<sup>1</sup>

(*i*) And this view was adopted by the Court in *R. v. Frampton*, D. & B. 585, *post*, *Receiving Stolen Goods*, where it was held that a person might be convicted under the 7 & 8 Geo. 4, c. 29, s. 47, of receiving goods which had been embezzled.

(*k*) *R. v. Bailey*, 12 Cox, C. C. 56.

#### AMERICAN NOTE.

<sup>1</sup> The word "officer," as used in statutes of embezzlement, has been held to apply to the sheriff of a county (*S. v. Brooks*, 42 Tex. 62), the directors of a bank (*C. v. Wyman*, 8 Met. (Mass.) 247), and the treasurer of a

railroad (*C. v. Tuckerman*, 10 Gray (Mass.), 173). As to commission agents, see *C. v. Foster*, 107 Mass. 221. *P. v. Wadsworth*, 63 Mich. 500. *Wright v. P.* 61 Ill. 382.



instance I have put, one employs another, and binds him to use his time and services about his (the employer's) business, then the person employed is subject to control. Here Turner agrees with Mr. Edwards that he shall and will from the date of the agreement "act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town and soliciting orders." It is, therefore, clear that he was employed as "clerk or servant" by Mr. Edwards, who had full control over his time and services.' (*l*)

The trustees of a benefit building society used to borrow money which they had no power as trustees to borrow. On one occasion the prisoner, who was secretary, received the sum borrowed and kept it. The indictment described him as the servant of 'W. and others his masters.' It was held sufficient; for if the money was the property of the society, W. was a member of the society, and the prisoner was properly described as servant of 'W. and others,' *i. e.*, of the society; but if the money was the property of the trustees, W. was also a trustee, and the prisoner was properly described as servant of 'W. and others,' *i. e.*, of the trustees. (*m*)

The prisoner was employed by a coal merchant under an agreement whereby 'he was to receive 1s. per ton procuration fee, payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment, collections to be paid on Friday evening before 5 p. m., or Saturday, before 2 p. m.' He received no salary, was not obliged to be at the office except on Friday or Saturday, to account for what he had received. He was at liberty to go where he pleased for orders. Held, that the prisoner was not a clerk or servant within the statute. (*n*)

In one case, (*o*) upon the construction of certain agreements, the prisoner was held not to be a clerk or servant within the Act, *et per* Erle, C. J., 'We think that this conviction ought to be quashed. The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the moneys of his employer, to be within the statute; but if a man be entrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute. The question in this case depends upon the construction to be put upon the two documents, and such construction is the province of the judge.'

The prisoner was employed to solicit orders for the prosecutors, and was to be paid by a commission on the sums received through his means. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. The judge at the trial directed the jury that the prisoner was a clerk or servant within the meaning of 24 & 25 Vict. c. 96, s. 68. Held, upon the above facts, that he was not a clerk or servant within the meaning of that section, and therefore that the direction was wrong; but that, generally speaking, whether a person under such an employment and

(*l*) R. v. Turner, 11 Cox, C. C. 551, Lush, J.

(*m*) R. v. Redford, 11 Cox, C. C. 367.

(*n*) R. v. Marshall, 11 Cox, C. C. 490.

See also R. v. Mayle, 11 Cox, C. C. 150.

(*o*) R. v. Bowers, 35 L. J. M. C. 206, L. R. 1 C. C. R. 441.

paid by commission is a clerk or servant, is a question of fact for the jury. (p)

The prisoner, who carried on business as an accountant and debt collector (there was no evidence to shew what was the nature of that business), was employed by the prosecutors to collect certain debts specified in a list given to him, and to pay over to the prosecutors the amounts received as soon as he collected them. The time and mode of collecting the debts were in his discretion, and he was authorised to sue for them, if necessary, but at his own charge. In no case was he to receive from the prosecutors more than five per cent. on the amount collected by him and paid over to the prosecutors. The jury having found, on these facts, that the prisoner was employed in the capacity of clerk, and convicted him of embezzlement of certain sums received by him, and not paid over to the prosecutors; held, that the finding was wrong; that he was not employed as a clerk, and that the conviction could not be sustained. (q)

A treasurer of a friendly society, (duly enrolled and the rules of which had been certified by the barrister appointed in that behalf,) whose duty it was to receive the moneys paid into the society, and hold them to the order of the secretary, countersigned by the chairman, or a trustee, and to account whenever called upon, to which office no salary was attached, is not a clerk or servant liable to be indicted for embezzlement under 24 & 25 Vict. c. 96, s. 68; (r) *et per* Bovill, C. J. — 'We are all of opinion that the view of the assistant judge was correct. He reserved the point in deference to the case of *R. v. Murphy*. (s) At first sight that case appears to be an authority in favour of a conviction. There, however, the prisoner was not the treasurer, nor was there any treasurer, or ever to be one: he was clerk, and took credit for payments as secretary, and no distinction appeared ever to have been made in the books of the society between secretary and treasurer. In the present case the prisoner was simply treasurer, with duties defined by the statute and the rules. It is material to observe the points raised in *R. v. Murphy*, (s) by the prisoner's counsel. The first point was that the prisoner had duly accounted, and that his offence only amounted to breach of trust. The second was that the prisoner was a member and could not be convicted of embezzling his own money, and the third was, that he had received the money as treasurer, for which employment he had not received any remuneration. The contention there was, not that the prisoner was not a clerk or servant in the first instance, but that he subsequently held the money in the character of treasurer; and that up to the 17th of September he had acted as secretary, and so stood in the relation of servant of the society, but that after that period the money remained in his hand as treasurer, and so as respects that

(p) *R. v. Negus*, 42 L. J. M. C. 62; L. R. 2 C. C. R. 34; *et per* Blackburn, J. 'The test is, was the prisoner under the control and bound to obey his master, if he was bound to bestow his whole time upon his master that would be strong evidence, but it is not essential. It may be that if the whole facts connected with the employment were set out in evidence, the jury

might have found that he was servant, but they were not asked the question, but directed as a matter of law that he was. That was not right.'

(q) *R. v. Hall*, 13 Cox, C. C. 49.

(r) *R. v. Tyree*, 38 L. J. M. C. 58, L. R. 1 C. C. R. 177.

(s) 4 Cox, C. C. 101.

money, the relationship of servant to the society never existed. On the part of the Crown, it was argued that the prisoner was secretary, and not treasurer, and that there was no such office as treasurer. Blackburn, J., dwells on the fact that there was an employment of the prisoner to collect subscriptions, and to have the surplus, after payments, of money received ready for distribution when required, and he says, "In this state of things can any one doubt but that on accepting this office he was to perform its duties? But it is contended that his duties as clerk ceased, the moment the balance of account was struck, and a new relationship between him and the trustees arose in respect of the balance in his hands. We do not think so. He was the clerk when he got the money, and he was the clerk when he absconded." It is impossible to say therefore, that the treasurer of the society was held to be a servant. The case went on an entirely different ground. In the other case of *R. v. Proud*, (t) the party indicted was clerk and secretary, and there was no treasurer. He was employed to collect the moneys; therefore he was a servant, not the treasurer. There must exist the relationship of clerk or servant. But here the moneys were vested in the trustees; the prisoner held them and had to pay them over on order signed by the secretary and countersigned by the chairman or a trustee. He gave security for the performance of his office or trust. This does not seem to us to make him a servant, but an accountable officer.'

A. held certain local appointments, and amongst them that of clerk to the local board of W., the business of the board being transacted at his office. A.'s son, who lived with him, assisted him in his office, and in conducting the business of the local board; there was no evidence that the son was paid any salary by his father, and the only evidence was that he in fact assisted him as clerk or servant or assistant in his office. The local board had occasion to raise money on mortgage of the rates, and the prisoner managed the business of the loan for his father, and received at his father's office money from the mortgagees, and should have paid it into the bank. In two instances, having received such moneys, he embezzled them. Held, that although he was not employed as clerk or servant, or in the capacity of clerk or servant to the local board, he was employed in the capacity of clerk or servant to his father, and was properly convicted on an indictment which charged him with having embezzled the moneys of A., his master. (u)

The prisoner was indicted for embezzlement as servant of D. Lever and others, who were named. These persons and the prisoner were a committee formed from the members of two friendly societies for the purpose of conducting a railway excursion. The committee nominated certain persons to sell tickets entitling the bearer to share in the excursion, and issued to them the tickets for sale. The tickets and the money produced by their sale belonged to the two societies, each lodge being entitled in proportion to the number of its members. The duty of the persons appointed to sell the tickets was to pay over the money received from their sale to a person appointed by the committee to receive it for the use of the societies; they received no

(t) 31 L. J. M. C. 71.

(u) *R. v. Foulkes*, 13 Cox, C. C. 63.  
44 L. J. M. C. 65.

remuneration for their services. The prisoner, a member of one of the lodges, was one of the persons nominated to sell tickets, and sold a number of them, and fraudulently disposed of the money received for their sale. The jury found that he received the money for and in the name of the committee, and fraudulently converted it to his own use; and, upon a case reserved, upon the questions whether he was employed 'for the purpose or in the capacity of a clerk or servant,' within the meaning of the 24 & 25 Vict. c. 96, s. 68, and whether being a member of the committee, and of one of the societies, and thus a joint owner of the tickets, and the money produced by the sale of them, he could be lawfully convicted; it was held that he was not a clerk or servant within the meaning of the Act. (v)

The prisoner was the clerk and servant of an insurance company and head manager at their chief office. In the ordinary course of business he received cheques payable to his order from the managers of branch offices, and it was his duty to endorse these cheques and hand them to the company's cashier. The prisoner, however, endorsed the cheques and cashed them with a friend, who paid the cheques into his own account. He then took the amount he had received to the cashier to be set off against an overdraft of his salary. The prisoner having been convicted of embezzling the proceeds of the cheques, Held, that the proceeds of the cheques were received by him on account of his masters, notwithstanding that the person who cashed the cheques was a stranger to his masters. (w)

An assistant overseer of a parish, elected by the parishioners in vestry under the 59 Geo. 3, c. 12, s. 7, who fix his duties and salary, is to be deemed the servant of the inhabitants of the parish, and to receive money collected by him for the poor-rate levied upon the parish as such servant, and may be so described in an indictment for embezzling such money so received. (x)

Where a servant, whose duty was to take a barge belonging to his master with cargo from A. to B., and receive back such return cargo, and from such persons as his master should direct, and such only, contrary to the express orders of his master, which were to return empty from B. to C., part of the return voyage to A., took nevertheless a return cargo of manure from B. to C., and received the freight from the owner of the cargo (who knew only the prisoner in the transaction), and did not account to his master for the freight, and denied having carried such return cargo. Held, that the money was not received by him for or in the name of or on the account of his master, and that he was not guilty of embezzlement under the 24 & 25 Vict. c. 96, s. 68. (y)

(v) *R. v. Bren*, L. & C. 346. No opinion was pronounced on the other point. See now 31 & 32 Vict. c. 116, s. 1, *ante*, p. 253.

(w) *R. v. Gale*, 2 Q. B. D. 141.

(x) *R. v. Carpenter*, 35 L. J. M. C. 169; L. R. 1 C. C. R. 29.

(y) *R. v. Cullum*, L. R. 2 C. C. R. 28. 42 L. J. M. C. 64, *et per* Bovill, C. J. 'In this case the prisoner contrary to his master's orders used the barge for his own purposes. He did not profess to carry the

manure for his master. The servant who paid the freight said he did not know for whom he paid it. It is more consistent with the facts of this case, that the prisoner was misusing his master's property for his own purposes, and not for, or in the name of, or on account of, his master. Therefore I think he was not within the terms of the section, and the conviction must be quashed.' *R. v. Cullum* is followed in *R. v. Read*, 3 Q. B. D. 131.

But now  
See Baker  
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A society in the nature of a friendly society, but having rules — not enrolled or certified under the Friendly Societies Acts — some of which are in restraint of trade, and therefore void, is not an illegal society in the sense that it is disabled from prosecuting a servant for embezzlement. (2)

A director of a limited company, who is also employed as a servant to collect moneys for them, is liable to be convicted as a 'clerk or servant' of the company under sec. 68. (a)

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 248, 'A person appointed to any office or service by or under a local marine board shall be deemed to be a clerk or servant within the meaning of' 24 & 25 Vict. c. 96, s. 68. 'If any person so appointed to any office or service fraudulently applies or disposes of any chattel, money, or valuable security received by him whilst employed in such office or service for or on account of any local marine board or for or on account of any other public board or department, for his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him or fraudulently withholds, detains, or keeps back the same or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid, that person shall be guilty of embezzlement within the meaning of' 24 & 25 Vict. c. 96, s. 68.

'In any indictment under this section it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the local marine board by whom the person was appointed, or of the board or department for or on account of whom the same was received.'

Sec. 71 of 24 & 25 Vict. c. 96, 'shall apply as if an offence under this section were embezzlement under that Act.'

By the 24 & 25 Vict. c. 96, s. 71, 'For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against Her Majesty or against the same master or employer, within the space of six months from the first to the last of such acts; and in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order

(2) R. v. Stainer, 39 L. J. M. C. 54; L. R. 1 C. C. R. 230. See also R. v. Tankard (1894), 2 Q. B. 548.

(a) R. v. Stuart (1894), 1 Q. B. 310.

that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.' (b)

The provisions contained in sec. 71 are intended to remove the very considerable difficulties which so often prevented a prosecution under the repealed statute from being effectual. The full case, upon which the master had arrived at the conclusion of his servant's guilt, and determined to prosecute, could hardly ever be laid before the jury, on account of the rule which forbids evidence to be given of two distinct and independent felonies upon one indictment; it repeatedly occurred that the person from whom the prisoner had received the money could not specify the mode of payment; and it happened not unfrequently that the prisoner had received a piece of coin or a note of a larger amount than the sum which was to be paid on account of his master, and had given change. (c) In the former of these cases the jury often acquitted, from an impression that the prisoner had acted by mistake and unintentional error — an impression which would have been removed, if the facts upon which the master proceeded could have been fully laid before them; and in the two latter cases the prosecution necessarily failed, as being unsupported by the evidence.

An indictment alleged an embezzlement of money, and the evidence proved that the prisoner received a cheque, but did not shew that he had turned it into money in any way, and it was held that the indictment was not supported by the evidence. (d)

It was the duty of an agent of a coal society to collect and receive from persons who bought coals from the society, for which they were to pay by weekly instalments, such weekly payments, and to send in a weekly account on the Tuesday of every week, and on such Tuesday to pay the gross amount received by him in the course of the week into a bank to the credit of the society. An indictment for embezzlement against the agent, containing three counts, charged in the first count the act of embezzling a sum of £1 1s., and evidence was given on that count that during a certain week, payments amounting in the whole to this amount had been made to the prisoner by ten different persons in small sums, and that the prisoner omitted to account at the end of the week or at any time for those several sums, or for any specific amount of £1 1s. In the other two counts, sums were charged, being aggregate sums similarly composed and received weekly, but not accounted for weekly in a similar manner, and thirty-one small sums in all were thus shewn not to have been accounted for at three weekly accountings. Held, that the evidence was properly received, and that the indictment did not charge more than three distinct acts of embezzlement, each act of embezzlement being the omission to account weekly for the aggregate sum composed of the several sums received during the week. (e)

(b) This clause is framed from the 7 & 8 Geo. 4, c. 29, s. 48; 9 Geo. 4, c. 55, s. 41 (1); 2 & 3 Will. 4, c. 4, s. 3; and 14 & 15 Vict. c. 100, s. 18. It applies to every case included in secs. 68 and 70. The words in *italics* were inserted to supply an omission in the 2 & 3 Will. 4, c. 4, s. 3.

(c) See *R. v. Ward, Gow*, N. P. R. 168.

(d) *R. v. Keena*, L. R. 1 C. O. R. 113; 37 L. J. M. C. 43.

(e) *R. v. Balls*, 40 L. J. M. C. 148; L. R. 1 C. C. R. 328.

A conductor of a tramway car was charged with embezzling 3s. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been £3 1s. 9d. according to his way bills for the day, but he paid in only £3 0s. 8d. Held, that there was sufficient evidence of the receipt of 7s. 11d. the total amount of fares of the particular journey, and of the embezzlement of 3s. part thereof. (f)

By 24 & 25 Vict. c. 96, s. 72, 'If upon the trial of any person indicted for embezzlement, or *fraudulent application or disposition as aforesaid*, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or *fraudulent application or disposition*, but is guilty of simple larceny, or as larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or a servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or *fraudulent application or disposition as aforesaid*, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement or *fraudulent application or disposition, as the case may be*, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, *fraudulent application or disposition*, and no person so tried for embezzlement, *fraudulent application or disposition*, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, *fraudulent application or disposition*, or embezzlement, upon the same facts.' (g)

Although by the preceding section a prisoner who is indicted for larceny may be convicted of embezzlement, if the evidence proves that he was guilty of that offence; yet, in such a case, the jury must return a verdict that the prisoner is guilty of embezzlement; and if

(f) *R. v. King*, 12 Cox, C. C. 73, *et per* Bovill, C. J., 'I think there was sufficient evidence on both points. It was the prisoner's duty to receive the fares when he issued the tickets, and the evidence was that fifteen of the passengers were threepenny fares; and twenty-five twopenny fares, and that each paid money to the prisoner, and the prisoner gave to each a ticket. The amount of these fares would be 7s. 11d., and it was the prisoner's duty to have received that money. The witnesses

saw them all pay money to the prisoner. The evidence is almost conclusive that the prisoner received 7s. 11d. Then, did he embezzle any part of that sum? He did; for he made out a false account of the number of passengers, and paid over only 4s. 11d. The conviction will therefore be affirmed.'

(g) This clause is taken from the 14 & 15 Vict. c. 100, s. 13, and extended so as to apply its provisions to the cases included in the last two preceding sections.

they return a general verdict of guilty, when there is no evidence of stealing, it is erroneous, for a prisoner cannot lawfully be convicted of stealing if there is only evidence of embezzlement. (*h*)

The 12 & 13 Vict. c. 103, s. 15, recites that 'The guardians of certain unions and parishes under the authority of the orders of the poor law commissioners and of the poor law board are empowered to appoint collectors of poor rates and assistant overseers for some one or more of the parishes comprised within their union, or for their parish, as the case may be, who collect and receive the money and other property of the parish or parishes for which they are appointed; and in cases of embezzlement or larceny of such money or property by such collector or assistant overseer, difficulty has arisen as to the proper description of his office in the indictment or other proceeding;' and enacts 'that in respect of any indictment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the poor law commissioners or the poor law board shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish without the names of any such inhabitants being specified.' (*i*)

This enactment was occasioned by a case in which it was held that a person appointed by the guardians of a union as assistant overseer for a district within the union, under an order of the poor law board, ought not to have been convicted on an indictment charging him, as the servant of the guardians, with embezzling the money of the guardians it not appearing that he received the money 'for, in the name, or on the account of,' the guardians, but of the overseers. (*j*) So where a collector of rates was appointed under an order of the poor law board, Maule, J., held, on the authority of the preceding case, that he was not indictable for disposing of the money he received; for he was not a servant at all, but an independent officer, between whom and his superiors none of the ordinary attributes of service existed. (*k*)

But this enactment does not seem to reach the following case. The prisoner was appointed a collector of poor rates of a union under an order of the poor law board, which the Court of Queen's Bench held invalid; and in consequence, a vestry meeting duly elected the prisoner assistant overseer for their parish under the 59 Geo. 3, c. 12, s. 7, and the justices in petty sessions confirmed this appointment, which specified that he should discharge all the duties of overseer.

(*h*) *R. v. Gorbutt*, D. & B. 166. The case was not argued, but, assuming that the facts merely proved embezzlement, the decision is clearly right, and the Court was of opinion that the facts only proved that offence. It would seem, however, that that is questionable; for in addition to clear cases of embezzlement, there seem to have been cases where payments were made to the prosecutors and others in their employ, and the money afterwards paid by them to the prisoner, and it should seem that some of these moneys were converted by the

prisoner to his own use, and that would clearly be larceny. However, the facts are so badly stated that it is difficult to see what really was proved, and the case must be taken to establish nothing more than is stated in the text. C. S. G.

(*i*) See vol. 1. p. 27.

(*j*) *R. v. Townsend*, 1 Den. C. C. 167; 2 C. & K. 168, May, 1846. At the trial, Patteson, J., held that the prisoner was not the servant of the overseers, and did not reserve that point.

(*k*) *R. v. Truman*, 2 Cox, C. C. 306.



The prisoner, having received money for which he had not accounted, was indicted for embezzling this money; and Rolfe, B., held that the prisoner was, to all intents and purposes, an overseer, and that he was not clerk or servant either to the overseers of the parish or to the guardians of the union. (*l*)

As to embezzlement by one of several partners or joint owners see 31 & 32 Vict. c. 116, *ante*, p. 253.

By the 24 & 25 Vict. c. 96, s. 98, principals in the second degree and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to be imprisoned for any term not exceeding two years.

Upon the trial of any indictment for any offence in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

A clerk whose duty it was to remit to his employers in Middlesex moneys collected by him, on April 18th collected at York a sum of money which he never remitted. On April 19th and 20th he wrote and posted from places in Yorkshire, to his employers in Middlesex, letters in which no mention of this sum of money was made, and on April 21st he sent from Yorkshire a letter intended to make them believe that he had not collected this money. It was held that the receipt of the letter of April 21st in Middlesex was sufficient to give jurisdiction to try the prisoner there. (*m*)

(*l*) *R. v. Sampson*, 1 Cox, C. C. 335. The case does not state whose clerk or servant he was alleged to be. See *R. v. Carpenter*, 10 Cox, C. C. 246, 35 L. J. M. C. 169, *ante*, p. 346.

(*m*) *R. v. Rogers*, 3 Q. B. D. 28, per

*Kelly, C. B., Field, Lindley, and Manisty, JJ.* Huddleston, B., however was of opinion that no part of the crime was committed in Middlesex, and that the prisoner was wrongly indicted in that county. See also *R. v. Tredgold*, 14 Cox, C. C. 220.

## CHAPTER THE TWENTIETH.

### OF EMBEZZLEMENT AND FRAUDS BY BANKERS, BROKERS, AGENTS, TRUSTEES, DIRECTORS, PUBLIC OFFICERS, AND OTHERS.

#### SEC. I.

##### *Statutes in force. (a)*

SHORTLY after the decision in *Walsh's case*, (b) the 52 Geo. 3, c. 63, was passed for more effectually preventing the embezzlement of securities for money and other effects, left or deposited for safe custody, or other special purpose, in the hands of bankers, merchants, brokers, attorneys, or other agents. This Act, the 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55, ss. 42, 43, are now repealed.

By the 24 & 25 Vict. c. 96, s. 75, 'Whosoever, having been entrusted, *either solely or jointly with any other person*, as a banker, merchant, broker, attorney, or other agent, (c) with any money, or security for the payment of money, with any direction in writing (d) to apply,

(a) The decisions on the repealed statutes which are still of value will be found in Appendix E, at the end of this volume.

(b) R. & R. 215.

(c) Whilst in treaty with Messrs. G. and P. for the sale and transfer of a public-house licence, the prisoner was required by them to give security for the purchase money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which the latter was to deposit with Messrs. G. and P. by way of security, and not negotiate or use for any other purpose, and if the transfer was not effected, was to return them to the prosecutor. The prisoner, instead of depositing them with Messrs. G. and P., converted two of them to his own use: — Held, that the prisoner was not an 'agent' within the 75th section, nor a 'bailee' within the 3rd sec. of 24 & 25 Vict. c. 96, and could not be convicted under either. *R. v. Cosser*, 13 Cox, C. C. 187, Bramwell, B. *Ante*, p. 141.

(d) A broker from time to time gratuitously made investments in shares, bonds, &c., on the Stock Exchange to a considerable amount as agent for the prosecutrix, and was kept in cash advances by cheques in round sums not specifically made against any particular items. On the 12th of November, 1872, by letter he sent to the prosecutrix a scheme of investment, men-

tioning as an item two Japanese bonds with an approximate price against them. On the 16th of November the prosecutrix sent by letter a statement of accounts between them, balanced up to that date, with a cheque for the balance, saying, 'When I know the amount of the Japanese I will immediately forward you a cheque for the same.' On the 27th of November the broker wrote to the prosecutrix, inclosing a contract note for three £100 Japanese bonds at £112 each, saying he was fortunate in securing them for her, and that he had no doubt of her ratifying what he had done. The contract note was signed by the broker in the form of a sold note from him to the prosecutrix. On the same day the prosecutrix wrote to him, that she had received the contract note for three Japanese bonds, and his letter, and that she 'inclosed a cheque for £336 in payment,' and that she was satisfied that he had purchased the three bonds for her. The cheque was payable to the broker's order, and was endorsed and cashed by him. He wrote on the 29th of November acknowledging the receipt of the cheque for three Japanese bonds, which he would forward to her immediately on their being delivered. The broker never paid for the bonds, which, after being carried over from time to time, were sold by his order. He applied the proceeds of her cheque to his own purposes. Held, that the letter from the prosecutrix of the 27th of November, saying that she

*pay or deliver such money or security or any part thereof respectively, or the proceeds (e) or any part of the proceeds of such security, for any purpose or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so entrusted, such money, security, or proceeds, or any part thereof respectively; and whosoever, having been entrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, (f) or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so entrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, [at the discretion of the Court,] (g) to be kept in penal servitude for any term not exceeding seven years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement;] (h) but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.' (i)*

'inclosed the cheque for £336 in payment' was a sufficient direction to apply the cheque or its proceeds to take up the Japanese bonds by paying the seller if not delivered, and if delivered, by paying himself, the broker, and that a conviction of the broker under the above section should be confirmed. *R. v. Christian*, 43 L. J. M.C. 1. L. R. 2 C. C. R. 94. *R. v. Cronmire*, 16 Cox, C. C. 42. See *R. v. Cooper*, *post*, p. 360.

(e) See *R. v. Golde*, 2 M. & Rob. 425, decided under a repealed statute.

(f) See sec. 1 as to these words, *ante*,

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p. 235. The words do not include money. See *In re Bellencontre* (1891), 2 Q. B. 122.

(g) The words in brackets are repealed, but the punishment remains the same except as to solitary confinement. See *ante*, p. 50, note (c).

(h) This punishment is extended by the 23 & 24 Vict. c. 16, s. 7, to any person misappropriating certain corporation moneys.

(i) This clause is taken from the 7 & 8 Geo. 4, c. 29, ss. 49, 50; and 9 Geo. 4, c. 55, ss. 42, 43 (1). The first words in *italics* are introduced to remove any ques-

In *R. v. Tatlock, (j)* in which the defendant was indicted under this section, Cockburn, C. J., said, 'The defendant was indicted under the 75th section of 24 & 25 Vict. c. 96. The facts were as follows:—

'Having negotiated, as broker, certain policies of insurance on a ship belonging to the prosecutor, and the ship having been lost the defendant was entrusted with the policies for the purposes of collecting the amounts due upon them. These he received in cheques to his own order, which he endorsed and paid into his own bankers, to his own credit; but he failed, either then or at any time afterwards, to pay the amount to the prosecutor, and two months later filed a petition for liquidation. The jury, in answer to questions specifically put to them by the learned commissioner before whom the case was tried, found expressly that the prisoner was entrusted with the policies for a special purpose, namely, that he should receive, and when received, forthwith pay over the moneys to the prosecutors. They further found that the prisoner had no authority to sell, negotiate, transfer, or pledge the policies; and that in violation of good faith, and contrary to the purpose for which they were entrusted to him, he converted the proceeds to his own use. Upon which they were directed by the learned commissioner to find the prisoner guilty. The question submitted to us is, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the jury should have been directed to find a verdict of not guilty. It appears to me plain that there has been a miscarriage in this case. But I scarcely know in what position we are placed as to the facts as found by the jury, or on the facts as proved by the evidence; it being to my mind perfectly plain not only that the right questions have not been put to the jury, but also that their answers to the questions as put are directly contrary to the evidence. The proper remedy would be for a new trial, but that we have no authority to direct. I think, however, that the form in which the question is put leaves it open to say whether the learned commissioner, instead of putting any questions to the jury should not, upon the evidence, have directed them to acquit the prisoner; and this I think would have been the proper course, the evidence being, in my opinion, insufficient to warrant a conviction.

'The case turns on the construction of the second branch of the section referred to which enacts that, "Whosoever, having been entrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel, or valuable security, or any power of attorney for the sale or transfer of any share or inter-

tion where two or more persons have been jointly entrusted. The former enactments did not extend to a direction to apply any security for the payment of money; the present clause is extended to that case, and the words 'pay or deliver' 'to any person' are introduced to include cases where the direction is to pay or deliver a bill of exchange or other security to a particular person. The words 'or the use and benefit of any person other than the person,' &c., are introduced to include cases where the banker, &c., converts the property not to his own use, but to that of some person other than the person employing him. If

it should be suggested that these words are too large, as they would include a payment to the use of A. by the direction of the party entrusting the money to the banker; the answer is, that to bring a case within this clause, three things must concur. The property must be disposed of, first, in violation of good faith; secondly, contrary to the terms of the direction; thirdly, to the use of the banker, or of some one other than the party entrusting the banker; and consequently no case where the banker obeys the direction of the party entrusting him can come within the clause.

(j) 2 Q. B. D. 157.

est in any public stock or fund, whether of the United Kingdom or of any foreign State, or in any stock or fund, of any body corporate, company, or society for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit or to the use or benefit of any person other than the person by whom he shall have been so entrusted, such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate or any part thereof, shall be guilty of a misdemeanor."

'I entertain very serious doubts, whether a policy of insurance comes within this section. The term chattel is intended, I think, to apply to objects which can be sold, bartered, or pledged; and a policy of insurance cannot be said to be a "valuable security," any more than a contract of sale or any other contract. It is simply a contract whereby, in consideration of a premium, one party insures another against a given loss. Unless the loss occurs nothing is payable. A valuable security is one on which money is payable, irrespective of any contingency. Moreover, a policy of insurance upon which money is received, is neither "sold," "negotiated," "transferred," nor "pledged," in any sense of the word. The money due on it is paid and the contract comes to an end just as when money is paid on a contract of sale.

'I likewise entertain very serious doubts whether this enactment extends to a case in which a person entrusted with any of the instruments enumerated in the section for the purpose of disposing of it, or receiving money on it, having done so, embezzles the proceeds. The enactment, if the words are carefully followed, appears to me to apply solely to the dealing with securities without authority, and contrary to the purpose for which they were entrusted, and in so doing, converting the instrument, or the proceeds of it, to the use of the party so violating his trust. But here the party uses the instrument for the very purpose for which it was entrusted to him, namely, that of receiving the money due on it. Let us assume, for the purpose of the argument, that he afterwards embezzles the money. He still cannot be said to have dealt with the policy "without authority," which, by the express terms of the statute, is an essential element of the offence.

'It may however be said that if an instrument is entrusted to a person for the purpose of his receiving money upon it, and handing over the money so received to the principal, he receives it for a "special purpose;" and that if the agent receives such money with the intention of applying it to his own use, instead of handing it over to the person employing him,—the authority being vitiated by the intended fraud,—he is acting without authority as well as in violation of good faith.

'Assuming this to be so, and that a party receiving money on an instrument entrusted to him for the special purpose of his receiving the money due upon it, and forthwith handing such money over in specie, and who at the time he receives the money, intends in violation of good faith to apply it to his own use, commits the offence created by the statute, I doubt exceedingly whether that would be so where the

money having been received with an honest intention, the fraudulent design of misappropriating it afterwards arose. If this doubt be well founded, it would be a question for the jury whether the defendant, at the time he received the money, intended to appropriate it to his own purposes; a question which was not submitted to the jury in the present case.

‘At all events, it is to my mind perfectly clear that unless there was at the time the money was received the fraudulent intention of keeping the money, — in which case the statute may possibly apply, — it cannot apply to a case in which, by the understanding of the parties, the person receiving the money is not to hand it over at once to the principal, but is to carry it to an account between them, and to pay it only in settlement of such account. That such was the understanding between the prosecutors and the defendants, whether as arising from the general custom of trade as between the insurance brokers and their principals, or from the course of dealing between these immediate parties, appears to me to result from the evidence. No evidence having been given as to any general custom, I do not think we are at liberty to take notice of the statement of such a custom occurring in any work on insurance law; but sufficient evidence of the understanding between the parties is to be found in the fact that when the defendant is applied to for money received on the policies, he answers, while acknowledging the receipt, that it will not be due to the prosecutor for a month, and this is acquiesced in, affording, as it seems to me, at all events, *prima facie* — and no evidence was offered on the part of the prosecution to rebut the presumption — good ground to infer that the defendant, either by the custom of business, or the course of dealing between himself and his principals, was entitled, instead of paying over the money at once, to hold it and treat it as his own for a time, settling for it only in account when the time for settlement came. If such were not the terms on which the defendant was employed, it was for the prosecution to rebut the inference which arises from the facts I have referred to.

‘Assuming such a case to be within the statute, it would be a question for the jury whether the defendant at the time the money was received intended to embezzle it. Possibly proof that a party receiving money under such circumstances was, and knew himself to be, hopelessly insolvent, and being aware that his account at his banker’s was heavily overdrawn, paid the money in to the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to convert the property to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that two months after the receipt of the money the defendant filed a petition for liquidation. At the time he received it he may have been solvent. It was for the prosecution to give evidence as to the state of his circumstances, if it could be shewn that he was insolvent when the money was received, so as to raise the inference that in paying it into his bankers he intended to defraud the prosecutor of the amount. No such evidence having been given, I think that, even supposing the case to be within the statute, — as to

which I entertain a great doubt, — the learned commissioner should have held that there was no case to go to the jury, and should have directed an acquittal. I am therefore of opinion that the conviction was wrong, and should be quashed.'

Amphlett, B., in whose judgment Bramwell, B., concurred, said: — 'I am of opinion that the conviction must be quashed.

'The indictment is framed upon the second branch of the 75th section of 24 & 25 Vict. c. 96, and the case alleged against the defendant is that, being entrusted as a broker with certain ship policies, for the special purpose of receiving the moneys due thereon, and paying over the same forthwith to the prosecutor, he fraudulently converted the same to his own use.

'Now, looking at both branches of the section, which one ought to do, for the purpose of arriving at the true meaning of either, it appears to me that the second branch only deals with the case of chattels and securities sold or converted into money without authority, and does not embrace in its provisions policies like these, which were entrusted to the defendant for collection.

'For we must observe that the section only relates to certain classes of agents whom the Legislature has not thought fit to make amenable to the ordinary law of embezzlement; and it is only therefore under defined conditions and safeguards that such agents can be proceeded against criminally for misappropriating moneys or securities entrusted to them.

'The general scheme appears to be this. If moneys or securities which they are authorised to convert into money, are entrusted to agents of this character, they are only answerable criminally for a fraudulent misappropriation if a direction in writing as to the disposal of such moneys was given. That is provided for by the first branch of the section, which embraces the case we are considering; for I cannot doubt, having regard to the interpretation clause, that the policies were securities for the payment of money, within the meaning of the section.

'There remained the case (which was supposed to require the protection of the criminal law) of chattels or securities entrusted to such agents for safe custody, or for some special purpose, without authority to sell or convert into money; and that is provided for by the second branch of the section, which makes such agents criminally liable for a fraudulent misappropriation of such last-mentioned chattels or securities, or of the proceeds of the same. It has been argued that these last words can have no meaning unless they are held to refer to securities other than those which they had no authority to convert into money.

'I think this is a mistake. These words are not to be found in the first Act (52 Geo. 3, c. 63) on this subject, but were inserted in the subsequent Acts for the obvious purpose, as it appears to me, of meeting the case, which may well happen, of such agent selling, or at all events alleging that he had sold, honestly, though without authority, and afterwards yielding to temptation, and fraudulently converting the proceeds to his own use. Without these words the agent in such a case would escape, or it might, at all events, be more difficult to convict him.

'The irrational consequences that might occur if securities dealt with by the first were also held to be comprised in the second branch of the section are numerous and, as it appears to me, afford a strong argument that it was not so intended by the legislature. For instance, if you gave such an agent money for a particular purpose, but not expressed in writing, he would not be criminally responsible; but if you had given him a cheque and told him verbally to get it cashed and apply the proceeds in the same way, he would. What is the sense or meaning of such a distinction? Is he not, as soon as he cashes the cheque, entrusted with the amount exactly in the same way as if it had been handed over to him directly by his principal?

'Again, it is admitted on all hands that if a debenture or other security be entrusted to a broker with authority to sell, negotiate, transfer, or pledge, the case would not be within the second branch of the section; and that, in the absence of a written direction as to the disposal of the proceeds, he would be civilly only, and not criminally responsible: but, according to the argument, if the security were entrusted to him for the purpose of collecting the money due upon it, he would be criminally responsible for the misapplication of the proceeds. I confess I cannot see any reason why he should be criminally responsible in one case but not in the other.

'It is certainly difficult to bring a broker so authorised to collect moneys due on a security within the description of an agent authorised to sell, negotiate, transfer, or pledge, although I think there is little doubt but that the framers of the section, by the use of the latter words, imagined that they had exhausted every means of converting securities into money; I do not, however, think it necessary to deal with that difficulty since my judgment is based not upon subtleties of language, but upon the broad ground that, according to the true construction of the section, cases which if there had been a written direction would have fallen within the first branch do not, in the absence of such written direction, fall within the second branch of the section. In fact, I think that the cardinal principle of the section is that such an agent is only (in the absence of a written direction) to be criminally responsible for moneys which may come into his hands by some unauthorised act of his own.

'This construction of the section was adopted and formed the ground for an unanimous decision of the Court of Appeal, consisting of five judges, in *R. v. Cooper*, (*k*) and I think we are bound by that authority, even if it be the fact as is alleged that there was another ground, unnoticed by the counsel who argued or the judges who decided that case, which might have supported the decision.

'Upon the other point argued before us, as to the sufficiency of the evidence, in point of fact, to support the conviction, I will only say that I find it very difficult to understand what, if anything, the learned judge has referred to us beyond the legal question on which I have already expressed my opinion. If he meant to ask us whether the facts stated in the case justified the findings of the jury, I should say they did not, for I can find in the facts as stated no evidence at all of the special purpose stated in the indictment, and consequently none of the alleged conversion.'

(*k*) L. R. 2 C. C. R. 123, *post*, p. 360.



Pollock, B., in whose judgment Kelly, C. B., concurred, said, 'In so far as the decision of this case depends upon the proper construction to be put upon the section of the statute under which the prisoner was indicted, the 24 & 25 Vict. c. 96, s. 75, I entertained during the argument, and still entertain, considerable doubt. I have had, however, the advantage of seeing the judgments which have been prepared by my learned Brethren, and thinking as I do, that the conviction was unsatisfactory for reasons to which I will presently refer, I am not prepared to differ with the view which has been taken by the majority of the Court upon the construction of a statute which is undoubtedly capable of more than one interpretation. If it could be assumed that the construction of the statute which was insisted upon by the prosecution was correct, it appears to me that, having reference to the duty of the prisoner to pay over to the prosecutor the sums of money which he had received in payment of the policies, and also to the false statement made by the prisoner to the prosecutor after he had received these sums, there may have been evidence which might and ought to have been submitted to the jury, with a view to their finding whether or no the prisoner, who undoubtedly had received the money, converted it to his own use or benefit within the meaning of the statute. But the prisoner was not a mere clerk of the prosecutor; he was an insurance broker, carrying on an independent business, and it must be assumed that he had many other principals for whom he acted besides the prosecutor, and it does not appear what had been the previous course of dealing between the prosecutor and the prisoner as to the payment or accounting by the latter for money received by him on the settlement for losses. These are matters having an essential bearing on the guilt or innocence of the prisoner, and yet they do not appear to have been explained by the evidence, or brought to the attention of the jury, who by their answer to the third question appear to have assumed that the duty of the prisoner was to pay over the money forthwith without having their attention called to, or having entered on the consideration of, the facts from which such a duty could be properly inferred. Under these circumstances, when I have to answer the question which has been submitted to us by the learned commissioner, I cannot say that I consider that the facts, as proved, were sufficient to constitute the offence mentioned in the statute, and therefore, in my judgment, the conviction should be quashed.'

And where the prisoner, who was neither a banker, merchant, broker, nor attorney, was employed by railway contractors to procure for them a contract for the construction of a foreign railway, and was charged under the section with the misappropriation of valuable securities with which his employers had entrusted him in the course of his employment, it was held, that the facts disclosed no offence within the meaning of the section, the judges saying that sec. 75 did not apply to every one who might happen to be entrusted as prescribed therein, but only to the class of persons there specified. (*l*)

The prisoner was an agent employed to sell goods on commission, and as soon as he received money from customers he was to remit it to his employers. During the employment the employers wrote to

(*l*) *R. v. Portugal*, 16 Q. B. D. 487.

him: 'We will send H. B. & P. three bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us.' The prisoner received certain sums from customers, and appropriated them to his own use. Upon a case reserved, the Court held that the letter did not amount to a direction in writing within sec. 75, and quashed the conviction. Hawkins, J., said that sec. 75 only applied where the agent had been entrusted by his employer with money accompanied by a direction in writing how to apply it, and not where he received the money from a third person on behalf of his employer. (m)

By the 24 & 25 Vict. c. 96, s. 76. 'Whosoever, being a banker, merchant, broker, attorney, or agent, and being entrusted *either solely or jointly with any other person*, with the property (n) of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use *or benefit, or the use or benefit of any person other than the person by whom he was so entrusted*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.' (o)

An attorney was employed to raise money on mortgage of property, which money was to be in part applied to pay off an incumbrance on the property, and the rest, after payment of the expenses, to be paid to the mortgagor. There was no direction in writing as to how the money was to be applied. The attorney found a mortgagee, prepared the mortgage deed, got it executed, obtained the money, and handed over the deed to the mortgagee. He did not pay off the prior incumbrancer, but paid over a portion of the money to the mortgagor (who did not know for some years how much money he, the attorney, had received); and he received from the mortgagor the interest upon the portion of the mortgage money he had paid over to him, and paid the mortgagee the interest upon the whole mortgage money. He converted to his own use all the money which he received, except the portion which he paid over to the mortgagor. It was held, that as the attorney was not entrusted with the deed or the money for safe custody, and as there was no direction in writing to apply the proceeds of the mortgage deed, and as the mortgage deed could not be said to have been transferred in violation of good faith, and contrary to the object or purpose for which it was entrusted to him, he did not come within the 75th or 76th sections of 24 & 25 Vict. c. 96. (p)

Sec. 77. 'Whosoever, being entrusted, *either solely, or jointly with any other person*, with any power of attorney for the sale or transfer of any property, (n) shall fraudulently sell or transfer or otherwise

(m) *R. v. Brownlow*, 14 Cox, C. C. 216, Lindley, J., concurred with Hawkins, J., as to this point, but Kelly, C. B., Mellor and Denman, JJ., delivered no judgment upon it.

(n) See sec. 1, *ante*, p. 79, as to this word.

(o) This clause is taken from the 20 & 21 Vict. c. 54, s. 2. See the note to the last section. As to the punishment, see the last section.

(p) *R. v. Cooper*, 43 L. J. M. C. 89; L. R. 2 C. C. R. 123. This case was followed in *R. v. Newman*, 8 Q. B. D. 706 as to 'safe custody' within sec. 76 where the facts were similar; but in *R. v. Fullagar*, 14 Cox, C. C. 370, where the money was given to the solicitor to keep till a certain day and then invest, it seems that it was given for 'safe custody.' This may now be considered as settled law. See *In re Bellencontre* (1891), 2 Q. B. 122.

convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.' (g)

**Factors.** — Sec. 78. 'Whosoever, being a factor or agent entrusted, (r) either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so entrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the same punishments: Provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.' (s)

**Definitions.** — Sec. 79. 'Any factor or agent entrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such

(g) See note (o) *ante*.

(r) See *Phillips v. Huth*, 6 M. & W. 572, and *Hatfield v. Phillips*, 9 M. & W. 647, 14 M. & W. 665; as to the meaning of this word in the 6 Geo. 4, c. 94; and *Heyman v. Flewker*, 13 C. B. (N. S.) 519, and *Lamb v. Attenborough*, 1 B. & S. 881, as to its meaning in the 5 & 6 Vict. c. 39; in which last case, it was held that these Acts do not apply to a case of master and servant. *Baines v. Swainson*, 4 B. & S.

270. See *Fuentes v. Montes*, L. R. 4 C. P. 73; 38 L. J. C. P. 95, where the agent's authority was revoked.

(s) This clause is framed from the 7 & 8 Geo. 4, c. 29, s. 51; 9 Geo. 4, c. 55, s. 44 (1); and 5 & 6 Vict. c. 39, s. 6. See the note to sec. 75, *ante*, p. 353. As to 'document of title to goods,' see sec. 1, p. 235, and *infra*; as to the punishment, see sec. 75, *ante*, p. 353.

*factor or agent* having been entrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been entrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such *factor or agent* shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him or on his behalf; and where any loan or advance shall be *bona fide* made to any *factor or agent* entrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods or document of title shall actually be received by the person making such loan to advance, without notice that such *factor or agent* was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such *factor or agent*, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such *factor or agent*; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section; and a *factor or agent* in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been entrusted therewith by the owner thereof, unless the contrary be shewn in evidence.' (t)

Sec. 1. 'The term "document of title to goods" shall include any bill of lading, *India* warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, *bought and sold note*, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or *therein mentioned or referred to*.' (u)

**Trustees.** — Sec. 80. 'Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, (v) or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, *or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid*, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being con-

(t) This clause is taken from the 5 & 6 Vict. c. 39, s. 4, and so altered as to correspond with the terms used in the preceding section.

(u) This clause is taken from the 5 & 6 Vict. c. 39, s. 4, with the addition of

'transfer' and 'valuable thing,' from the 7 & 8 Geo. 4, c. 29, s. 5, and the new words in *italics*.

(v) See *R. v. Fletcher*, L. & C. 180, 31 L. J. M. C. 206.

victed thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned: Provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of Her Majesty's attorney-general, or, in case that office be vacant, of Her Majesty's solicitor-general: Provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the Court or judge before whom such civil proceeding shall have been had or shall be pending.' (*w*)

Sec. 1. 'The term "trustee" shall mean a trustee on some express trust created by some deed, will, or instrument in writing, (*x*) and shall include the heir, or personal representative of any such trustee, *and any other person upon or to whom the duty of such trust shall have devolved or come*, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future Act relating to joint stock companies, bankruptcy, or insolvency.' (*y*)

**Directors, &c., of any body corporate or public company.** — Sec. 81. 'Whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, *or for any use or purposes other than the use or purposes of such body corporate or public company*, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.' (*z*)

Sec. 82. 'Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property (*a*) of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.' (*b*)

Sec. 83. 'Whosoever, being a director, (*c*) manager, public officer,

(*w*) This clause is taken from the 20 & 21 Vict. c. 54, ss. 1, 13. See note to sec. 75, *ante*, p. 353. As to 'property,' see sec. 1, *ante*, p. 79; as to the punishment, see sec. 75, *ante*, p. 353.

(*x*) A fruit broker obtained from his bankers an advance as against certain goods consigned to him and then at sea. He deposited with them the endorsed bills of lading and signed a letter of hypothecation by which he undertook to hold the goods in trust for the bankers, and to hand over the proceeds as and when received. Day, J., held that this amounted to an express trust under the section. *R. v. Townshend*, 15 Cox, C. C. 466.

(*y*) This clause is taken from the 20 & 21 Vict. c. 54, s. 17, with the additions in *italics*.

(*z*) This clause is taken from the 20 & 21 Vict. c. 54, s. 5.

(*a*) See sec. 1, *ante*, p. 79, as to this word.

(*b*) This clause is taken from the 20 & 21 Vict. c. 54, s. 6.

(*c*) By the 25 & 26 Vict. c. 89, s. 166, if any director, officer, or contributory of any company, wound up under this Act, destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register,

or member of any body corporate or public company, shall with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or *valuable* security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned.' (d)

Sec. 84. 'Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned.' (e)

Sec. 85. 'Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed (f) such act on oath, in consequence of any compulsory process of any Court of law or equity, in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.' (g)

Sec. 86. 'Nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity

book of accounts, or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour. Secs. 167 & 168 provide for the payment of the costs of the prosecution out of the assets of the company.

(d) This clause is taken from the 20 & 21 Vict. c. 54, s. 6.

(e) This clause is taken from the 20 & 21 Vict. c. 54, s. 7.

(f) See *R. v. Gunnell*, 16 Cox, C. C. 154.

(g) The first part of this clause is taken from the 20 & 21 Vict. c. 54, s. 11, and see the 7 & 8 Geo. 4, c. 29, s. 52, and 9 Geo. 4, c. 55, s. 45 (1). The latter part of this clause is repealed by 53 & 54 Vict. c. 71, s. 27, and it is provided that a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in respect of any of the misdemeanors referred to in sec. 85, of 24 & 25 Vict. c. 96.

which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.'

Sec. 87. 'No misdemeanor against any of the last twelve preceding sections of this Act shall be prosecuted or tried at any Court of general or quarter sessions of the peace.' (h)

By 31 & 32 Vict. c. 116, after reciting that it is expedient to provide for the better security of the property of co-partnership and other joint beneficial owners against offences by part owners thereof, and further to amend the law relating to embezzlement, it is enacted:—

Sec. 1. 'If any person, being a member of any co-partnerships, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners.' (i)

**Railway companies.**—By 3 & 4 Vict. c. 97, s. 4 (an Act for regulating railways), every officer of any railway company who shall wilfully make any false return to the Lords of the Privy Council for Trade, shall be deemed guilty of a misdemeanor. (j)

By 29 & 30 Vict. c. 108 (the Railway Companies Securities Act, 1866) s. 17, if any director or officer of a railway company is guilty of an offence against this Act, he shall be liable, on conviction thereof on indictment, to fine or imprisonment, or, on summary conviction thereof, to a penalty not exceeding ten pounds.

By 31 & 32 Vict. c. 119 (the Regulation of Railways Act, 1868), s. 5, if any statement, balance sheet, estimate, or report, which is required by this Act is false in any particular, to the knowledge of any person who signs the same, such person shall be liable, on conviction thereof on indictment, to fine and imprisonment, or, on summary conviction thereof, to a penalty not exceeding fifty pounds.

By sec. 8 of this Act, any inspector may examine upon oath the officers and agents of the company in relation to its business, and any person who, when so examined, makes any false statement, knowing the same to be false, is guilty of perjury.

By 34 & 35 Vict. c. 78 (the Regulation of Railways Act, 1871), s. 10,

(h) This clause is taken from the 20 & 21 Vict. c. 54, s. 16. There was a provision in the 20 & 21 Vict. c. 54, s. 14, that if on the trial of any misdemeanor against that Act, it appeared that the offence amounted to larceny, the defendant should not be acquitted. This clause was omitted, because by the 14 & 15 Vict. c. 100, s. 12, in such a case the defendant is not to be acquitted, unless the Court think fit to direct the jury to be dis-

charged, and the defendant to be indicted for the felony; and this appeared to be the better provision of the two.

(i) The section applies to an association which is not legalised. *R. v. Tankard* (1894), 1 Q. B. 548.

(j) This section is repealed except so much as relates to a table of tolls, rates, and charges, by 34 & 35 Vict. c. 78, s. 17.

if any return which is required by this Act is false in any particular to the knowledge of any person who signs the same, such person shall be liable, on conviction thereof, on indictment, to fine and imprisonment or, on summary conviction thereof, to a penalty not exceeding £50.

**Officers of savings banks.** — By 26 & 27 Vict. c. 87, s. 9, if any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank, shall receive any sum or sums of money from or on account of any depositor, or person desirous of becoming such, or on account of such savings bank, and shall not forthwith, or in the case of local receivers acting on behalf of any savings bank, within the time specified in the rules of the said savings bank, duly account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the said savings bank, such actuary, cashier, secretary, officer, or local receiver, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanor.

By the Municipal Corporations Act, 1882, (k) s. 117, 'If any person authorised to receive money to arise from the sale of any annuities or securities purchased or transferred under the foregoing provisions of this Act, or under any Act repealed by this Act, or any dividends thereon, or any other such money as aforesaid, appropriates the same otherwise than as directed by this Act or by the Treasury in pursuance thereof, he shall be guilty of a misdemeanor,' and shall be subject, in respect thereof, to the provisions of 24 & 25 Vict. c. 96, s. 75.

(k) 45 & 46 Vict. c. 50.



## CHAPTER THE TWENTY-FIRST.

### OF EMBEZZLEMENTS OF MINOR IMPORTANCE.

SEVERAL enactments are to be found amongst the statutes relating to embezzlements of minor importance, and providing for their punishment by a summary mode of proceeding.

By the 39 & 40 Vict. c. 36, s. 85, 'If any goods shall be taken out of any warehouse without due entry, the occupier of such warehouse shall forthwith pay the duties due upon such goods; and every person taking out any goods from any warehouse without payment of duty, or who shall aid, assist or be concerned therein, and every person who shall destroy or embezzle any goods duly warehoused, shall be deemed guilty of a misdemeanor, and shall upon conviction suffer the punishment by law inflicted in cases of misdemeanor, (a) but if such person shall be an officer of customs or excise not acting in the due execution of his duty, and shall be prosecuted to conviction by the importer, consignee, or proprietor of such goods, no duty shall be payable for or in respect of such goods, and the damage occasioned by such destruction or embezzlement shall, with the sanction of the Commissioners of the Treasury, be repaid or made good to such importer, consignee, or proprietor by the Commissioners of Customs.'

In Chit. Crim. Law a precedent is given of an indictment against a surveyor of highways, for using materials obtained for repairing the highways upon his own premises, for employing the public labourers on his own grounds, and for embezzling the gravel and other materials which had been procured for the parish. (b) This indictment does not appear to have been framed upon the provisions of any statute; but to have charged the offence against the defendant as a misdemeanor at common law; laying the acts to have been done by colour of his office, and in dereliction of his duty as surveyor of the highways. (c)

(a) See vol. i. p. 66.

(b) 3 Chit. Crim. L. 666, where it is said in note (p), that this indictment was pro-

cured from the crown office, and was used in 1799 against one Robinson.

(c) See vol. i. p. 416, *et seq.*, as to offences by persons in office.

## CHAPTER THE TWENTY-SECOND.

### OF EMBEZZLEMENT BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND, AND BY PUBLIC OFFICERS, OR BY THE POLICE.

By the 24 & 25 Vict. c. 96, s. 73, 'Whosoever, being an officer or servant of the governor and company of the Bank of England or of the Bank of Ireland, and being entrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of or belonging to the said governor and company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with any such bond, deed, note, bill, dividend or other warrant, security, money, or other effects as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for life [or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.] (b)

The prisoner was indicted under the 15 Geo. 2, c. 13, as a servant, entrusted with a note of the governor and company, for embezzling it. It appeared that he took it off a cancelled file, to which he and many other clerks had access, and that he was the person who read from the cash-book the sums and dates to check the cancelled account, and there was evidence that his motive was to get a reward from the bank by shewing how this fraud could be committed. The recorder saved the points whether the cancelled note came within the description in the 15 Geo. 2, of a note, security, or effects of the bank; and also whether, in case it did, the prisoner was so entrusted with the possession of it as to be within the statute. The conviction was held bad, on the ground that it did not appear by the facts, as stated, that the prisoner was a person *entrusted* with the cancelled note, although he had *access* to it. (c)

An indictment on this statute charging the prisoner with embezzling 'certain bills, commonly called *exchequer bills*,' was held to fail, as the

(a) The words in brackets are repealed, but the punishment remains the same except as to solitary confinement. See *ante*, p. 50, note (e).

(b) This clause is framed from the 37 Geo. 3, c. 48, s. 6; 35 Geo. 3, c. 56, s. 6; 15 Geo. 2, c. 13, s. 12; 4 & 5 Vict. c. 56,

ss. 1, 4; 21 & 23 Geo. 3, c. 16, s. 16 (1), and 5 Vict. Sess. 2, c. 28, s. 4 (1).

(c) *R. v. Bakewell*, MS. Bayley, J., and R. & R. 35. 2 Leach, 943, and noticed by Le Blanc, J., 2 Leach, 962, and there said to have gone off upon another point. The cancelling was effected merely by a punch through.

person who signed the bills on the part of government was not legally authorised so to do. It appeared that the bills in question were issued under the 43 Geo. 3, c. 5, which contained a proviso that every such bill should be signed by the auditor of the exchequer, or in his name by any person duly authorised by him to sign the same, with the approbation of three or more of the lords commissioners of the treasury, in writing under their hands; but which proviso had not been complied with, as the authority of a Mr. Jennings, by whom the bills were, in fact, signed, had not been properly renewed. Upon this it was objected, on behalf of the prisoner, that the bills in question were not legal exchequer bills; and that, as the indictment in every count averred the instruments alleged to have been embezzled to be exchequer bills, the allegation was not proved. And the Court were of opinion that the objection was good; that as the formalities required by the statute, by which these bills were created, had not been complied with, they were not good exchequer bills; and that the circumstances of the Bank of England having purchased them as exchequer bills, and of the bills having in that character answered the purposes for which they were originally created, could have no effect in this case, as they could not alter the nature of the fact. (*d*)

But another indictment was preferred against the prisoner, which described the exchequer bills in question as *effects* belonging to the governor and company of the Bank of England: stating the effects, in the first count, as paper writings, purporting to be exchequer bills; in the second, as certain papers upon the credit whereof the bank had advanced a large sum of money; and in the third, as certain papers, &c., purporting to be bills commonly called exchequer bills; and in other counts, the exchequer bills in question were called *securities* instead of effects. It was objected by the counsel for the prisoner, before any evidence was called on the part of the prosecution, that, as it had been determined, by his acquittal on the former indictment, that the papers he was charged with having embezzled were not exchequer bills at the time of the embezzlement, he could not be again charged with having embezzled the same papers, as being *effects* belonging to the Bank of England; he having committed no other act of embezzlement than that contained in the former indictment; for though by a remedial statute, 43 Geo. 3, c. 60, these defective papers had been rendered good and valid exchequer bills for civil purposes, yet, that statute having impliedly declared that these papers were, previously to the passing it, mere waste papers, and of no value at the time the embezzlement of them took place, it could not *ex post facto* make them valuable *effects*, within the 15 Geo. 2, c. 13, s. 12; which word *effects*, it was contended, could apply only to things in themselves of intrinsic value. But Le Blanc, J., observed, that the word '*securities*' was used in the statute as well as the word '*effects*:' which shewed that the Legislature intended that the statute should extend to other kinds of property than securities; the word '*effects*' being of a larger and more comprehensive meaning than the word '*securities*:' and he directed that the trial should proceed. The facts of the case were then proved; and the jury having found the

(*d*) Aslett's (first) case, 2 Leach, 954. Macdonald, C. B., Rooke and Lawrence, JJ.

prisoner guilty, the case was reserved for the consideration of the twelve judges. The important question submitted to them was, whether, on the true construction of the 15 Geo. 2, c. 13, s. 12, these papers, which were issued as exchequer bills, did, in point of law, come within the words 'effects or securities,' meant to be described in the Act? After able argument by counsel, and much consideration by the judges, at different conferences, the result of their mature deliberation was communicated by Lord Alvanley, C. J., who stated that the judges had not been unanimous upon this point, but that a majority of them were of opinion that the bills, or papers, were 'effects or securities,' within the true meaning of the Act, and that the prisoner was properly convicted. After alluding to the great object of the Legislature, in giving protection and security to the Bank of England, his lordship proceeded to state that the papers in question were papers of value; that though they might not, on the face of them, be of any descriptive legal value, yet that they carried about them such a consequence, at least, as might make their preservation of infinite importance to the bank; that the government of the country was pledged to pay them even as they were, the holders of them having as strong a claim upon the justice of the government for such payment as if they were technically correct in all their parts; and that they were, therefore, in the true meaning of the word, securities which might be rendered available to any persons having the legal right to them. He then observed, that the papers in question were not less to be deemed *effects*; which word was a very large and general term, and confined to no particular description of property, either in specie or value: and was, therefore, probably inserted in the Act, studiously, when the Legislature were placing a special guard around the bank; and also that the offence of embezzling the effects, or securities, mentioned in the Act, was not made larceny, where some value must attach on the thing taken, but was created a felony, which induced no necessity for any value being ascertained. He then put several cases to shew that the papers in question were *effects*; and after stating that the judges had not found themselves driven to the extreme length of construing the word 'effects' to extend to such trifling articles as the stumps of old pens, or a piece of blotting paper (an absurdity which had been supposed in argument); he said that their judgment only determined that the words of the Act necessarily extended to such securities, or effects, as were entrusted to the officers and servants of the bank; and that the bills in question came under that description. (e)

The 50 Geo. 3, c. 59, s. 1, reciting that, 'It is most expedient that due provision should be made effectually to prevent the embezzlement of money or securities for money belonging to the public, by any collector, receiver, or other officer entrusted with the receipt, custody, or management thereof;' enacted, 'that if any person or persons to whom any money or securities for money shall be issued for public services, shall embezzle such money, or in any manner fraudulently apply the same to his own use or benefit, or for any purpose whatever

(e) Aslett's (second) case, 1 New. Rep. decided in this case, that the 15 Geo. 2, 1. 2 Leach, 958, R. & R. 67. It was also c. 13, was not repealed by 39 Geo. 3, c. 85.

except for public services,' every such person shall be guilty of a misdemeanor. (f)

Sec. 2. 'If any such officer, collector, or receiver so entrusted with the receipt, custody, or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or entrusted to his care, or of the balances of money in his hands or under his control, such officer, collector, or receiver so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the Court, and be rendered forever incapable of holding or enjoying any office under the Crown.'

By the 24 & 25 Vict. c. 96, s. 69, 'Whosoever being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, shall steal any chattel, money, or valuable security (g) belonging to or in the possession or power of Her Majesty, or entrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (h) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](i)

Sec. 70. 'Whosoever being employed in the public service of Her Majesty, (j) or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, (k) shall embezzle *any chattel, money, or valuable security which shall be entrusted to or received or taken into possession by him by virtue of his employment*, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit,

(f) This section was repealed by the 2 Wm. 4, c. 4.

(g) See sec. 1, *ante*, p. 235.

(h) The words in brackets are repealed, but the punishment remains the same except as to solitary confinement. See *ante*, p. 50, note (o).

(i) This clause is new. Its object is to place the persons mentioned in it in the same position as ordinary clerks and servants, and it is framed so as to bear the same relation to the next following section as sec. 67 does to sec. 68. As to hard labour, &c., see *ante*, p. 51; vol. i. p. 80, 81.

(j) A., an inspector of prisons, duly authorised to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools under 29 & 30 Vict. cc. 117, 118, and instructed to pay the amount received into the Bank of England, to the credit of the Paymaster-General, employed the prisoner, a member of the police force of the borough of L., as his agent in taking

proceedings against the parents of such children for the recovery of such contributions on A.'s behalf, and for generally carrying out the provisions of the Reformatory and Industrial Schools Act. Under this employment, which was sanctioned by Her Majesty's Treasury, the prisoner received and misappropriated moneys, the contributions of parents, ordered by magistrates to be paid for the maintenance of their children in the schools. Held, that the prisoner was, while so employed, in the public service of Her Majesty, so as to render him amenable to indictment for embezzlement under 24 & 25 Vict. c. 96, s. 70. *R. v. Graham*, 13 Cox, C. C. 57. The High Bailiff of a County Court appointed the prisoner under the powers contained in the County Court Acts as a bailiff, to assist him in his duties. It was held that he was not a person employed in the service of Her Majesty, but was the servant of the High Bailiff. *R. v. Parsons*, 16 Cox, C. C. 498.

(k) See sec. 1, *ante*, p. 235.

or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from Her Majesty, and being convicted thereof shall be liable, [at the discretion of the Court,] (l) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour;] and every offender against this or the last preceding section may be dealt with, indicted, tried, and punished either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of *larceny*, embezzlement, or fraudulent application or disposition of any chattel, money, or valuable security in this and the last preceding section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in Her Majesty.' (m)

By sec. 71, (n) three distinct acts of embezzlement, fraudulent application, or disposition, committed within the space of six months, may be included in one indictment: and where the offence relates to money or a valuable security, the money or security may be described simply as money, and the allegation will be sustained by proof of any amount, though it be not proved of what such amount was composed.

By sec. 72, (o) any person indicted for embezzlement, fraudulent application or disposition of any property, may be convicted of larceny, if the offence turn out to be larceny, and *vice versa*.

By sec. 98, principals in the second degree, and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact, except receivers, are punishable

(l) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(m) This clause is taken from the 2 Will. 4, c. 4, ss. 1, 4, 5, with an insertion of words to include the clause in the 22 & 23 Vict. c. 32, s. 25, as to the police. The words of the former enactment were, 'embezzle the same.' The words in *italics* were substituted as more correct. The clause is extended as to the venue, commitment, and indictment, so as to include cases falling within the preceding section. By the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 29. 'Any moneys, chattels, or other valuable securities which shall or may be received by any officer,

clerk, or other person in the service of the Customs, either as duties of Customs or under or by virtue of any statute or by the order or direction of the Commissioners of Customs or in virtue of his office or employment, or otherwise for the use and service of Her Majesty or of any public department, shall be deemed to be moneys, chattels, or valuable securities for the public service, and shall be considered as such within the meaning of 24 & 25 Vict. c. 96, and in any information, indictment, or other instrument relating thereto the same may be laid as the property of Her Majesty.'

(n) *Ante*, p. 347.

(o) *Ante*, p. 349.

#### AMERICAN NOTE.

<sup>1</sup> In the various statutes in America creating the offence of embezzlement, the word "officer" frequently occurs, and the word would seem to include most of the public officers affected by the English statutes. See *U. S. v. Bixby*, 10 Bis. 238. *S. v. Wells*, 112 Ind. 237. *Hoyt v. S.*, 50 Ga. 313. *S. v. Newton*, 26 Ohio St. 265. *C. v. Morrissey*, 86 Pa. 416. *S. v. Brandt*, 41

Iowa, 593. *P. v. McKenney*, 10 Mich. 54. *Kavanaugh v. S.*, 41 Ala. 399. A provision for the punishment of the offence of embezzlement by any cashier or other officer of any bank was held in Massachusetts to apply to embezzlements by the president and directors of a bank. *O. v. Wyman*, 8 Met. 247.

by imprisonment for any term not exceeding two years, with or without hard labour. (g)

An indictment upon the 2 Will. 4, c. 4, was sufficient, although it did not allege that the prisoner embezzled the money whilst he was employed in the public service. A count charged that the prisoner, being at a certain time and place a clerk employed in the public service of Her Majesty, and by virtue of such employment entrusted with the receipt and custody of money, the property of Her Majesty, did then and there receive into his possession, by virtue of such employment as such clerk, certain money, the property, &c., and did then and there feloniously embezzle the same, and so did feloniously steal, take, and carry away the same; and it was objected that the count was bad, as it did not allege that the prisoner embezzled whilst he was such clerk; the allegation of his being clerk was confined to the fact of receiving the money, and did not necessarily extend to the time of the embezzlement. Coleridge, J., 'I am clearly of opinion that the indictment is good. If the fact of the prisoner's continuing clerk be necessary to the offence, the indictment, grammatically taken, would perhaps contain a sufficient averment of that fact. But it is by no means clear that an embezzlement (if such a case be possible) after a person ceased to be clerk or servant, of money received whilst he was such, would not be within the Act. The statute, in its words, does not necessarily imply that he should embezzle whilst clerk or servant, and if it does so imply it, the indictment which pursues the same terms also implies it.' (r)

Evidence of acting in the capacity of an officer employed by the Crown is sufficient to support an indictment under this statute, and the appointment need not be regularly proved. (s)

We have seen that in several cases great discussion has taken place upon the question whether on an indictment under the 2 Wm. 4, c. 4, it was necessary to prove the embezzlement or misapplication of any particular sum, or whether it was not sufficient to prove a general deficiency in account, and the cases on this subject have been already introduced with those decided as to ordinary clerks or servants, in order that all the cases bearing on the question might be considered together, and therefore it is sufficient to refer to them here. (t)

Where a prisoner was indicted under the 2 Wm. 4, c. 4, s. 1, for embezzling money received by him by virtue of his employment as a letter carrier, and it appeared that he was a letter carrier employed by the post-office to deliver letters about Gloucester, and he had been in the habit of calling at the lodge of the county infirmary, and receiving letters there, and a penny upon each to prepay the postage, and his practice was to deliver these letters at the post-office; he sometimes omitted to call at the lodge, and then the letters were taken by some one else, and put in the post-office; and during his illness, a person who performed his duties had called at the lodge, received the letters and pennies, and delivered them at the post-office in the same manner as the prisoner. No evidence was given of the

(g) As to proceedings against the employes of local marine boards, see 57 & 58 Vict. c. 60, s. 248, *ante*, p. 347.

(r) *R. v. Lovell*, 2 M. & Rob. 236. See this case, *ante*, p. 337, as to the point

whether a servant of the crown was a servant within the 7 & 8 Geo. 4, c. 29, ss. 46, 47.

(s) *R. v. Borrett*, 6 C. & P. 124; *R. v. Townsend*, C. & M. 178, *infra*.

(t) See *R. v. Moah*, Dears. C. C. 626, and *R. v. Lambert*, 2 Cox, C. C. 300.

terms of the prisoner's appointment. There was evidence that the prisoner had embezzled some pence received with the letters. It was objected that there was no evidence that the pence were received by virtue of his employment. It was the mere voluntary act of the prisoner to go and receive the letters. Coleridge, J., 'I think there is evidence to go to the jury. The case does not rest simply on what was done by the prisoner, but there is also the fact that the person who performed his duties during his illness pursued the same course as the prisoner.' (u)

(u) *R. v. Townsend*, C. & M., 178.



## CHAPTER THE TWENTY-THIRD.

### OF LARCENY AND EMBEZZLEMENT BY PERSONS IN THE POST-OFFICE; OF STEALING LETTERS; AND OF SECRETING BAGS OR MAILS OF LETTERS.<sup>1</sup>

THESE offences were formerly punished under the provisions of the 5 Geo. 3, c. 25; the 7 Geo. 3, c. 50; the 42 Geo. 3, c. 81; and the 52 Geo. 3, c. 143; but the 1 Vict. c. 32, after the 1st of August, 1837, repeals the whole of the 5 Geo. 3, c. 25, 'except so much thereof as relates to the postage on letters and packets conveyed by the post within the British dominions in America and the West Indies, and to any felony or other offence committed within such dominions;' the whole of the 7 Geo. 3, c. 50, 'except so much thereof as relates to any felony or other offence committed within the British dominions in America and the West Indies;' the whole of the 42 Geo. 3, c. 81; and so much of the 52 Geo. 3, c. 143, 'as relates to the post-office.' And the punishment of these offences is now regulated by the 1 Vict. c. 36, which came into operation on the 1st of August, 1837. (a) The Acts relating to telegraph messages will be found *post*, p. 396.

By 1 Vict. c. 36, s. 25, 'Every person employed by or under the post-office who shall, contrary to his duty, open or procure or suffer to be opened a post letter, (b) or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of

(a) The previous sections impose penalties on contravening the privilege of the post-office, retaining ship letters, abusing the privilege of newspapers, on masters of ships not taking letter bags, on carelessness and misconduct of persons engaged in conveying or delivering letter bags, letters, &c., on collectors of tolls demanding toll or stop-

ping mails; and provide as to the mode of proceeding for recovery of the penalties, &c. Penal servitude or imprisonment is now substituted for the punishment of transportation. See 47 & 48 Vict. c. 76, s. 18, *post*, p. 399.

(b) As to disclosing the contents of a telegraph message see *post*, p. 396.

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#### AMERICAN NOTE.

<sup>1</sup> There are provisions in the statutes of the United States very similar to those contained in the English statutes relating to the secreting, embezzling, or destroying of post-letters, and the American Courts follow the English Courts in their interpretation of the words used. The term "Post-office" in America seems to include any place of deposit for letters. It may be a desk, a trunk, or box carried about from one building to another. *U. S. v. Marselis*, 2 Blatch.

108. *U. S. v. Nott*, 1 McLean, 499. A "letter carrier" is in America a somewhat different person from an English letter carrier. *U. S. v. Parsons*, 2 Blatch. 104, and the word "Post-letter" does not occur in the American statutes. See *U. S. v. Fisher*, 5 McLean, 23. *U. S. v. Pond*, 2 Curt. C. C. 265. *U. S. v. Tanner*, 6 McLean, 128. *U. S. v. Driscoll*, 1 Low. 303. *U. S. v. Emerson*, 6 McLean, 406.

a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the Court shall seem meet: Provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state, and in Ireland under the hand and seal of the Lord Lieutenant of Ireland.'

By the Post-office Act, 1891 (54 & 55 Vict. c. 46), s. 10, 'Any person not in the employment of the Postmaster-General, who wilfully and maliciously, with intent to injure any other person, either opens or causes to be opened any letter which ought to have been delivered to such other person, or does any act or thing whereby the due delivery of such letter to such other person is prevented or impeded, shall be guilty of a misdemeanor and be liable to a fine not exceeding £50, or to imprisonment not exceeding six months.

'Nothing in this section shall apply to a person who does any act to which this section applies, when he is parent, or in the position of a parent or guardian, of the person to whom the letter is addressed.

'A prosecution shall not be instituted in pursuance of this section, except by direction of the Postmaster-General.

'A letter, in this section, means a post letter, within the meaning of the Post-office Protection Act, 1884, and any other letter which has been delivered by post.'

By 1 Vict. c. 36, s. 26, 'Every person employed under the post-office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall at the discretion of the Court, either be transported beyond the seas for the term of seven years, (c) or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life.' (d)

Sec. 27. 'Every person who shall steal from or out of a post letter any chattel or money or valuable security, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life.' (d)

Sec. 28. 'Every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post-office or from an officer of the post-office or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life.' (d)

Sec. 29. 'Every person who shall steal, or unlawfully take away a

(c) Penal servitude for any term not exceeding seven and not less than three years.

(d) Penal servitude for life or any term not less than three years.

post letter bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years.' (e)

Sec. 30, 'with regard to receivers of property sent by the post and stolen therefrom,' enacts, 'that every person who shall receive any post letter or post letter bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the Post-office Acts, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent, or to have been intended to be sent by the post, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to be transported beyond the seas for life.' (f)

Sec. 31, reciting that 'post letters are sometimes by mistake delivered to the wrong person, and post letters and post letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in expectation of gain or reward,' enacts, 'that every person who shall fraudulently retain, or shall wilfully secrete or keep or detain, or being required to deliver up by an officer of the post-office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable to be punished by fine and imprisonment.' (g)

Sec. 35. 'In the case of every felony punishable under the Post-office Acts, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by the Post-office Acts punishable; and every accessory after the fact to any felony punishable under the Post-office Acts (except only a receiver of any property or thing stolen, taken, embezzled, or secreted), shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under the Post-office Acts shall be liable to be indicted and punished as a principal offender.'

Sec. 36. 'Every person who shall solicit, or endeavour to procure any other person to commit a felony or misdemeanor punishable by

(e) Penal servitude for any term not exceeding fourteen and not less than three years.

(f) See *ante*, note (d).

(g) This provision is similar to the 42 Geo. 3, c. 81, s. 4 (now repealed); and

would meet such cases as *R. v. Mucklow*, R. & M. 160, *ante*, p. 131. Sec. 331 relates to forging the hand-writing of the receiver-general in England or Ireland, and will be found in *Forgery*.

the Post-office Acts shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being thereof convicted shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years.'

Sec. 37, 'for the more effectual prosecution of offences committed against the Post-office Acts,' enacts, 'that the offence of every offender against the Post-office Acts may be dealt with, and indicted and tried, and punished, and laid and charged to have been committed in England and Ireland, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place, and if committed in Scotland either in the high Court of justiciary at Edinburgh or in the circuit Court of justiciary to be holden by the lords commissioners of justiciary within the district where such offence shall be committed, or in any county or place within which such offender shall be apprehended or be in custody, as if his offence had been actually committed there; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag or post letter, or in respect of a post letter bag or post letter, or a chattel or money or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter bag or the post letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed in either of the said counties through which or adjoining to which or by the boundary of any part of which the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessory before or after the fact to any such offence, if the same be a felony or a high crime, and every person aiding or abetting or counselling or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried.' (h)

(h) Sec. 38 relates to bail in Scotland. It was formerly decided that an indictment for robbing a mail bag of letters must be laid in the county where the letters were actually taken, in order to bring the case within the statute 7 Geo 3, c. 50, s. 2; and that it could not be laid in the county where the prisoner was only in possession of them;

the jury having found that the letters were taken from the bag in some other county, through which the mail had passed. Thomas's case, 2 Leach, 634, 2 East, P. C. c. 16, s. 39, p. 605. It was argued in this case that there was a new taking and offence in the county where the prisoner had possession of the letters: but upon this it is

Sec. 39. 'Where an offence punishable under the Post-office Acts shall be committed within the jurisdiction of the admiralty, the same shall be dealt with and inquired of and tried and determined in the same manner as any other offence committed within that jurisdiction.'

Sec. 40. 'In every case where an offence shall be committed in respect of a post letter bag or a post letter, or a chattel, money, or a valuable security, sent by the post, it shall be lawful to lay in the indictment or criminal letters to be preferred against the offender the property of the post letter bag or of the post letter, or chattel or money or the valuable security sent by the post, in the Postmaster-General; (i) and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the post letter bag or any such post letter or valuable security was of any value; and in any indictment, or in any criminal letters to be preferred against any person employed under the post-office for any offence committed against the Post-office Acts, it shall be lawful to state and allege that such offender was employed under the post-office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment.'

Sec. 42. (j) 'Where a person shall be convicted of an offence punishable under the Post-office Acts for which imprisonment may be awarded, the Court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction.' (k)

Sec. 47. (j) 'for the interpretation of the post-office laws,' (l) enacts, 'that the following terms and expressions shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found; (that is to say) the term *British letter* shall mean a letter transmitted within the United Kingdom; and the term *British newspapers* shall mean newspapers printed and published in the United Kingdom, liable to the stamp duty and duly stamped; and the term *British postage* shall mean the duty chargeable on letters transmitted by post from place to place within the United Kingdom, or if transmitted to or from the United Kingdom, chargeable for the distance which they shall be transmitted within the United Kingdom, and including also the packet postage, if any; and the term *Colonial letter* shall mean a letter transmitted between any of Her Majesty's colonies and the United Kingdom; and the term *Colonial newspapers* shall mean newspapers printed and pub-

observed that the statute 7 Geo. 3, c. 50, s. 2, did not make the stealing of letters generally a capital offence, but the stealing them from places particularly specified; which is a definite act, local in its nature, and cannot be extended, by construction, to a new taking in every county into which the thing stolen is conveyed, as in the case of simple larceny. 2 East, P. C. c. 16, s. 39, p. 606.

(i) See also the 3 & 4 Vict. c. 96, s. 66, that it is sufficient in any part of an indictment to describe the Postmaster-general as 'Her Majesty's Postmaster-General,' without any other name, addition, or description.

(j) Secs. 42 & 47 are amended by 47 & 48 Vict. c. 76.

(k) Sec. 43 gives a power of distress for the recovery of sums due for postage, not exceeding £20, in the United Kingdom or elsewhere in Her Majesty's dominions. Sec. 44 provides in what way duties for postage may be sued for. Sec. 45 gives the forms of conviction, &c. Sec. 46 regulates the mode of proceeding in actions.

(l) As to telegraph Acts being within this Act see *post*, p. 397.

lished in any of Her Majesty's dominions out of the United Kingdom; and the term *convention posts* shall mean posts established by the Postmaster-General under agreements with the inhabitants of any places; and the term *double letter* shall mean a letter having one inclosure; and the term *double postage* shall mean twice the amount of single postage; and the term *East Indies* shall mean every port and place within the territorial acquisitions now vested in the East India company in trust for Her Majesty, and every other port or place within the limits of the charter of the said company (China excepted), and shall also include the Cape of Good Hope; and the term *express* shall mean every kind of conveyance employed to carry letters on behalf of the post-office other than the usual mail; and the term *foreign country* shall mean any country, state, or kingdom not included in the dominions of Her Majesty; and the term *foreign letter* shall mean a letter transmitted to or from a foreign country; and the term *foreign newspapers* shall mean newspapers printed and published in a foreign country in the language of that country; and the term *foreign postage* shall mean the duty charged for the conveyance of letters within such foreign country; and the term *franking officer* shall mean the person appointed to frank the official correspondence of offices to which the privilege of franking is granted; and the term *Her Majesty* shall mean *Her Majesty, her heirs and successors*; and the term *Her Majesty's colonies* shall include every port and place within the territorial acquisitions now vested in the East India company in trust for Her Majesty, the Cape of Good Hope, the Islands of Saint Helena, Guernsey, Jersey, and Isle of Man (unless any such places be expressly excepted), as well as Her Majesty's other colonies and possessions beyond seas; and the term *inland postage* shall mean the duty charged for the transmission of post letters within the limits of the United Kingdom or within the limits of any colony; and the term *letter* shall include packet, and the term *packet* shall include letter; (m) and the expression *Lord Lieutenant of Ireland* shall mean the chief governor or governors of Ireland for the time being; and the expression *lords of the treasury* shall mean the lord high treasurer of the United Kingdom of Great Britain and Ireland, or the lords commissioners of Her Majesty's treasury of the United Kingdom of Great Britain and Ireland, or any three or more of them; and the term *mail* shall include every conveyance by which post letters are carried, whether it be a coach or cart or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term *packet boat*; and the term *mail bag* shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters; and the term *master of a vessel* shall include any person in charge of a vessel, whether commander, mate, or other person, and whether the vessel be a ship of war or other vessel; and the expression *officer of the post-office* shall include the Postmaster-General, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, post-boy, rider, or any other person employed in any business of the post-office, whether employed by the

Postmaster-General, or by any person under him or on behalf of the post-office; and the term *packet postage* shall mean the postage chargeable for the transmission of letters by packet boats between Great Britain and Ireland, or between the United Kingdom and any of Her Majesty's colonies, or between the United Kingdom and foreign countries; and the term *packet letter* shall mean a letter transmitted by a packet boat; and the term *penalty* shall include every pecuniary penalty or forfeiture; and the expression *persons employed by or under the post-office* shall include every person employed in any business of the post-office according to the interpretation given to officer of the post-office; and the terms *packet boats* and *post-office packets* shall include vessels employed by or under the post-office or the admiralty for the transmission of post letters, and also ships or vessels (though not regularly employed as packet boats) for the conveyance of post letters under contract, and also a ship of war or other vessel in the service of Her Majesty, in respect of letters conveyed by it; and the term *postage* shall mean the duty chargeable for the transmission of post letters; and the term *post town* shall mean a town where a post-office is established (not being a penny or twopenny or convention post-office); and the term *post letter bag* shall include a mail bag or box, or packet or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not contain post letters.'

By sec. 48, the Act extends to 'the islands of Man, Jersey, Guernsey, Sark, and Alderney, and in all Her Majesty's colonies and dominions where any post or post communication is established by or under the Postmaster-General of the United Kingdom of Great Britain and Ireland.'

The 52 Geo. 3, c. 143 (now repealed), related expressly to the embezzling and stealing the whole or *any part* of a bank note, &c. The former statute, 7 Geo. 3, c. 50, was not equally extensive; but it was holden that a letter carrier secreting half a bank note in one letter on one day, and the other half in another letter on another day, was guilty of a secreting within that statute. (*n*) And the 42 Geo. 3, c. 81, s. 2, extended the provisions of the 7 Geo. 3, c. 50, to the protection of any *parts* of the securities or instruments therein mentioned. (*o*)

Some of the cases decided upon the 7 Geo. 3, c. 50, and 52 Geo. 3, c. 143, may be useful in the construction of the similar provisions of the new statute.

It was holden upon an indictment on the 7 Geo. 3, c. 50, charging the prisoner, as a servant to the post-office, with embezzling a letter containing a bill of exchange, that it was not necessary to prove that he had taken the oath required by the 9 Anne, c. 10, s. 41. It was objected that as he had not taken the oath, he could not be considered as a legal servant to the post-office; but the objection, being submitted to the consideration of the twelve judges, was overruled. (*p*)

It has been held in several cases that it is sufficient to prove that

(*n*) *R. v. Moore*, 2 Leach, 575. 2 East, P. C. c. 16, s. 22, p. 582.

(*o*) See the interpretation clause, *ante*, p. 285.

(*p*) *Clay's case*, 2 East, P. C. c. 16, s. 21, p. 580. 1 Leach, 3, note (*a*).

the prisoner acted in the capacity charged in the indictment. Thus where husband and wife were indicted on the 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, and it was proved by the postmaster of Carmarthen that he had appointed the husband postmaster of Ferryside, and that that appointment was sanctioned by the Postmaster-General, and that the husband had been postmaster for three years; it was submitted that to support the indictment against the wife she must be employed by or under the post-office, and in this case she merely acted as the assistant of her husband in his absence; and with respect to the husband the written appointment ought to have been produced; but Parke, B., held it was sufficient to shew that the prisoners had acted as servants of the post-office. (q) So where the prisoner, who was indicted under the 2 Will. 4, c. 4 (now repealed), was a letter carrier employed by the post-office to deliver letters about Gloucester, and had been in the habit of calling at the lodge of the Gloucester infirmary, and receiving letters there, and a penny upon each to prepay the postage, and his practice was to deliver these letters at the Gloucester post-office; but he sometimes omitted to call at the lodge, and then the letters were taken by some person and put in the post-office; and during the time he had been ill, another person, who performed his duties, had also called at the lodge and received the letters and the pennies, and delivered them at the post-office in the same way as the prisoner. Evidence was also given to show that the prisoner had embezzled pence received at the lodge to prepay letters. It was admitted that proving that the prisoner acted as a letter carrier was sufficient to shew that he held that situation, but it was urged that where the charge was of embezzling money received by virtue of his employment, it must be shewn that it was the duty of the prisoner to receive the money, and in this case it was his mere voluntary act, and he was neither bound to go to the lodge nor to receive the letters; but it was held that there was evidence to go to the jury that the money was received by virtue of the prisoner's employment. (r)

It was held that a person, employed as a servant to clean boots and shoes, &c., by a law-stationer at a receiving-house of the general post-office in Middle Temple-lane, and who used to assist in tying up and sealing the post-office bag, was not a person 'employed by or under the post-office,' within the meaning of the 52 Geo. 3, c. 143. (s)

But where a postmistress employed the prisoner at a salary of 14s. a week to carry the letter bag from Dursley to Berkeley, and she was allowed by the post-office, in her quarterly account, the sums she paid him; but the prisoner never sorted the letters or opened any mail bag; it was held that he was a person in the employ of the post-office. (t)

The prisoner was charged as being employed under the post-office, and stealing a post letter containing money. He was in the service of a chemist, who was the postmaster of the district where the letter

(q) *R. v. Rees*, 6 C. & P. 606. *R. v. Borrett*, 6 C. & P. 124.

(r) *R. v. Townsend*, C. & M. 178. See also *Goodwin's case*, 1 Lew. 100.

(s) *R. v. Pearson*, 4 C. & P. 572, *Little-dale and Bosanquet, JJ.*

(t) *R. v. Salisbury*, 5 C. & P. 155, *Patteson, J.* See *R. v. Townsend*, C. & M. 178, *supra*.



was posted, as an assistant in his business, and received a salary from him, but nothing from the post-office; he used, however, occasionally to assist him in sorting letters, one of which he was proved to have abstracted. It was the practice for those similarly employed in district offices to go before a magistrate with a paper, get the paper filled up, and take an oath faithfully to perform the duties; and the prisoner's master when he entered his employ gave him such a paper, telling him to go before a magistrate and take the oath; the prisoner went away, and on his return said he had been before the magistrate, and taken the oath, and shewed the paper properly filled up. Cresswell, J., held that this was sufficient evidence of his being employed under the post-office. (u) So where the prisoner, who was indicted for a similar offence, was in the service of a district postmaster, and occasionally assisted in making up the letter bags, but without being specially employed by, or receiving any remuneration from the post-office; but it was proved that he had taken the same oath as the prisoner had in the preceding case; Patteson, J., held that it was quite sufficient, as it brought the case within the preceding case. (v)

Upon an indictment alleging that the prisoner being employed under the post-office stole a letter containing money, it appeared that the prisoner had for some time been employed under the post-office to carry letters from Cwm Avon to Taybach. The letters were delivered in a sealed bag, which it was his duty to deliver as he received it to the postmaster at Taybach, and on such delivery the performance of the duty of his employment was complete. One day the prisoner brought the bag safely, and delivered it to the postmaster, whose duty it was to sort the letters in time to make up the bags for the mail passing through the town. The prisoner, being requested by the postmaster to assist in the sorting, consented to do so, and whilst proceeding in the assortment, stole the letter in question. It was contended that as the sorting formed no part of the prisoner's duty, but was rendered merely for the personal accommodation of the postmaster, the case was not within the statute; but, upon a case reserved after a verdict of guilty, it was held that the prisoner came within the terms 'employed under the post-office;' for he was employed by the postmaster, who was employed by the Postmaster-General. (w)

Where on an indictment under the 1 Vict. c. 31, s. 26, for stealing a post letter containing a penny, the property of the Postmaster-General, it appeared that a female servant took a letter for her mistress to the post-office in Drury-lane, and a penny, for the purpose of paying the postage; but finding the shop shut, put the penny inside the letter, and fastened it with a pin, and dropped it into the letter-box, intending that the penny should be applied for the payment of the postage;

(u) *R. v. Milner*, 4 Cox, C. C. 275. Before the evidence of the oath and the paper was given, Cresswell, J., said, 'The sorting of letters certainly does not appear to come within the legitimate duty of a chemist's apprentice. There may be some difficulty, if no further evidence of employment by the post-office can be given.'

(v) *R. v. Simpson*, 4 Cox, C. C. 276. Until the oath was proved in this case, Patteson, J., entertained similar doubts to

Cresswell, J., in the preceding case, and said, 'I am not aware of any case in which it has been held that a person in the employment of a postmaster is in the employ of the post-office.'

(w) *R. v. Reason*, Dears. C. C. 226. During the argument, Coleridge, J., said, 'A postmaster in the country is often assisted by his wife. I have never understood it to be doubted that the wife, in such a case, is employed under the post-office.'

this letter the prisoner got into his possession at the general post-office, whilst engaged in stamping letters there; and it was urged that this was not a money letter; but Lord Denman, C. J., was of opinion that the letter came within the description in the Act of Parliament, viz., a letter containing money; and although the money was not put in for the purpose of its being conveyed in the letter to the country, yet that it was in fact money contained in the letter; and though it was only of small amount, yet the intention of the prisoner, and the breach of trust, and the dishonesty committed by him, were the same as if the money had been of larger amount, and had been enclosed in the letter to be sent into the country. (x)

But where an indictment under the same statute stated that the prisoner, being employed under the post-office, stole a post letter containing a sovereign, and there were counts charging the embezzling the letter and money, and a count for stealing a sovereign, the property of the Postmaster-General; and it appeared that the prisoner was a letter carrier, and in consequence of suspicions, an assistant inspector of the letter carriers enclosed a marked sovereign in a letter, directed it, and sealed and marked it as if it had been put into the post-office in the regular way as a paid letter; and while the letters were being sorted at the office, where the prisoner was employed, the letter was placed in a heap of letters which he was about to sort, and which he was about to deliver. The letter was not delivered, and the marked sovereign was found in the prisoner's pocket. The sovereign was one of those that are occasionally found on the floor of the general post-office, having fallen out of letters; they are collected and deposited with one of the officers of the post-office, and form a fund, which is carried to the credit of the public, under the direction of the Postmaster-General. It was objected that the letter could not be considered as a post letter, and that the sovereign could not be treated as the property of the Postmaster-General. Upon a case reserved, the judges were unanimously of opinion, that the objection, that it was not a post letter or a letter put into the post must prevail; the statute only applying to letters put into the post in the ordinary way; and secondly, that the sovereign must be considered, in point of law, as the property of the Postmaster-General, all the persons in the office being his servants; and therefore the sovereign was correctly described as the sovereign of the Postmaster-General; it was his sovereign against all the world except the owner of it. (y)

So where upon an indictment for stealing a post letter it appeared that the post-office authorities, suspecting the prisoner, caused to be made up a letter directed to T. Higgins, and enclosed money therein, and it had the usual postage stamp on it. Phayle, an inspector, delivered it in at the window of the outer hall of the general post-office personally to Gardiner, another inspector, who handed it to Clare, another inspector who locked it up for the night, and then handed it to Scales, a sorter, with directions to place it with the other letters, which in the due course of the office, the prisoner would have to take and sort

(x) *R. v. Mence*, C. & M. 234. There were other counts varying the charge, and probably there was one for stealing a post letter, and whatever doubt there may be as

to the ruling as stated, there can be no doubt that this letter was a post letter.

(y) *R. v. Rathbone*, C. & M. 220. 2 M. C. C. R. 242.

and deliver to Clare, in the letter carrier's office. Scales took an opportunity when the prisoner did not observe him of taking up some letters, which the prisoner had to sort, and mixed the letter in question with them, and placed the whole on the prisoner's seat, and directed the prisoner when he had sorted them to take them up to Mr. Clare's office in due course. The prisoner, either in sorting the letters, or in taking them up to Mr. Clare's office, opened and secreted the letter in question. In the ordinary course of posting a letter at the outer hall of the general post-office, Phayle would have placed it in the receiving box in the outer hall, instead of delivering it to Gardiner personally at the window; and, upon a case reserved after a verdict of guilty, it was held that the letter was not a post letter within the meaning of the Act; for no one received the letter who was authorised so to do, and the statute only applies to letters put in the post in the ordinary way. The case was governed by *R. v. Rathbone*, (z) from which it cannot be distinguished. (a)

The prisoner was indicted under the 1 Vict. c. 36, for stealing a post letter containing two half sovereigns. A superintendent of the post-office addressed a letter, 'Thomas Hicks, to be left at the Checkers, Radford-lane, Exeter,' and put two half sovereigns in it and sealed it. There was no such person as T. Hicks, and no such places in Exeter as the Checkers or Radford-lane. It was taken to the Oxford post-office, and sent thence in the Enstone bag by the mail cart to Enstone, where the prisoner was the postmistress, and she abstracted the half sovereigns. On the opening, Pollock, C. B., referred to the interpretation of 'post letter' in the 1 Vict. c. 36, s. 47, and said, 'This letter, if letter it be, is a fictitious one, and is not addressed to any person that ever existed. I do not think that this can be considered a letter at all, and, if so, it was certainly not a post letter.' At the close of the case it was contended that the prisoner was not guilty of larceny; the letter was sent with intent that she should receive it; the letter was put into the hands of the prisoner by the voluntary act of the superintendent himself; and therefore the prisoner committed no trespass in opening it. But Pollock, C. B., held that, as the letter was opened, and the half sovereigns taken out, the prisoner was guilty of larceny at common law. (b)

The prisoner was indicted for stealing a post letter containing a sovereign. In consequence of suspicion a sheet of paper was folded up as a letter by a person connected with the post-office, and addressed 'Mrs. Nicholls, George-street, Manchester,' which was a feigned address, and a marked sovereign was enclosed; and it was then posted at the post-office where the prisoner was on duty. When the bag was made up the postmistress examined the letter, and expressed her opinion that it contained money, in which opinion the prisoner coincided. By mistake the letter was not stamped, but put into the bag in the precise state in which it had been posted. The prisoner went with the letter bag to another post-office, as it was his duty, where on examination of the bag it was discovered that the letter was missing, and when about to be searched the prisoner took the letter from his pocket, and begged to be forgiven. It was contended that this was not a 'post letter,' as

(s) *Supra.*(a) *R. v. Shepherd*, Dears. C. C. 606.(b) *R. v. Gardner*, 1 C. & K. 628.

the paper contained no writing, was addressed to an imaginary person, and did not bear any post mark ; but the objection was overruled and the prisoner convicted. (c)

The prisoner was indicted for stealing a post letter containing money. The president of the London district office, suspecting the prisoner's honesty, made up and sealed a letter, and directed it to 'Mary Donaldson, Sackville-street, Dublin,' and enclosed in it half a sovereign. This letter, with two stamps upon it, was dropped into the box of the receiving-house in Aldgate, where the prisoner was employed. The address was fictitious, and the letter was posted only to test the honesty of the prisoner. The prisoner, instead of transmitting this letter to the General Post-office, abstracted it from the receiving-box, opened it, took out the half-sovereign, and kept both the letter and money, meaning to appropriate them to his own use. The jury found the prisoner guilty, and, upon a case reserved, the judges were unanimously of opinion that this was a post letter, and therefore the conviction was right. (d)

The prisoner was charged in different counts with stealing, embezzling, and destroying a post letter, he being at the time employed under the post-office. The prisoner was the post messenger between Glasgow Dock and Lancaster. The postmistress at the office at Glasgow Dock received the letter in question, addressed to 'Mary Shandley, 24 North-street, Liverpool,' together with £1 for a post-office order to that amount, 3*d.* for the poundage on such order, 1*d.* for the postage, and 1*d.* for the messenger from that office to the one in Lancaster, by way of commission or gratuity for his trouble in getting the order. The letter when received was unsealed, and the postmistress in due course delivered it, still unsealed, and with the money, to the prisoner, instructing him to obtain the order for the £1 at the Lancaster office, and then, after enclosing the order in it,

(c) *R. v. Newey*, 1 C. & K. 630, note (a). Gurney, B., said he would confer with some other judges on the point, and the prisoner was afterwards transported without any notice being taken of this point.

(d) *R. v. Young*, 1 Den. C. C. R. 194, 2 C. & K. 466. During the argument, Parke, B., said, 'I cannot understand why it is not a post letter; it has all the ingredients of the definition in the statute; and whether it can be delivered or no, seems beside the question. By sec. 47, 'The term post letter shall mean any letter or packet transmitted by the post under the authority of Postmaster-General: the question therefore is, what does the word 'letter' mean? and, with all deference, it no more means a fabricated letter than the terms 'bill of exchange,' 'sovereign,' or 'shilling' when used in an Act, mean a forged or counterfeit bill, sovereign, or shilling, unless the context shews that that is their meaning. It is apprehended that it is a general rule that, wherever a statute mentions anything, it means a real and genuine, and not a spurious or fabricated thing, unless, from the terms used, or the context, the contrary appears. It is clear that a forged, or even

an unstamped cheque, would not be a valuable security within sec. 26. Pooley's case, *post*, p. 388. Now, suppose a forged or unstamped cheque, enclosed in a fictitious letter and posted, and stolen in the post-office, it is clear that there could be no conviction for stealing the cheque, because it was forged or unstamped; and yet, according to these decisions, there could be a conviction for stealing the letter, although it was fabricated. In other words, in sec. 26, 'letter' includes a fictitious letter, but 'valuable security' does not include a fictitious security. If the Act is examined it is obvious the paramount intent was to protect genuine letters, and that the term 'letter' is throughout used with reference to genuine letters alone. One of the essentials of a letter is that it shall be sent by one person with the intent that it shall reach another person; and by the interpretation clause 'a letter shall be deemed a post letter from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed,' and therefore it assumes that there is to be a person to whom it is directed.

to post the letter at that place. The postmistress at the Lancaster office stated that the prisoner had never delivered the letter, and had paid no money at her office for the post-office order, nor on account of any such order. A portion of the same letter was, on the prisoner's apprehension, found in his box. It was submitted that the prisoner could not be considered as employed under the post-office in this instance, and that the letter was not a post letter, as it was delivered to him in order that he might perform an act of agency with respect to it before it should be actually posted at Lancaster. But Cresswell, J., was of opinion that under these circumstances the letter must be considered a post letter, and the prisoner in the employ of the post-office. (e)

It was decided on the 7 Geo. 3, c. 50, that a bill of exchange might be laid in the indictment as a warrant for the payment of money. The prisoner, a clerk employed in the post-office at Birmingham, was charged in the indictment with stealing from a letter a certain warrant for the payment of money; and it was objected on his behalf that the instrument in question was not according to the true construction of the statute, a warrant for the payment of money, but a post bill, note, or bill of exchange. (f) The prisoner having been found guilty, this point was submitted to the consideration of the judges. Three of the judges doubted, at first, whether the instrument could be considered as a warrant within the meaning of the statute; for as the statute enumerated specific things, and expressly mentioned bills of exchange, they thought that the words 'other warrant' must mean something besides a bill of exchange, (such as warrants from some of the public boards for payment of money) but they afterwards admitted that the case could not be distinguished from a case of forgery, where an indictment laid in the same manner was holden good; (g) and they ultimately appeared to be satisfied as to the indictment in the present case. The other nine judges were clear, that the indictment was well laid; as the instrument, though it was a bill of exchange, was also a warrant for the payment of money, that it was a voucher to the bankers, or drawees, if genuine, for the payment, and that it might also have been laid as a draft. (h)

Where the indictment charged the prisoner, as a person employed in sorting letters in the post-office, with secreting a letter, containing a draft purporting to be drawn in London, but which appeared to have been drawn at Maidstone without having any stamp upon it, contrary to the 31 Geo. 3, c. 25, s. 4, it was holden, that this was not a draft for the payment of money within the 7 Geo. 3, c. 50, s. 1. The objections taken at the trial were; first, that a draft on a banker or bill of

(e) *R. v. Bickerstaff*, 2 C. & K. 761. See *R. v. Glass*, 1 Den. C. C. 215, 2 C. & K. 395, where a letter carrier was entrusted with money in a similar manner to obtain money-orders, and he was held not guilty of stealing the money, as he had no intention to steal it when he received it.

(f) It was in the following form:—  
Post Bill.

No. 6127.

Birmingham, 13th Feb., 1783.

Sir Wm. Lemon Bt. and Co., bankers,

London, pay 5 Ga. to Mr. Richd. Moore or bearer, on dem<sup>d</sup>. value rec<sup>d</sup>.

Robt. Coales.

Five Ga.

Entd. R. Moore.

As to this being a post bill, it was observed that the words of the Act were '*Bank post bill*.'

(g) *Shepherd's case*, 2 East, P. C. c. 16, s. 22, p. 582.

(h) *Willoughby's case*, 2 East, P. C. c. 16, s. 22, p. 581.

exchange not stamped pursuant to the 31 Geo. 3, c. 25, and 37 Geo. 3, c. 136, could not be received in evidence for any purpose; but if it were admissible, then, secondly, that such a draft or bill of exchange, if it could be so called, could not be the subject of larceny, inasmuch as it could not be of any value whatever; and thirdly, that being so invalid, it could not be considered as a security for the payment of money within the 2 Geo. 3, c. 25, s. 3, the secreting of which, when sent in a letter, came within the meaning of the 7 Geo. 3, c. 50. The note was, however, received in evidence, and the jury found the prisoner guilty. And, on a case reserved, it was contended that the paper in question, purporting to be a draft for payment of money, was not in law a draft for payment of money, within the 7 Geo. 3, c. 50, as it was not stamped pursuant to the Stamp Acts; (*hh*) and that, being unstamped, it was not a chose in action, the stealing of which could be the subject of larceny within the 2 Geo. 2, c. 25, s. 3, (*i*) for without a stamp it was of no value; (*j*) and the judges were all of opinion that the draft not being stamped was of no value, nor in any way available, and therefore was not a bill or draft within the Act. (*k*)

Where the letter embezzled was described as having contained several notes, it was held to be sufficient to prove that it contained any one of them; and also that if the instrument is upon the face of it a note, the maker's signature need not be proved. In the same case it was also held, that upon an indictment stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either is sufficient. (*l*)

A case has been mentioned in a former part of this work, (*m*) where upon an indictment on the first section of the 7 Geo. 3, c. 50, it was holden, that a servant of the post-office, employed as a facer of letters, who secreted a letter containing the *paid notes* of a country bank, which were in the course of being conveyed from the London bankers, who paid them to the country bankers, for the purpose of being re-issued, had committed an offence within the statute; as the notes, though not re-issued, were considered as retaining the character and falling within the description of promissory notes. (*n*)

Upon an indictment on the 7 Geo. 3, c. 50, the charge was laid against the prisoner, in the first and third counts, as a person 'employed in sorting and charging letters in the post-office;' and in the second and fourth counts as a person 'employed in the business relating to the General Post-office;' and upon the evidence it appeared, that the prisoner was only a sorter and not a charger of letters, whereupon the jury were directed to convict him on the second and fourth counts only. But an objection was afterwards taken that, as the prisoner had been acquitted on the counts which charged him as a sorter and charger, and he did not appear to be

(*hh*) 31 Geo. 3, c. 25, and 37 Geo. 3, c. 136.

(*i*) Repealed by 1 Wm. 4, c. 66, s. 31.

(*j*) In the course of the argument, Lord Eldon, C. J., observed that the Legislature had not made it felony to secrete any letter, but to secrete any letter containing any of the particular securities specified in the statute.

(*k*) Pooley's case, 2 Leach, 887, 3 Bos. & Pull. 311. R. & R. 12. See R. v. Yates, R. & M. C. C. R. 170, *ante*, p. 241.

(*l*) R. v. Ellins, R. & R. 188.

(*m*) *Ante*, p. 242.

(*n*) Ranson's case, 2 Leach, 1090, R. & R. 232. And see Clarke's case, *ante*, p. 237.

a person employed by the post-office in any other business but that of sorting, which is one of the employments particularly specified in the statute, he could not be convicted on the second and fourth counts. And this objection being submitted to the consideration of the judges, they thought the objection valid; but they inclined to think that the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a sorter only. (o)

Where an indictment upon the 7 Geo. 3, c. 50, s. 1, charged the prisoner, as a person employed in the business of the post-office as a post-boy, &c., with secreting, &c., certain bills of exchange, contained in a letter sent by the post, which came to his possession in his said employment, it was holden not to be a variance to describe such letter in the indictment as one 'to be delivered to Messrs. B., N., and H. ;' as the word *Messrs.* was frequently added to their address in the direction of letters, and other papers received on business, though the parties themselves, in drawing or indorsing bills, making out invoices, &c., wrote B., N., and H., without ever adding *Messrs.* as part of their description. And it was considered that the acceptance of bills, directed to them in that manner, would be a using of that firm. It was also holden to be sufficient to allege, in part description of the bills so secreted and stolen, that they were subscribed by A. and B., without saying that they were drawn or made by them. (p)

Where an indictment on the 52 Geo. 3, c. 143, alleged that a letter was 'to be delivered to a certain person at Turvey,' and the letter was directed to Mr. P. at Turvey-house, which was in the parish of Turvey, about a quarter of a mile from the village of that name, it was held sufficient; for if it was to be delivered at Turvey-house, that was a delivery at Turvey, as Turvey-house was in the parish of Turvey. (q)

Though the post-office marks in town or country, proved to be such, are evidence that the letters, on which they appear, were in the office to which those marks belong at the dates which they specified; yet a mark of double postage having been paid on a letter is not of itself evidence that the letter contained an enclosure. Upon a case reserved, the judges held a conviction wrong, on the ground that there was not sufficient evidence of a double letter having been put into the post-office; the clerk, who put it into the office, paid the postage, and wrote 'post paid 2s.,' not having been called. (r)

Upon an indictment for stealing a letter the same proof of an asportation is sufficient, as in the case of stealing any other chattel. Where, therefore, a prisoner did not deliver a letter, and, being asked for it, produced it from his pocket, into which it must have been removed from the letter pouch, and the jury were told that if they were satisfied that the prisoner put the letter into his pocket with the intention of stealing or secreting it he might be convicted, and the

(o) *Shaw's case*, 2 Black. Rep. 789. 2 East, P. C. c. 16, s. 21, p. 580. 1 Leach, 79.

(p) *Dawson's case*, 2 East, P. C. c. 16, s. 39, p. 605.

(q) *R. v. Pearson*, 4 C. & P. 572, Little-dale and Bosanquet, JJ.

(r) *R. v. Plumer*, R. & R. 264. It seems to have been considered also in this case, that though a letter found upon the prisoner might properly be read, it was not evidence of the facts stated in it, and that such facts must therefore be proved by other evidence.

jury found that the prisoner detained the letter with the intention of stealing it, and convicted him, the conviction was held right. (s)

The offence of embezzling moneys received for the postage of letters was made punishable by the 5 Geo. 3, c. 25, s. 19, and the 7 Geo. 3, c. 50, s. 3. But these statutes are repealed by the 1 Vict. c. 32, and the 1 Vict. c. 36 contains no provisions for the embezzlement of moneys received for postage. (t)

Where the prisoner was indicted for secreting a letter, containing a bank note for ten pounds, the jury found specially that the prisoner was an officer employed in the business of the post-office, in stamping and facing letters; that he secreted the letter in question, while in the execution of his office, without opening it, and without knowing that the ten pound bank note was contained in it; and that he secreted it with intent to defraud the King of the postage thereof, which had been paid. The determination of the judges upon this case was never communicated. (u) But it is suggested that the case seems to fall within one of the offences provided for by the 5 Geo. 3, c. 25, s. 19; though some difficulty might have arisen in bringing it within the corresponding clause, 7 Geo. 3, c. 50, s. 3, because it appeared that the letter had not been destroyed, but was found in the prisoner's custody. (v)

In a case upon the 7 Geo. 3, c. 50, s. 2, it appeared that the prisoner, intending to steal the mail bags, went one night, about the usual time, to the post-office at High Wycombe; and, pretending to be the mail guard, obtained, from the person who was there, the bags of letters, which were let down to him from out of the window of the post-office by a string, from whence he took them, and immediately made off. Upon these facts the prisoner was convicted on a count in the indictment for stealing the letters out of the post-office; and the case being submitted to the consideration of the twelve judges, they were all of opinion that the conviction was right; and that the artifice of the prisoner, in obtaining the delivery of the letters, in the bag, out of the house, was the same as if he had actually taken them out himself. (w) In this case the property did not pass; as the postmaster had no property in the mail bags to part with. (x)

On an indictment for stealing post letters, it appeared that the prisoner had been in the service of C. & Co., and had been accustomed to go for them and get their letters at the post-office; and after he left their service a person, not identified, went to the post-office, and obtained five letters for C. & Co., and on the same day these letters were proved to have been in the prisoner's possession; Channell, B., left the case to the jury, in accordance with the cases in which it has been held, that prisoners who had obtained goods by fraud were guilty of larceny. (y)

(s) *R. v. Poynton*, L. & C. 247. See this case, *ante*, p. 124.

(t) The practice has been to indict in such cases under the 2 Wm. 4, c. 4.

(u) *Sloper's case*, 2 East, P. C. c. 16, s. 23, p. 583. 1 Leach, 81.

(v) 2 East, P. C. c. 16, s. 23, p. 583; and see *Howatt's case*, *infra*.

(w) *Pearce's case*, 2 East, P. C. c. 16, s. 39, p. 603.

(x) This was noticed as differing the case

from that of *Atkinson*, 2 East, P. C. c. 16, s. 104, p. 673. *Ante*, p. 168.

(y) *R. v. Gillings*, 1 F. & F. 36. See *R. v. Jones*, 1 Den. C. C. 188. In all such cases the postmaster has no power to part with the property in the letter, and therefore the offence is larceny and not false pretences. See *R. v. Kay*, D. & B. 231, *ante*, p. 178; and see *R. v. Dowdeswell*, cited *Roscoe's Criminal Evidence*, 11th ed. 623, 836, and *R. v. Middleton*, *ante*, p. 149.



It was supposed to have been decided that the second section of the 7 Geo. 3, c. 50, did not extend to servants of the post-office. (z) But the report of such decision has been mentioned as incorrect. And it is clear that a person might be convicted under the third section of the 52 Geo. 3, c. 143, for stealing a letter, though such person had an employment in the post-office, especially if such letter did not come to him in the course of his employment. The prisoner was employed by the post-office to deliver letters, and not to sort them; but he did sort them, when by rights, he ought not to have done so, and, whilst sorting, stole a letter. The indictment charged him as a sorter with secreting, and as a common person (under sec. 3 of the 52 Geo. 3) with stealing; but as it appeared that he ought not to have been allowed to sort, he was acquitted of secreting, and it was then urged that he could not be convicted under the third section, because he was a person employed in the post-office, and the case of *R. v. Pooley* was cited. A case being reserved, the judges stated that the report of *R. v. Pooley* was as to the point in question mistaken; that *R. v. Simpson, cor.* Lord Ellenborough, Thomson, B., and Lawrence, J., O. B. 1810, was in point the other way; that a man who stole was not less a person stealing because he had some employment in the office; and that upon a contrary construction if a person in the office stole, but not in the course of his employment, he would be unpunishable. (a)

Previously to the last case it had been holden that a letter carrier taking letters out of the post-office, intending to deliver them to the owners, but to *embezzle the postage*, was not indictable for stealing such letters, under the second section of the 7 Geo. 3, c. 50. The prisoner was a letter carrier at the post-office at Manchester; he contrived to obtain possession of the letters in question before they were counted out and delivered to him by any of the clerks in the usual way; and he was detected with them in his pocket, in the letter carrier's room, which was near to the clerk's office. But the jury found, when they convicted him, 'that he intended to have delivered the letters, and only to have embezzled the postage.' Upon the case being afterwards submitted to the consideration of the twelve judges, two of them, at first, suggested that, as the act of the prisoner deprived the Crown of its lien, though there were no intention to defraud the true owner, it was as much larceny as stealing from a pawnbroker; and that the clause in question was positive, without adverting to the view with which the act was done. On the other hand it was observed that the two first clauses of the statute, secs. 1 and 2, respected the safe carriage of letters, and seem to be confined, as appeared further by the preamble, to a taking to the prejudice of the owner: and that the third clause, sec. 3, was for the protection of the reve-

(z) *R. v. Pooley*, R. & R. 31, 2 Leach, 904. 1 East, P. C. *Addenda*, xvii., 3 Bos. & Pull. 315. Skutt's case, as stated in Pooley's case, 2 Leach, 904. A different objection is mentioned as the ground of the acquittal in Skutt's case in another report of it (1 Leach, 106, 2 East, P. C. c. 16, s. 22, p. 582), namely, that the letters contained *money*, and not any security relating

to the payment of money mentioned in the statute.

(a) *R. v. Brown*, MS. Bayley, J., and R. & R. 32, note (a). And see *R. v. Salisbury*, 5 C. & P. 155, where Patteson, J., held that a letter carrier might be convicted of stealing a letter out of a post-office upon an indictment under the 52 Geo. 3, c. 143.

nue; which went to shew that the Legislature did not mean to protect the revenue by the antecedent clauses. And it was also observed that if the letters had been so taken by those to whom they were directed, it would not have been within the clause under consideration: though, if it were a question of larceny at common law, it would be equally larceny in the owner. And this being an indictment on the statute, and not for taking the goods of such an one, as charged in an indictment for stealing the goods of a bailee, all the judges ultimately agreed that the conviction was wrong, on the finding of the jury, which negatived a stealing within the Act. (b)

Secreting a letter containing a bill of exchange was not within the 52 Geo. 3, c. 143, s. 2, if the object was to deliver the letter with its contents, but to cheat the revenue of the postage. The first count stated the prisoner to be employed in stamping letters, and that he secreted a letter containing bills of exchange. The second count charged the prisoner with stealing the bills. The prisoner was a stamper in the London post-office, and having been seen to slip a letter into his coat pocket, was desired to empty his pocket, which he did, and thereout produced eight letters, one of which was the letter stated in the indictment; it was a letter written from America, and put in the post-office at Liverpool, marked 'Liverpool ship letter;' from whence it arrived that morning, directed 'Mr. Samuel Williams, 13, Finsbury-square.' It was and had been taxed as a double letter, and the sum of three shillings and twopence marked upon it as the amount of postage, and had been afterwards stamped by the prisoner, whose duty it was, after stamping it, to deliver it to the sorter. The other seven letters were single letters, and it was sworn that they could be of no use to the prisoner, but to enable him to receive the postage. When the prisoner produced the letters, he was asked if he had any explanation to give, and he said he had taken them to *cog*, which is a cant phrase for taking them as missorted letters to get the postage. The jury found the prisoner guilty, but added that they thought the secreting the letter was only for the purpose of appropriating the postage; and, upon a case reserved, the judges were of opinion that, as the statute extended to such letters only as contained valuable documents, the security of the documents was the object contemplated by the Legislature, and as the prisoner had no intention to put these documents in hazard, or to prevent the person for whom they were intended from receiving them, the case, though within the letter, was not within the spirit of the Act, and the conviction was therefore wrong. (c)

One count charged the prisoner, whilst employed in the post-office, with stealing two letters containing money, another with secreting the letters. The prisoner's duty was to open the bags brought to the table at which he was placed, take out the letters and separate them. A bag, which contained amongst others the letters in question, was brought to the table. He opened it, took out all the letters, and put

(b) *Howatt's case*, 2 East, P. C. c. 16, s. 39, p. 604.

(c) *R. v. Sharpe, R. & M.*, C. C. R. 125. Sec. 26 of the 1 Vict. c. 36, seems framed

to meet this and the preceding case, as it makes the offence to secrete, 'for any purpose whatever,' a post letter, without reference to its contents. C. S. G.

them on the table before him. Twenty or thirty bags were opened on the same table by the prisoner at the same time, and the letter-bills of the several bags were by him spread before him on the table. It then became his duty to separate the registered letters and unpaid letters from the unregistered paid letters, and to fold the registered letters in the bills, and place them in a drawer. In the course of this separation he put two unregistered letters in one of the letter bills, and some of the registered letters in their respective bills in the drawer, from which he afterwards gave them to the register-clerk to check the bills containing them. He afterwards put the rest of the registered letters in the drawer, and when collected carried them to the register-clerk. When he had done so, he returned towards his table, and went to the water-closet. He was observed to hold in his hand what appeared to be a bill folded over letters, was followed, and after he had placed himself, with his breeches down, on the seat of the water-closet, was observed to put his hands between his legs. He was immediately taken into custody. On his coming from the water-closet, the two letters, sealed and unopened, lay on the paper contained in the pan. It appeared that if, through neglect, the letters were not accurately sorted, the person guilty of such neglect was liable to punishment. The jury found that the prisoner, having committed a mistake in sorting the letters in question, secreted them in the water-closet, in order to avoid the supposed penalty attached to such mistake; and, upon a case reserved, it was held that the evidence supported both counts. First, as to the secreting, no purpose was alleged in the indictment; but the words and object of the Act made it clear that no purpose need be stated. Particular duties are imposed on the servants of the post-office; they are not to secrete letters for any purpose whatever. If they secrete letters, be their purpose in doing so what it may, they are equally guilty. This decision is in exact accordance with *R. v. Douglas*, which was confirmed in error. (d) Secondly, as to the larceny. The act was clearly a larceny; the prisoner could have no other intention than to deprive the post-office authorities of the letters, which were their property; he put them in a place whence in a moment they would naturally disappear. They were therefore meant to be entirely withdrawn from the owner. (e)

The 52 Geo. 3, c. 143, s. 3, made it felony to steal 'from or out of any post-office or house or place for the receipt or delivery of letters;' and under that Act it was held that a receiving-house was not a 'post-office,' but 'a place for the receipt of letters,' and that the whole shop and not merely the letter-box was to be considered 'a place for the receipt of letters;' and that in order to constitute a stealing from or out of such place the letter must be carried out of the shop, and therefore, if a person took a letter and stole its contents in the shop, that was not an offence within that section of the Act. The indictment in some counts charged the prisoner with stealing a letter from and out of a certain post-office, and it appeared that the prisoner was

(d) 13 Q. B. 42, and see *Holloway v. R.*, 17 Q. B. 317.

(e) *R. v. Wynn*, 1 Den. C. C. 365. 2 C. & K. 859. 'The moment the prisoner

dropped the letters into the water-closet, there was an *asportavit*, and the intent is shewn by the place where they were dropped.' Per Parke, B.

servant of Mr. Abram, a law stationer, at a shop in Middle Temple Lane, which was a receiving-house of the general post-office. The letter in question was taken to Mr. Abram's shop, but whether it was put into the letter-box, or given to a person in Mr. Abram's shop, was not clearly proved. One of the notes contained in the letter was afterwards found in a boot, in a room of a house opposite to Mr. Abram's shop, and the prisoner acknowledged having put this note into the boot: it was held that this shop was not a post-office within the meaning of the Act; but that it was 'a place for the receipt of letters;' that the whole room was the place for receiving letters and not the mere box, and that if a person went into the shop and laid a letter on the counter, that was sufficient: but that in order to convict the prisoner of stealing the letter out of the post-office the jury must be satisfied that he took the letter out of the shop, and it was not sufficient if he opened it in the shop and took its contents out in the shop. (*f*)

The first count charged the prisoner with stealing notes out of a certain post letter; the second with stealing a post letter from a post-office; the third with stealing notes then sent by the post; the fourth was similar; and there were counts also for a simple larceny. A person took the letter containing the notes to the Talbot Inn, and placed it on a table under the bar window in the passage leading into the kitchen, and placed on the letter twopence to prepay the postage; and the prisoner being near, he pointed out the letter to her, when she said, 'They will be here directly, and I will give it to them;' and he then went away. The post-office was at the Talbot Inn, and the letter-box was in the before-mentioned passage, and always kept locked. The prisoner was in the service of the innkeeper, but he had never authorised the prisoner, or any other of his servants, to receive letters for him. It was objected that, in order to support the first four counts, it was essential to shew that the letter was a 'post letter,' which it was not; as it was neither put into the letter-box nor delivered to any postmaster, or to any person authorised by the post-office, or even authorised by the postmaster to receive letters for him; and Wightman, J., held that as to those counts the objection must prevail, as this was neither a 'post letter,' nor were the notes contained in it 'sent by the post.' (*g*)

On an indictment for stealing a £10 Bank of England note from a post letter, it appeared that Mrs. Rice took the letter containing the note to a district receiving-house, and handed it to the postmistress, with a request that it might be registered, and paid the fee for registration; but the postmistress, being busy at the time asked Mrs. Rice to call again, when she would give her a receipt. In the mean time she put the letter under a glass case in the shop, to which the prisoner had access. A short time afterwards Mrs. Rice called again; the letter was taken from the case and stamped, but it was subsequently discovered that the note had been extracted. It was contended that the letter could not be taken to be a post letter, and *R. v. Harley* (*h*) was relied upon. For the prosecution, sec. 47 of the Act,

(*f*) *R. v. Pearson*, 4 C. & P. 572. *Lit-tledale and Bosanquet*, JJ.

(*g*) *R. v. Harley*, 1 C. & K. 89. The prisoner was convicted of simple larceny.

(*h*) *Supra*.

which declares that 'the delivery to a letter carrier or other person authorised to receive letters for the post should be a delivery to the post-office,' was relied upon. Cresswell, J., 'I think *R. v. Harley* does not apply here. There was no delivery to any person authorised to receive the letter; here it was delivered into the hands of the postmistress herself. I think this is a post letter within the statute.' (i)

It has been held that letters put into pigeon-holes in a post-office for private individuals are still within the post-office. On an indictment on the 52 Geo. 3, c. 143, for stealing letters from the post-office at Liverpool, it appeared that at that post-office there is a set of pigeon-holes, into which letters for certain merchants, who pay to the postmaster a guinea a year, were placed immediately on their arrival; and by this means those merchants were enabled to get those letters sooner than they otherwise would do; it was objected, that as soon as the letters were deposited in the pigeon-holes they ceased to be in the post-office, and consequently that the indictment for stealing from the post-office could not be sustained; but the objection was overruled. (j)

The 52 Geo. 3, c. 143, s. 2, contained two clauses, one relating to letters, &c., with which persons employed under the post-office had been 'entrusted in consequence of such employment,' the other relating to letters, &c., which in any other manner came into the possession of such persons 'whilst so employed.' The prisoner, who was indicted under this Act for stealing a letter from the post-office at Dursley, was employed by the postmistress at Dursley to carry letters from Dursley to Berkeley, and the evidence tended to shew that he had stolen a letter, sent from Cardiff and directed to Dudley, but which had been missent to Dursley. Patteson, J., 'I think this letter cannot be said to have come to his hands in consequence of his employment, because he, as a letter-carrier from Dursley to Berkeley, would not have a letter addressed from Cardiff to Dudley come to his hands in the course of his duty. However, the second section of the Act goes on, "whilst so employed." The question then is, whether those words relate to time only, or whether they make it essential that the letter should come to his hands in the course of his duty. I am inclined to think that they relate merely to time, because the words, "in consequence of such employment," are used in another part of the section.' (k)

Under the 52 Geo. 3, c. 143, s. 3, which provided for the stealing mail bags, &c., from 'any carriage or from the possession of any person employed to convey letters,' in a case where a mail rider had fixed the mail portmanteau on the saddle of his horse, containing four bags of letters, and had slung the bridle of his horse on a staple at the stable door of the post-office about thirty yards from the door of the house, and then went into the house to put on his great-coat and stayed about two minutes, and in the interval the robbery took place; it was held to be a stealing from the possession of the mail rider. (l)

(i) *R. v. Rogers*, 5 Cox, C. C. 298.

(j) *Brett's case*, 1 Lew. 228, Vaughan, B.

(k) *R. v. Salisbury*, 5 C. & P. 155, and MSS. C. S. G. The present Act omits the

distinction contained in the 52 Geo. 3, c. 143.

(l) *R. v. Robinson*, 2 Stark. N. P. C. 485, Wood, B.

By the 17 & 18 Vict. c. 83, s. 27, any unstamped document may be received in evidence in criminal cases, and it is therefore unnecessary to retain the old cases on the admissibility of unstamped documents.

By the 11 & 12 Vict. c. 88, s. 4, 'every officer of the post-office, who shall grant or issue any money order with a fraudulent intent, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall at the discretion of the Court either be transported beyond the seas for the term of seven years (*m*) or be imprisoned for any term not exceeding three years.' (*n*)

Upon an indictment for any offence mentioned in this chapter the prisoner may, under the 14 & 15 Vict. c. 100, s. 9, be convicted of an attempt to commit that offence, and may thereupon be punished in the same manner as if he had been convicted on an indictment for such attempt.

By 43 & 44 Vict. c. 33, s. 4 (4), a *postal order* is to be deemed an order for the payment of money, and a valuable security within the meaning of the statutes relating to forgery and stealing.

### Telegraph Messages. (*o*)

**Telegraph Acts.**—By the 31 & 32 Vict. c. 110, 'The Telegraph Act, 1868' (entitled 'An Act to enable her Majesty's Postmaster-General to acquire, work, and maintain Electric Telegraphs'), sec. 20, 'Any person having official duties connected with the post-office, or acting on behalf of the Postmaster-General, who shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic messages, or any message entrusted to the Postmaster-General for the purpose of transmission, shall, in England and in Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and shall upon conviction be subject to imprisonment for a term not exceeding twelve calendar months; and the Postmaster-General shall make regulations to carry out the intentions of this section, and to prevent the improper use, by any person in his employment or acting on his behalf, of any knowledge he may acquire of the contents of any telegraphic message.' (*p*)

By sec. 21, 'In every case where an offence shall be committed in respect of a telegraphic message sent by or entrusted to the Postmaster-General it shall be lawful and sufficient in the indictment or criminal letters to be preferred against the offender, to lay the property of such telegraphic message in Her Majesty's Postmaster-General,

(*m*) Penal servitude for any term not exceeding seven and not less than three years.

(*n*) By sec. 5, in any indictment, &c., for any felony or misdemeanor committed or attempted to be committed in respect of anything relating to the post-office, it shall be sufficient in every place to name 'Her Majesty's Postmaster-General,' without any further description. By 43 & 44 Vict. c. 33, s. 4 (3) 'An officer of the post-office

who reissues a (postal) order previously paid shall be deemed to have reissued the order with a fraudulent intent within the meaning of 11 & 12 Vict. c. 88, s. 4, and that section as amended is extended to the Isle of Man and the Channel Islands.

(*o*) A conversation through a telephone would, it seems, be a message. *A. G. v. Edison Telephone Co.*, 6 Q. B. D. 244.

(*p*) See 47 & 48 Vict. c. 76, s. 11, *post*, p. 398.

without specifying any further or other name, addition, or description whatsoever, and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the telegraphic message was of any value, and in any indictment or in any criminal letters to be preferred against any person employed under the post-office for any offence committed under this Act it shall be lawful and sufficient to state and allege that such offender was employed under the post-office at the time of the committing of such offence, without stating further the nature or particulars of his employment.'

By the 32 & 33 Vict. c. 73, s. 23, (r) 'Every written or printed message or communication delivered at a post-office for the purpose of being transmitted by a postal telegraph, and every transcript thereof made by any person acting in pursuance of the orders of the Postmaster-General, shall be a post-letter within the meaning of an Act passed in the first year of the reign of her present Majesty, c. 36; provided always that nothing in this Act contained shall have the effect of relieving any officer of the post-office from any liability which would but for the passing of this Act have attached to a telegraph company, or to any other company or person, to produce in any Court of law, when duly required so to do, any such written or printed message or communication.'

By sec. 24, "The Telegraph Act, 1868" (31 & 32 Vict. c. 110, *supra*) and this Act shall be "Post Office Acts," and the provisions contained therein respectively shall be "Post Office Laws" within the meaning of the 1 Vict. c. 36.' See *ante*, p. 375, *et seq.*

By 33 & 34 Vict. c. 88 ('The Telegraph Act, 1870') these Acts are extended to the Channel Islands and the Isle of Man.

### *Injuring Post-Office Property.*

By the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76), sec. 3, 'A person shall not place, or attempt to place, in or against any post-office letter box any fire, any match, any light, any explosive substance, any filth, any noxious or deleterious substance or any fluid, and shall not commit a nuisance in or against any post-office letter box, and shall not do, or attempt to do, anything likely to injure the box, appurtenances, or contents. Any person who acts in contravention of this section shall be guilty of a misdemeanor, and be liable on summary conviction to a fine not exceeding £10, and on conviction, on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months.

'Sec. 4. (1) A person shall not send, or attempt to send, a postal packet which either

'(a) Encloses any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, any sharp instrument not properly protected, any living creature which is either noxious or likely to injure other postal packets in course of conveyance, or an

(r) This Act may be cited as the Telegraph Act, 1868, may be cited together as the Telegraph Act, 1868, and this Act and the Telegraph Acts, 1868-1869.

officer of the post-office, or any article or thing whatsoever which is likely to injure either other postal packets in course of conveyance, or an officer of the post-office, or

‘(b) Encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or any indecent or obscene article, whether similar to the above or not; or

‘(c) Has on such packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character.

‘(2) Any person who acts in contravention of this section shall be guilty of a misdemeanor, and shall be liable’ as in the previous section.

‘(3) The detention in the post-office of any postal packet on the ground of its being in contravention of this section, shall not exempt the sender thereof from any proceedings which might have been taken if the same had been delivered in due course of post.’

Sec. 5 imposes a fine on summary conviction for affixing placards, &c., on post-office property.

Sec. 6 prohibits the imitation of post marks and post-office envelopes, &c. Sec. 7, the making, uttering, or selling of fictitious stamps. Sec. 8, the putting up of false notices as to the reception of letters. Sec. 9, the obstruction of post-office officials in the execution of their duty. All these offences are punishable on summary conviction, as also is the retention of post-office clothing or property by a man who has ceased to be an officer of the post-office.

By sec. 11, ‘Every person who forges, or wilfully and without due authority alters a telegram, or utters a telegram knowing the same to be forged, or wilfully and without due authority altered, or who transmits by telegraph as a telegram, or utters as a telegram, any message or communication which he knows to be not a telegram, shall, whether he had or had not an intent to defraud, be guilty of a misdemeanor, and shall be liable on summary conviction to a fine not exceeding £10, and on conviction on indictment, to imprisonment with or without hard labour for a period not exceeding twelve months. (s)

‘If any person, being in the employment of a telegraph company as defined by this section, improperly divulges to any person the purport of any telegram, such person shall be guilty of a misdemeanor, and be liable, on summary conviction, to a fine not exceeding £20, and on conviction on indictment, to imprisonment with or without hard labour for a term not exceeding one year, or to a fine not exceeding £200.

‘For the purposes of this section, the expression “telegram” means a written or printed message or communication sent to or delivered at a post-office or the office of a telegraph company for transmission by telegraph, or delivered by the post-office or a telegraph company as a message or communication transmitted by telegraph.

‘The expression “telegraph company” means any company, corporation, or persons carrying on the business of sending telegrams for the public, under whatever authority, or in whatever manner, such company, corporation, or persons may act or be constituted.

‘The expression “telegraph” has the same meaning as in the Telegraph Act, 1869, and the Acts amending the same.’

(s) See *Ex parte Wickham*, 10 Times L. R. 286.



By sec. 13, 'The Court before whom a person is convicted on indictment of an offence under any enactment of the Post-office Acts, may mitigate the punishment fixed by such enactment for the offence as follows: that is to say, when the punishment mentioned in the enactment is or may be transportation, the Court shall award in lieu of it either penal servitude for any period not exceeding the period of transportation fixed by such enactment, and not less than the minimum period of penal servitude for the time being allowed by law, or imprisonment with or without hard labour for a term not exceeding two years.'

By sec. 19 (1), 'In this Act, and in the Post-office Act, 1837 (7 Will 4 & 1 Vict. c. 36), and in any enactments incorporating or referring to that Act, or to be construed as one therewith, the following expressions shall, unless the context otherwise requires, have the meanings assigned to them by this section (that is to say),—

'The expression "post letter" shall mean a postal packet as defined by this Act from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed, and a delivery of a postal packet of any description to a letter carrier, or other person authorised to receive postal packets of that description for the post, shall be a delivery to the post-office, and a delivery at the house or office of the person to whom the postal packet is addressed, or to him or to his servant or agent or other person considered to be authorised to receive the postal packet according to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed.

'The expression "post office" shall mean any house, building, room, carriage, or place where postal packets, as defined by this Act, or any of them, are by the permission or under the authority of the Postmaster-General received, delivered, sorted, or made up, and from which such packets, or any of them, are by the authority of the Postmaster-General despatched, and shall include any post-office letter box.

'The expression "post-office letter box" shall include any pillar box, wall box, or other box or receptacle provided by the permission or under the authority of the Postmaster-General for the purpose of receiving postal packets, or any of them, for transmission by or under the authority of the Postmaster-General.

'(2) When it appears to the Postmaster-General that any post-office letter box, by reason of being on the premises of any private person or otherwise, is so situate as not to afford the same security against the improper removal of postal packets therefrom, or other fraud, as exists in the case of other post-office letter boxes, he may declare that the same shall be a private posting box, and shall affix upon or near such box a notice of its being, and of the effect of its being, a private posting box, and a postal packet put into that box shall not, for the purpose of any enactment, law, or contract, whereby the due posting of a postal packet is evidence of the receipt thereof by the addressee, be deemed to have been duly posted, a certificate purporting to be signed by the Postmaster-General, or any secretary or assistant secretary of the post-office, and to the effect that any box or receptacle is, or was, provided by the permission or under the authority of the Post-

master-General for the purpose of receiving postal packets, or any of them, shall in any legal proceeding be evidence of the facts stated in the certificate.'

By sec. 20, 'The expression "postal packet" has the same meaning as in 38 & 39 Vict. c. 22, s. 10, as amended by this Act, inclusive of such postal packets as are defined by regulations of the Treasury to be parcels, and includes a telegram.'

By 24 & 25 Vict. c. 97, s. 37, 'Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove, any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.' (t)

By the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), which confirms the Submarine Telegraphs Convention, —

Sec. 3 (1) 'A person shall not unlawfully and wilfully or by culpable negligence break or injure any submarine cable to which the Convention for the time being applies in such manner as might interrupt or obstruct, in whole or in part, telegraphic communication.

'(2) Any person who acts, or attempts to act, in contravention of this section shall be guilty of a misdemeanor, and on conviction, —

'(a) If he acted wilfully shall be liable to penal servitude for a term not exceeding five years, or to imprisonment with or without hard labour for a term not exceeding two years, and to a fine, either in lieu of or in addition to such penal servitude or imprisonment; and

'(b) If he acted by culpable negligence, shall be liable to imprisonment for a term not exceeding three months, without hard labour, and to a fine not exceeding £100, either in lieu of, or in addition to, such imprisonment.

(t) This clause is new. It consists of two branches. The first provides against injuries to any battery or other thing used in electric telegraphs. The second provides against the preventing or obstructing communications by such telegraphs: and these offences are made misdemeanors; but as it was foreseen that there may be malicious injuries, which would fall within the first part of this clause, of too trifling a character to deserve so severe a punishment, it was thought fit to empower any justice, who is

of opinion that it is not expedient to the ends of justice that the offence should be prosecuted by indictment, summarily to convict the offender. The summary proceedings may be in England under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93. As to summary conviction for attempt, see sec. 38 and 26 & 27 Vict. c. 112. For the general provisions as to such telegraphs, and for offences relating to telegraphic messages, see the 31 & 32 Vict. c. 110, ss. 20, 21, and the 32 & 33 Vict. c. 73, ss. 23, 24.

‘(3) Where a person does any act with the object of preserving the life or limb of himself or of any other person, or of preserving the vessel to which he belongs, or any other vessel, and takes all reasonable precautions to avoid injury to a submarine cable, such person shall not be deemed to have acted unlawfully and wilfully within the meaning of this section.

‘(4) A person shall not be deemed to have unlawfully and wilfully broken or injured any submarine cable where in the *bona-fide* attempt to repair another submarine cable injury has been done to such first-mentioned cable, or the same has been broken, but this shall not apply so as to exempt such person from any liability under this Act, or otherwise, to pay the cost of repairing such breakage or injury.

‘(5) Any person who within or (being a subject of Her Majesty) without Her Majesty’s dominions, in any manner procures, counsels, aids, abets, or is accessory to the commission of any offence under this section, shall be guilty of a misdemeanor, and shall be liable to be tried and punished for the offence as if he had been guilty as a principal.’

## CHAPTER THE TWENTY-FOURTH.

### OF LARCENY AND EMBEZZLEMENT OF NAVAL AND MILITARY STORES.

THE 4 Geo. 4, c. 53, is repealed by the 36 & 37 Vict. c. 91, and the 9 Geo. 4, c. 30, s. 5, is repealed by 28 & 29 Vict. c. 112.

The 38 & 39 Vict. c. 25, consolidates and amends the Acts relating to the protection of public stores, and will be found *post*, chap. xxx.

Provision is made by the Annual Mutiny Acts for the punishment of persons embezzling military and naval stores, by the proceedings of a court-martial, but as alterations are made in these provisions from time to time, it is not advisable to introduce them in this place.

## CHAPTER THE TWENTY-FIFTH.

### OF LARCENY OF CLOTH AND OTHER ARTICLES IN A PROCESS OF MANUFACTURE.

PARTICULAR provisions have been enacted by several statutes for punishing the embezzlement of articles in a course of manufacture, which, as they relate to petty offenders, (principally workmen employed in particular manufactories,) and subject them to the summary jurisdiction of justices of the peace, do not come within the scope of this treatise. (a)

By the 24 & 25 Vict. c. 96, s. 62, 'Whosoever shall steal, to the value of ten shillings, any *woollen*, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, *alpaca*, or *mohair*, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (b) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](c)

By the 24 & 25 Vict. c. 96, s. 98, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to be imprisoned for any term not exceeding two years.

Some questions may possibly arise upon the words 'laid, placed, or exposed during any stage, process, or progress of manufacture in any building, field, or other place.' Where the prisoner was indicted upon the 18 Geo. 2, c. 27, for stealing yarn out of a bleaching-ground, the evidence was that the yarn had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the prisoner; Thompson, B., held that the case did not come within the statute, as there was no occasion to leave the yarn upon the ground in the state in which it was taken by the prisoner. (d) So in another case upon that statute, where the indictment was for stealing calico placed to be printed and dried in a certain building, it was

(a) The greater part of them will be found in Burn's Just. tit. *Servants*.

(b) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (a).

(c) This clause is framed on the 7 & 8 Geo. 4, c. 29, s. 16, and the 3 Geo. 4, c. 55, s. 16 (1), with the additions in *italics*.

(d) Hugill's case, *cor.* Thompson, B., at York, 4 Blac. Com. 240, note (8), ed. 1800.

held that, in order to support the capital charge, it was necessary to prove that the building from which the calico was stolen was made use of either for drying or printing calico. (e) But it should be observed, that this repealed statute mentioned particularly a building, &c. made use of by any calico printer, &c. for printing, whitening, bowking, bleaching, or drying.

It has been decided upon the 7 & 8 Geo. 4, c. 30, s. 3, that goods remain in a 'stage,' 'process,' or 'progress of manufacture,' though the texture be complete, if they be not yet brought into a condition fit for sale. (f)

Upon the trial for any offence mentioned in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt.

(e) *R. v. Dixon*, R. & R. 53.

(f) *R. v. Woodhead*, 1 M. & Rob. 549, Coleridge, J. See this case, *post*.

## CHAPTER THE TWENTY-SIXTH.

### OF LARCENY BY TENANTS AND LODGERS.<sup>1</sup>

It was long doubted whether, as a lodger had a special property in the goods which were let with his lodgings, the stealing of them was felony: (a) and it was at length decided by a majority of the judges that it was not. (b) In consequence of this decision, the 3 Wm. & M. c. 9, s. 5, was passed; but several points of nicety and difficulty arose upon the construction of this statute, and upon the statement of the contract in the indictment, and it was repealed by the 7 & 8 Geo. 4, c. 27, and the 7 & 8 Geo. 4, c. 29, s. 45, substituted a more simple enactment; but that statute is now repealed.

By the 24 & 25 Vict. c. 96, s. 74, 'Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping, and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, [at the discretion of the Court,] (c) to be kept in penal servitude for any term not exceeding seven years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture in this section mentioned to prefer an indictment in the same form as if the

(a) Raven's *alias* Aston's case, Kel. 24, 81. 1 Hawk. P. C. c. 43, s. 2.

(b) Meeres's case, Show. 50. The ground of this decision was that the lodger, and not the landlord, has the possession during the time for which the lodgings are let, and

therefore the landlord cannot maintain trespass for taking the goods. *R. v. Belstead*, MS. Bayley, J., and R. & R. 411.

(c) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

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#### AMERICAN NOTE.

<sup>1</sup> The statute 3 Wm. & M. c. 9, does not appear to be in force in America, and of course the more recent statutes are not in force there, so that it would appear that

unless a lodger in America intended to steal the furniture before he entered into possession, he could not be convicted of larceny if he took it away and sold it. Bishop, ii. s. 866.

offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.' (d)

By the 24 & 25 Vict. c. 96, s. 98, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree, and accessories after the fact (except receivers) are liable to be imprisoned for any term not exceeding two years.

There may be a conviction of an attempt to commit any offence mentioned in this chapter upon the trial for that offence, and the prisoner may thereupon be punished accordingly.

(d) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 45; 9 Geo. 4, c. 55, s. 38 (1); and 12 & 13 Vict. c. 11, s. 2.



## CHAPTER THE TWENTY-SEVENTH.

### OF EMBEZZLEMENT AND FRAUDS BY BANKRUPTS. (a)

THE 'Debtors Act, 1869' (32 & 33 Vict. c. 62), which came into operation the same day as the 'Bankruptcy Act, 1869' (32 & 33 Vict. c. 71), viz., January 1st, 1870, contains provisions with respect to the offences of fraudulent debtors which are very similar to those which were formerly contained in the Bankruptcy Acts. Words and expressions defined or explained in the Bankruptcy Act, 1869, shall have the same meaning in the Debtors Act, 1869.

By Sec. 11, any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say,—

(1.) If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud: (b)

(2.) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

(3.) If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:

(4.) If after the presentation of a bankruptcy petition by or (c) against him or the commencement of the liquidation, or within four

(a) The cases decided on repealed statutes will be found in Appendix F to this volume.

(b) The disclosure is not restricted to property in possession of the bankrupt at the commencement of his bankruptcy. On the 15th of May, the prisoner, who was a tool maker, gave an order for six tons of steel. On arrival at his wharf he did not allow it to be unloaded, and on the 18th of June sold it at 14s. per cwt. for cash. Its estimated value was 18s. per cwt. On the 28th of June a petition in bankruptcy

was filed against the prisoner. He was adjudicated bankrupt on the 29th. On the 4th of July a receiver was appointed, who was subsequently made trustee, but the bankrupt did not discover the above-mentioned transaction until it was forced out of him on the 26th of July before the Registrar. Held, that there was a case to go to the jury. *R. v. Bolus*, 11 Cox, C. C. 610. *R. v. Michell*, 14 Cox, C. C. 490.

(c) See 46 & 47 Vict. c. 52, s. 163, *post*, p. 411.

months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds (*d*) or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

(5.) If after the presentation of a bankruptcy petition by or (*e*) against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his (*f*) property of the value of ten pounds or upwards:

(6.) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

(7.) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, (*g*) he fail for the period of a month to inform such trustee as aforesaid thereof:

(8.) If after the presentation of a bankruptcy petition by or (*e*) against him or the commencement of the liquidation he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(9.) If after the presentation of a bankruptcy petition by or (*e*) against him or the commencement of the liquidation, or within four months next before such presentation (*h*) or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification (*i*) of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(10.) If after the presentation of a bankruptcy petition by or (*e*) against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satis-

(*d*) See *R. v. Forsyth*, Russ. & Ry. 274. *R. v. Davidson*, 7 Cox, C. C. 158. *R. v. Creese*, 43 L. J. M. C. *infra*.

(*e*) See 46 & 47 Vict. c. 52, s. 163, *post*, p. 411.

(*f*) A debtor, on the 17th of October, 1873, filed his petition for the liquidation of his affairs by arrangement, and a trustee was duly appointed. In December, 1872, he had assigned his property to L. & W., to whom he was indebted (L. having then advanced a further sum of £350 for the purpose of enabling the business to be carried on) upon trust, for the benefit of L. and W., and his scheduled creditors. There were other creditors than those scheduled. On the 14th, 16th, and 17th of October, 1873, the debtor fraudulently removed portions of the property so assigned to L. and W., and in respect of these removals he was indicted under the Debtors Act, 1869, s. 11, sub-s. 5, for having within four months next before the commencement of the liquidation of his affairs, fraudulently re-

moved part of his property, of the value of £10 and upwards. Held, that the offence was not proved, for the property was not his at the time of removal, but that of L. and W., the trustees, under the assignment. Secondly, that the assignment required to be registered under the Bills of Sale Act, 17 & 18 Vict. c. 36, and was inoperative against the trustees under the liquidation. *R. v. Creese*, 12 Cox, C. C. 539.

(*g*) See *R. v. Beaumont*, 26 L. T. (N. S.) 587, 12 Cox, C. C. R. 183.

(*h*) 'Such presentation' includes the presentation of the petition by as well as against the bankrupt. *R. v. Beck*, 16 Cox, C. C. 718.

(*i*) See *R. v. Leatherbarrow*, 10 Cox, C. C. 637, where an indictment under the repealed Act against a bankrupt for altering his books with intent to defraud his creditors, did not state that the alteration was done *unlawfully*, and the indictment was held good.

fied that he had no intent to conceal the state of his affairs or to defeat the law. (*j*)

(11.) If after the presentation of a bankruptcy petition by or (*k*) against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs:

(12.) If after the presentation of a bankruptcy petition by or (*k*) against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses:

(13.) If within four months next before the presentation of a bankruptcy petition by or (*l*) against him, or in case of a receiving order made under sec. 103 of the Bankruptcy Act, 1883, before the date of the order (*l*) or the commencement of the liquidation, he, by any false (*m*) representation or other fraud, has obtained any property on credit (*n*) and has not paid for the same: (*o*)

(14.) If within four months next before the presentation of a bankruptcy petition by or (*l*) against him, or in case of a receiving order made under sec. 103 of the Bankruptcy Act, 1883, before the date of the order (*l*) or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

(15.) If within four months next before the presentation of a bankruptcy petition by or (*l*) against him, or in case of a receiving order made under sec. 103 of the Bankruptcy Act, 1883, before the date of the order (*l*) or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud: (*p*)

(*j*) See *R. v. Ingham*, 29 L. J. M. C. 18, decided under the repealed enactment, 12 & 13 Vict. c. 106, s. 252.

(*k*) See 46 & 47 Vict. c. 52, s. 163, *post*, p. 411.

(*l*) See 53 & 54 Vict. c. 71, s. 26, *post*, p. 417. The effect of the section is not retrospective. *R. v. Griffith* (1891), 2 Q. B. 145.

(*m*) By a false representation is meant one which the debtor knows to be false. *R. v. Cherry*, 12 Cox, C. C. 32. It is sufficient in arrest of judgment upon an indictment for an offence under sub-section 13, to allege that the bankrupt 'by certain false representations did obtain property on credit and has not paid for the same.' *R. v. Watkinson*, 12 Cox, C. C. 271. *R. v. Pierce*, 16 Cox, C. C. 213.

(*n*) Obtaining goods on approval was not an obtaining of credit within sec. 221 of the

repealed Act, 12 & 13 Vict. c. 106, *R. v. Lyons*, 9 Cox, C. C. 229.

(*o*) It was alleged in a count under this sub-section that the defendant obtained credit from the prosecutor 'by means of fraud other than false pretences,' without setting out the means; the count was held to be too general. *R. v. Bell*, 12 Cox, C. C. 37.

(*p*) A grocer obtained goods of his trade upon credit. Soon after receiving them, and before they were paid for, he executed a bill of sale in favour of his sister who lived with him. This bill of sale, which was given in consideration of a debt owing from him to his sister, passed away all his stock-in-trade and effects whatsoever, including the above-mentioned unpaid-for goods. Having been made bankrupt, he was indicted for misdemeanor under this sub-section. Held, that the production of the adjudication under the

(16.) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors, or any of them, to any agreement with reference to his affairs, or his bankruptcy, or liquidation.

An indictment charged that the defendant, a trader, 'did within four months next before the commencement of the liquidation, by arrangement of his affairs obtain' from W. certain goods, &c. It was held that the count was good since it sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within the meaning of sec. 11. (*q*)

A trader, when insolvent, and within four months of his bankruptcy, obtained goods on credit for exportation, and at once pledged the bill of lading; and could give no account of the application of the money so raised. The trustees reported that he had been guilty of offences under sub-secs. 14 and 15 of sec. 11 of the Debtors Act, 1869, and applied under sec. 16 for an order for his prosecution. Held, that to bring the case within sub-secs. 14 and 15 of sec. 11 you must shew dealings with the goods themselves otherwise than in the ordinary course of trade, and that the application of the money obtained by an ordinary dealing was for this purpose immaterial. (*r*)

Sec. 12. If any person who is adjudged a bankrupt, or has his affairs liquidated by arrangement, after the presentation of a bankruptcy petition by or (s) against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England, and takes with him, or attempts or makes preparation for quitting England and for taking with him any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour. (*t*)

seal of the Court was sufficient evidence of the bankruptcy. That disposing of the goods by bill of sale was not disposing of them in the 'ordinary way of trade,' and, therefore, that as property which the prisoner had obtained on credit, and had not paid for, had passed by the bill of sale, he came within the section unless he had no intent to defraud. But that assigning the whole of his property to one creditor, reserving nothing for the others, shewed an intent to defraud. Where the prosecution of a bankrupt under the Debtors Act, 1869, is not ordered by any Court, the judge at the trial has no power to allow the costs of the prosecution. *R. v. Thomas*, 11 Cox, C. C. 535, Lush, J. See *R. v. Bolus*, *ante*, p. 407.

(*q*) *R. v. Knight*, 14 Cox, C. C. 31, distinguishing *R. v. Oliver*, 13 Cox, C. C. 588.

(*r*) *Ex parte Brett*; *Re Hodgson*, 1 Ch. D. 151. 45 L. J. Bank. 17. 13 Cox, C. C. 128; *et per Mellish*, L. J., 'There ought to be evidence that the goods were purchased or dealt with beyond the ordinary course of business. The essence of the offence was that the goods themselves should have been dealt with not in the ordinary course of business. Where a man buys on credit and

sells at once at a much lower rate, in order to furnish himself with funds, that is clearly not a transaction in the ordinary way of business. What was done in the present case, however, amounted to nothing more than the ordinary way of dealing with goods by an export merchant. It does not come within sub-sections 14 & 15. Whether it is within sub-section 13 I have more doubt, but I think it does not. There ought to be some active fraud similar to a false representation to bring it within that sub-section. The mere fact that the bankrupt knew he could not pay for the goods is not sufficient to do so.'

(*s*) See 46 & 47 Vict. c. 52, s. 163, *post*, p. 411.

(*t*) It appears that an infant cannot be convicted of appropriating any part of his property 'which ought by law to be divided among his creditors,' where the debts proved against his estate are only trade debts and not necessities. *R. v. Wilson*, 5 Q. B. D. 28. If, however, the infant had expressly represented to the petitioning creditor that he was of full age, it is doubtful whether an adjudication would be made, but ordinarily an infant cannot be made a bankrupt for trade purposes. *Ex parte Jones*, 18 Ch. D. 109.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 163, (1) 'Sections 11 & 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), relating to the punishment of fraudulent debtors, and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him," the words "if after the presentation of a bankruptcy petition by or against him.'

(2) 'The provisions of the Debtors Act, 1869, as to offences by bankrupts, shall apply to any person, whether a trader or not, in respect of whose estate a receiving order has been made, as if the term "bankrupt" in that Act included a person in respect of whose estate a receiving order had been made.' (*u*)

By the Debtors Act, 1869, sec. 13, 'any person (*v*) shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour, that is to say, —

'(1) If in incurring any debt or liability he has obtained credit under false pretences, (*w*) or by means of any other fraud.

'(2) If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of, or any charge on his property.

'(3) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.'

By sec. 14, 'if any creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Act, 1869, wilfully and with intent to defraud, makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour.'

Sec. 15. 'Where a debtor makes any arrangement or composition with his creditors under the provisions of the Bankruptcy Act, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends.'

Sec. 16. 'Where a trustee in any bankruptcy (*x*) reports to any Court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied, upon the representation of any creditor or member of the committee of inspection, that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability

(*u*) As to making of a receiving order, see sec. 5, *et seq.*

(*v*) This means any person whether there have been proceedings in bankruptcy or not. *R. v. Rowland*, 8 Q. B. D. 530.

(*w*) The renewing of a bill of exchange is an obtaining credit under this section. *R. v. Pierce*, 16 Cox, C. C. 213.

(*x*) By the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 164, 'Sec. 16 of the Debtors Act, 1869, shall be construed and have effect as if the term "a trustee in any bankruptcy" included the official receiver of a bankrupt's estate and shall apply to offences under this Act as well as to offences under the Debtors Act, 1869.'

that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence.'

Sec. 17. 'Where the prosecution of the bankrupt under this Act is ordered by any Court, then, on the production of the order of the Court, (y) the expenses of the prosecution shall be allowed, paid, and borne, as expenses of prosecutions for felony are allowed, paid, and borne.'

Sec. 18. 'Every misdemeanor under the second part of this Act shall be deemed to be an offence within and subject to the provisions of the 22 & 23 Vict. c. 17, intituled 'An Act to prevent vexatious indictments for certain misdemeanors;' and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to shew that the act charged was not committed with a guilty intent.' (yy)

Sec. 19. 'In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged, in the words of this Act, specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading adjudication, or any proceedings in, or order, warrant, or document of any Court acting under the Bankruptcy Act, 1869.' (z)

It has been held that an indictment for a misdemeanor framed upon sec. 11, sub-sec. 13, of the Act 32 & 33 Vict. c. 62, which merely charged 'that a bankruptcy petition was presented against the defendant to the county Court, &c., upon which the defendant was adjudged bankrupt, and that the defendant, within four months before the presentation of the said petition, did by certain false representations obtain from B. on credit certain property, and has not paid for the same,' was sufficient in arrest of judgment under the above statute, and also under Peel's Act, 7 Geo. 4, c. 64, s. 20. (a)

H. was tried on an indictment charging that he and others 'unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against the said H., fraudulently to remove part of the property of the said H., to the value of £10 and upwards, that is to say, divers, &c., he, the said H., then and there being a trader and liable to become bankrupt,' and having pleaded not guilty, was convicted and sentenced. Error having been brought on the ground that the indictment contained no allegation that H. ever was adjudged bankrupt. Held, first, that the offence of conspiracy was complete as soon as an agreement had been entered into to remove the goods in contemplation of an adjudication of bankruptcy, even though no such

(y) If there is no such order, the judge at the trial cannot order the allowance of the costs. *R. v. Thomas*, 11 Cox, C. C. 535. See *ex parte Berry*, 27 L. J. (N. S.) 53, where a prosecution was abandoned.

(yy) This means that the offence shall be within the above-named statute as controlled by the 30 & 31 Vict. c. 35. See *R. v. Bell*, 12 Cox, C. C. 37. See vol. i. p. 2.

(z) See *R. v. Masson*, L. & C. 212, where, under the repealed enactment, it was held to be sufficient to state that the defendant had been duly adjudged bankrupt, but if the act of bankruptcy was set out in the indictment, a good act of bankruptcy must have been shewn.

(a) *R. v. Watkinson*, 12 Cox, C. C. 271. *R. v. Pierce*, 16 Cox, C. C. 213.

adjudication ever took place; secondly, that after verdict it must be taken to have been proved that the agreement was entered into in contemplation of an adjudication, though this was not averred in the indictment, such defect being cured by the verdict; thirdly, that as to aider by verdict at common law, there is no distinction between criminal and civil pleadings. (b)

Where the prisoner was indicted for removing goods with intent to defraud his creditors, and the evidence was that he removed them with intent to defraud one particular creditor, and the chairman of quarter sessions did not leave it to the jury to say whether this was any evidence of intent to defraud his creditors generally, but assumed that intent to defraud *one* was sufficient, the Court held that the indictment was not proved. (c)

Sec. 20. 'So much of the Act of the session of the fifth and sixth years of Her Majesty's reign (chapter thirty-eight), 'to define the jurisdiction of justices in general and quarter sessions of the peace,' as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this Act; and any offence under this Act shall be deemed to be within the jurisdiction of such justices and recorders.'

Sec. 23. 'Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence.'

**Power of Court to commit for trial.** — By the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 165:

(1.) 'Where there is in the opinion of the Court ground to believe that the bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanor in cases of bankruptcy, the Court may commit the bankrupt or such other person for trial.'

(2.) 'For the purpose of committing the bankrupt or such other person for trial the Court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail or otherwise.'

'Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court.'

By sec. 166, 'Where the Court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of, or connected with, any bankruptcy proceedings, it shall be the duty of the director of public prosecutions to institute and carry on the prosecution.'

By sec. 167, 'Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge, or that a composition or scheme of arrangement has been accepted or approved.'

By sec. 132, (1.) 'A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.'

(b) *Heymann v. R.*, 12 Cox, C. C. 383.

(c) *R. v. Rowlands*, 8 Q. B. D. 530.

(2.) 'The production of a copy of the London Gazette containing any notice of a receiving order or of an order adjudging a debtor bankrupt shall be conclusive evidence, in all legal proceedings, of the order having been duly made, and of its date.' (e)

By sec. 133, (1.) 'A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.'

(2.) 'Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.'

By sec. 134, 'Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any Court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.'

By sec. 136, 'In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the Court, or a copy thereof, purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.'

By sec. 149, (2.) 'Where by any Act or instrument reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act.'

By sec. 17, provision is made for the public examination of debtors, and by sub-section (7), 'The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.'

By sec. 31, 'When an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of £20

(e) See *R. v. Love*, L. & C. 597, 10 Cox, C. C. 110, where it was decided under the repealed enactment 12 & 13 Vict. c. 106, s. 233, that the Gazette was conclusive evidence against the bankrupt in a criminal proceeding, and that the bankrupt could not take advantage of any irregularity in the proceedings which were put in evidence. *R. v. Robinson*, 36 L. J. M. C. 78, 10 Cox, C. C. 467, where the defendant was a married woman when ad-

judicated a bankrupt. The production of the adjudication under the seal of the Court is sufficient evidence in an indictment against the bankrupt under the Debtors Act, 1869, s. 11, sub-s. 15, that the defendant was adjudged bankrupt. *R. v. Thomas*, 11 Cox, C. C. 585, *et per* Lush, J. The provision as to the Gazette is merely cumulative, and the bankruptcy may be proved by the Gazette or otherwise.



or upwards from any person, without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section.'

In order to obtain a conviction under this section, it is not necessary that there should be a stipulation to grant credit, it is sufficient if credit is in fact obtained. So where the prisoner, an undischarged bankrupt, agreed to buy a horse from a farmer in Ireland, without informing him that he was an undischarged bankrupt, and by the prisoner's direction the farmer sent the horse to the prisoner in England, without making any stipulation as to the time and mode of payment, it was held that there was evidence of an obtaining of credit by the prisoner within the meaning of the section. (*f*)

Where the prisoner ordered goods to a less extent than £20, but accepted delivery of goods over £20 in value, it was held that the conviction was good. (*g*)

An intent to defraud is not a material ingredient of this offence. (*h*)

**Warrant to arrest debtor under certain circumstances.** — By sec. 25 (1.) 'The Court may by warrant addressed to any constable or prescribed officer of the Court, cause a debtor to be arrested, and any books, papers, money, and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the Court may order, under the following circumstances:—

'(a.) If, after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable reason for believing that he has absconded, or (*i*) is about to abscond, with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him.

'(b.) If after presentation of a bankruptcy petition, by or against him, it appears to the Court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the official receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents, or writings which might be of use to his creditors in the course of his bankruptcy.

'(c.) If after service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession above the value of five pounds, without the leave of the official receiver or trustee.

'(d.) If, without good cause shewn, he fails to attend any examination ordered by the Court.

'Provided that no arrest upon bankruptcy notice shall be valid and

(*f*) *R. v. Peters*, 16 Q. B. D. 636, Lord Coleridge, C. J., Hawkins, Day, and Grant-ham, JJ. Manisty, J., dissenting.

(*g*) *R. v. Juby*, 16 Cox, C. C. 160.

(*h*) *R. v. Dyson* (1894), 2 Q. B. 176.

(*i*) 53 & 54 Vict. c. 71, s. 7. See *post*, p. 417.

protected unless the debtor before or at the time of his arrest shall be served with such bankruptcy notice.

‘(2.) No payment or composition made, or security given, after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.’

Sec. 27 makes provision for the discovery of the debtor's property, and gives power to the Court to examine on oath any person summoned before it concerning the debtor, his dealings, or property.

Upon an indictment under the 32 & 33 Vict. c. 62 (Debtors Act, 1869), an examination of the defendant before the registrar of the bankruptcy Court is admissible although a promise was made to him before his examination that it should not be used against him or filed. (*j*)

On an indictment of a trader for obtaining property on credit under the false pretence of dealing in the ordinary way of his trade, within four months before his liquidation, contrary to the 11th section of the Debtors Act, 1869, an examination of the trader in liquidation taken under the 97th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), was admitted in evidence against him. The summons to bring up the trader for examination was issued before the certificate of the appointment of the trustee was given by the registrar. The trader attended, was examined, and the examination was taken after the giving of the certificate of appointment. Held, that whether the summons was regularly issued or not, the trader by appearing and submitting to be examined, waived the irregularity, if any, and the examination was properly taken and admissible in evidence against the prisoner on the trial of the indictment. (*k*)

A debtor whose affairs were liquidated by arrangement, was indicted under 32 & 33 Vict. c. 62, s. 11, for that he, knowing that false debts had been proved under the liquidation, failed for the period of a month to inform B., the trustee, thereof. The evidence was that the debtor, on the 23rd of September, 1870, filed his petition in the county Court, alleging that he was unable to pay his debts, and that he was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors; that on the 10th of October the first meeting under the petition was held, and three false debts proved with his connivance. At the first meeting of the creditors it was resolved that a composition of 8s. in the pound, payable by instalments, and to be secured, should be accepted, and B. was appointed trustee in the matter. On the 12th of October the registrar of the county Court certified that B. was appointed trustee, and was declared to be trustee under the liquidation by arrangement. At the second meeting of creditors, on 19th October, it was resolved that the debtor's affairs should be liquidated by arrangement, and not in bankruptcy; that the remuneration of the trustee (B.) be left to a subsequent meeting; and that the trustee should pay the moneys received by him into the H. bank. Held, that upon the evidence B. was proved to be the trustee under the liquidation by arrangement, not-

(*j*) *R. v. Cherry*, 12 Cox, C. C. 32. Martin, B., who said, ‘If it had been made as a voluntary statement it would have been different, but here the defendant was obliged

to submit to examination under the Act of Parliament.’

(*k*) *R. v. Widdop*, 42 L. J. M. C. 9. See vol. iii. *Evidence*.

withstanding that at the first meeting, when he was originally appointed, it was resolved to accept a composition of 8s., and nothing was then resolved as to a liquidation by arrangement.

By the Bankruptcy Act, 1890, (53 & 54 Vict. c. 71) sec. 7, 'sec. 25 of the principal Act, (*l*) relating to the arrest of a debtor under certain circumstances, shall be read and construed as if the words "believing that he has absconded, or is about to abscond," were substituted for the words "believing that he is about to abscond."'

By sec. 26, 'sec. 11 of the Debtors Act, 1869, shall have effect as if there were substituted therein for the words "if within four months next before the presentation of a bankruptcy petition against him" the words "if within four months of the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under sec. 103 of the Bankruptcy Act, 1883, before the date of the order."'*(m)*

By sec. 27, so much of 24 & 25 Vict. c. 96, s. 85, is repealed as provides that no person shall be liable to be convicted of any of the misdemeanors mentioned in secs. 75–84 of that Act (being frauds by agents, bankers, or factors), if he shall have first disclosed the same in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy or insolvency; and by sub-sec. 2, 'A statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person in any proceeding in respect of any of the misdemeanors referred to in sec. 85.'*(n)*

(*l*) The Bankruptcy Act, 1883, see *ante*, p. 415.

(*m*) See *ante*, p. 409.

(*n*) See *ante*, p. 364.

## CHAPTER THE TWENTY-EIGHTH.

### OF RECEIVING STOLEN GOODS.<sup>1</sup>

RECEIVERS of stolen goods were at common law punishable only as for a misdemeanor, even after the thief had been convicted of felony in stealing them; (a) but by the provisions of several statutes, now repealed, such receivers were made accessories after the fact to the felony of the thief, in cases where the thief had been convicted, or was amenable to justice; and were made liable to be prosecuted for a misdemeanor in cases where the thief had not been convicted, and whether he was amenable to justice or not.

#### SEC. I.

##### *Statutes in force.*

By the 24 & 25 Vict. c. 96, s. 91, 'Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, *extorting, obtaining, embezzling, or otherwise disposing whereof* shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, *extorted, obtained, embezzled, or disposed of*, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, [at the discretion of the Court,] (b) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping: Provided, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.' (c)

(a) *Post*. 373.

(b) The words in brackets are repealed, but the punishment except as to solitary

confinement remains the same. See *ante*, p. 50, note (o).

(c) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 54, and 9 Geo. 4, c. 55,

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#### AMERICAN NOTE.

<sup>1</sup> See *C. v. Andrews*, 2 Mass. 409. S. v. Scovel, 1 Rep. Const. Ct. 274. S. v. M'Alvon, 40 Maine, 133. S. v. Wright, 4 M'Cord, 358. P. v. Wiley, 3 Hill, 194. In America, most if not all the States have statutory provisions making the receiver liable for a felony or misdemeanor. Bishop, i. s. 700.

Sec. 92. 'In any indictment *containing a charge of feloniously stealing any property it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof*, knowing the same to have been stolen, and in any indictment for feloniously receiving any property knowing it to have been stolen it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, *or any part or parts thereof*, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same *or any part or parts thereof*, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same *or any part or parts thereof* knowing the same to have been stolen.' (d)

Sec. 93. 'Whenever any property whatsoever shall have been stolen, taken, *extorted, obtained, embezzled, or otherwise disposed of* in such a manner as to amount to a felony, either at common law or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.' (e)

Sec. 94. 'If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part *or parts* (f) of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part *or parts* of such property.' (g)

s. 47 (I). The words in italics have been introduced in order to include all cases where property has been feloniously extorted, obtained, embezzled, or otherwise disposed of within the meaning of any section of this Act. The above 91st section is incorporated with the Seamen's Clothing Act, 1869, 32 & 33 Vict. c. 57.

(d) This clause is taken from the 11 & 12 Vict. c. 46, s. 3. The words 'containing a charge of' are substituted for the word 'for' in the former Act, in order that a count for receiving may be added in any indictment containing a charge of stealing any property. It will, therefore, apply to burglary with stealing, housebreaking, robbery, &c. The other words in italics provide for cases which frequently occur, and were not within the former clause; e. g., where different prisoners may be proved to have had possession of different parts of the stolen property.

(e) This clause is taken from the 14 & 15 Vict. c. 100, s. 15, and the first words in

italics are added to include receivers in other felonies against this Act. See the note to sec. 6 of the Accessories' Act, vol. i. p. 183. See *R. v. Hartall*, 7 C. & P. 475. *R. v. Hayes*, 2 M. & Rob. 155, cases decided before the above Act.

(f) Two or more persons may be indicted jointly for receiving stolen property knowing it to have been stolen, though each successively received the whole of the property at different times, and it makes no difference whether the receipt was direct from the principal felon, or from an intermediate person. *R. v. Reardon*, 35 L. J. M. C. 171. *R. v. Dring*, D. & B. 329.

(g) This clause is taken from the 14 & 15 Vict. c. 100, s. 14. Before this Act, if several persons were charged jointly with receiving stolen goods, a joint act of receiving must have been proved. See *R. v. Massingham*, R. & M. C. C. R. 257. *R. v. Gray*, 2 Den. C. C. 86. S. P. *R. v. Matthews*, 1 Den. C. C. 596.

Sec. 95. 'Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, [at the discretion of the Court,] (*h*) to be kept in penal servitude for any term not exceeding seven years, [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping.' (*i*)

Sec. 96. 'Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously, or unlawfully stolen, taken, obtained, converted, or disposed of may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.' (*j*)

Sec. 97. 'Where the stealing or taking of any property whatsoever is by this Act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this Act made liable.'

Sec. 114, after providing for the trial of any person who shall have in his possession in any one part of the United Kingdom any property which he shall have stolen in any other part of the United Kingdom, enacts that, 'if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.' (*k*)

(*h*) The words in brackets are repealed, but the punishment except as to solitary confinement remains the same. See *ante*, p. 50, note (*o*).

(*i*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 55; 9 Geo. 4, c. 55, s. 48 (1); and 20 & 21 Vict. c. 54, s. 9.

(*j*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 56; and 9 Geo. 4, c. 55, s. 49.

(*k*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 76. The corresponding clause in the 9 Geo. 4, c. 55, s. 75 (1), instead of 'feloniously taken,' had 'unlawfully taken.'

By 35 & 36 Vict. c. 93, s. 38, if a pawnbroker is convicted on indictment of any fraud in his business, or of receiving stolen goods knowing them to be stolen, the Court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly. (*l*)

## SEC. II.

*When Enactments apply.*

The bare receiving of stolen goods, knowing them to be stolen, did not make an accessory at common law. But if a party received goods from the thief to keep for him, knowing them to have been stolen, or if he received goods to facilitate the escape of the thief, or if he knowingly received them upon an agreement to furnish the thief with supplies out of them, and accordingly supplied him, this made the party an accessory at common law, for it was relieving and comforting. (*m*)

If the prisoner receive the property, knowing it to be stolen, for the purpose of assisting the thief, or for the purpose of concealment, it is a receiving within the statute, although he neither gains any profit or advantage by the receipt. (*n*)

It will be observed that the present clause includes all cases where property has been feloniously extorted, obtained, embezzled, or otherwise disposed of within the meaning of any section of the Act (see *ante*, p. 418, and see Sec. 95; *ante*, p. 420, where principal guilty of a misdemeanor). (*o*)

It may be well to observe that, although formerly a person could not be convicted as a receiver of stolen goods where the goods had been converted by a bailee in such a manner as not to amount to larceny, (*p*) yet under the present Act, wherever a bailee may be convicted as such for disposing of the goods entrusted to him, a person receiving with a guilty knowledge goods so disposed of may be convicted as a receiver. (*q*)

The effect of the 31 & 32 Vict. c. 116, s. 1, by which a partner or joint owner in goods is rendered liable to be convicted of stealing goods in respect of which he is so jointly interested, is not to render the receiver of such goods, knowing the same to have been stolen by such partner, liable to be convicted as such receiver under the 24 & 25 Vict. c. 96, s. 91. A. and B. were in partnership, and B., in fraud of the partnership, disposed of the goods of the firm to the prisoner, who knowingly received the same. The prisoner was indicted and convicted under the 24 & 25 Vict. c. 96, s. 91. Held that the conviction could not be supported. *Semble*, that the prisoner might have been indicted and convicted as an accessory to or after the felony, either at common law or under 24 & 25 Vict. c. 94, ss. 1, 3. (*r*)

(*l*) As to authority of pawnbroker to arrest a thief, see 35 & 36 Vict. c. 93, s. 34.

(*m*) 1 Hale, 620. *R. v. Smith, infra*.

(*n*) *R. v. Richardson*, 6 C. & P. 335, Gazelee, J., Vaughan, B., and Taunton, J. *R. v. Davis*, 6 C. & P. 177.

(*o*) *R. v. Frampton, D. & B. 585.*

(*p*) *R. v. Harris*, 5 Cox, C. C. 151.

(*q*) See the present enactment, *ante*, p. 418. See *R. v. Frampton, D. & B. 585.*

(*r*) *R. v. Smith*, 39 L. J. M. C. 112; 1 L. R. 1 C. C. R. 266.

## SEC. III.

*Who is a Receiver — Distinction between Receiver and Principal.*

Upon an indictment for receiving a watch, knowing it to have been stolen, it appeared that the prosecutor was in company with a prostitute named Duncan, at a public-house, and the prisoner and several others were there when they entered; the prosecutor's watch was there taken from him by some one who forced open the ring, which secured it to a guard. The prosecutor immediately missed his watch, and taxed the prisoner as the thief. A policeman was sent for, and a partial search made, but the watch was not found. The prisoner and one Holland were there all the time. The prosecutor and Duncan went to her room, and afterwards the prisoner came to them there, and said to the prosecutor, 'What would you give to have your watch back again?' Prosecutor said, 'A sovereign.' Prisoner then said, 'Let the young woman come along with me, and I will get you the watch back again.' Duncan and the prisoner then went together into a room in the prisoner's house, where Holland was. There was a table there, and Duncan at first saw there was no watch on the table, but a few minutes afterwards she saw the watch there. The prisoner was close to the table; she did not see it placed there, but she stated that it must have been placed there by Holland, as, if the prisoner had placed it there, she must have observed it. The prisoner told Duncan to take the watch, and go and get the sovereign. She took it to the room where the prosecutor was, and in a few minutes the prisoner and Holland came there, and Holland asked for the reward. The prosecutor gave Holland half a crown, and said he believed the watch was stolen, and told him to be off. Holland and the prisoner then left. The prisoner did not then say anything; nor did the witnesses see him receive any money. Holland absconded before the trial. The jury were told that if they believed that the prisoner knew that the watch was stolen, and, at the time when he went with Duncan to the room where it was given up, the watch was in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to justify them in convicting the prisoner. The jury found the prisoner guilty; and that though the watch was in Holland's hand or pocket, it was in the prisoner's absolute control; and, upon a case reserved, it was held that the conviction was right. According to the decided cases as well as to the dicta of judges, manual possession is unnecessary; and there may be a joint possession in the receiver and the thief. The jury might have found that the prisoner was the thief, or that Holland, being the thief, the watch remained in his exclusive possession, and that the prisoner acted as his agent in restoring the watch to the prosecutor; but the evidence justified the jury in coming to the conclusion which they did. (s)



Two prisoners were convicted under a count charging them with receiving goods knowing them to have been stolen, upon proof that they were present aiding and abetting a third receiver who was found in actual possession of a box containing the goods, but the two former never had manual possession of the box. Held, that the conviction was right. (*t*)

Levick had pleaded guilty to stealing a hat and watch, which the prisoner was indicted for receiving. A policeman proved that he went to the prisoner's house in consequence of something Levick told him, and asked the prisoner if Levick brought a hat there, and the prisoner said 'Yes,' and then went and took the hat out of a box in the corner of the room, in which he was found in bed. The witness asked him if he knew anything about the watch, and he said he did not; but being taken out of the house, he said he knew where the watch was; that it was planted at Mr. W.'s. They went there, but could not find it; and the prisoner then called for a boy, and asked him to get the watch; and the watch was afterwards brought by the boy to the prisoner, who gave it to the policeman. The house where the prisoner lived was a lodging-house. It was objected that there was no evidence of the prisoner's possession of the hat, as he had no exclusive possession of the room; and that all the evidence as to the watch was that he knew where it was: but, on a case reserved, it was held that there was sufficient evidence to go to the jury. (*u*)

Upon an indictment for receiving stolen fowls, it appeared that the prisoner's husband sent them without a direction by a coach to Birmingham, it being stated at the time of the delivery that a person would call for the box at Birmingham. The box arrived at Birmingham, and the prisoner went to the coach-office, and inquired for it; when the box was shewn to her by the coachman, and she claimed it as the box she was come for; upon which she was taken into custody, and the box being opened in her presence, was found to contain ten fowls. The prisoner was convicted; but, upon a case reserved, the judges were of opinion that the conviction was wrong, and that according to the evidence the prisoner never did in fact receive the fowls, nor ever had the power of doing so. Whoever had possession of the fowls at the coach-office, when the prisoner claimed to receive them, never parted with the possession. The prisoner by claiming to receive the fowls, which were never actually or potentially (*v*) in her possession, never in fact or law received them. (*w*)

Upon an indictment, which charged Straughan and Williamson with stealing and Wiley with receiving, it appeared that Straughan and Williamson went into the house of Wiley's father with a loaded sack carried by Straughan. Wiley lived with his father, and was a higgler, attending markets with a horse and cart. Straughan and Williamson remained in the house about ten minutes, and then went out of a back door, preceded by Wiley with a candle, Straughan again

(*t*) *R. v. Rogers*, 37 L. J. M. C. 83.

(*u*) *R. v. Hobson*, Dears. C. C. 400.

(*v*) In *R. v. Wiley*, 2 Den. C. C. 37. Lord Campbell, C. J., said he did not understand the legal meaning of 'potential.'

(*w*) *R. v. Hill*, 1 Den. C. C. 453, 2 C.

& K. 978. Another question was reserved, namely, how far the fact of the fowls having been sent to the prisoner by her husband could be an excuse for her receiving them, but by the above decision this question became immaterial.

carrying the sack on his shoulders, and went into a stable belonging to the same house, situated in a yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in they found the sack on the floor tied at the mouth, and the three men standing round it, as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag was found to contain cocks, hens, and ducks. Wiley on being charged with receiving the poultry knowing it to have been stolen, said he did not think he would have bought the hens. The Court told the jury that the taking of Straughan and Williamson with the stolen goods as above by Wiley into the stable, over which he had control, for the purpose of negotiating about the buying them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute. The jury convicted, and upon a case reserved, it was contended that there must be a parting with the possession by the thief, and a delivery to the receiver. The thief, having no legal property in the goods, can only pass the actual possession; and if he passes that he has no possession left in him, and therefore has not even constructive possession, and so he cannot be taken as holding the goods as agent for the prisoner. Therefore the prisoner cannot be held to have had constructive possession. On the part of the Crown it was contended that the prisoner had joint actual possession with the thieves. Eight of the judges (*x*) were of opinion that the prisoner could not be taken to have received the fowls. That the possession of the thieves seemed to exclude the notion of possession by the prisoner, (*y*) as the thieves never intended to part with the goods until the bargain was concluded. (*z*) That there must be a control over the goods by the receiver, which there was not in this case. (*a*) That although there might be 'a joint possession of goods in a thief and a receiver,' there was no evidence of that in this case, as 'the thieves seem always to have had possession of the goods, and the prisoner to have only had the intention of receiving them, not the actual receipt.' (*b*) That 'receiving must mean a taking into possession, actual or constructive,' which there was not here, as the prisoner 'never accepted the goods in any sense of the word, except upon a contingency, which, as it happened, did not arise.' (*c*) Four of the judges (*d*) were of opinion that the prisoner was shewn to have received the goods. 'The case was made out against the prisoner if he was proved to have had possession of the goods, knowing them to be stolen.' 'The prisoner was proved to have had a common purpose with the thieves, although he had not manual possession. They were all agents for each other, and the possession of the thieves was, therefore, in law the possession of the prisoner.' (*e*) 'The prisoner co-operated with the thieves in remov-

(*x*) Parke, B., Alderson, B., Patteson, J., Coleridge, J., Maule, J., Platt, B., Talfourd, J., and Martin, B.

(*y*) Talfourd, J.

(*z*) Martin and Platt, BB.

(*a*) Patteson, J.

(*b*) Alderson, B.

(*c*) Parke, B., who added, 'I think the

possession of the receiver must be distinct from that of the thief; and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver.'

(*d*) Lord Campbell, C. J., Cresswell, Erle, and Williams, JJ.

(*e*) Williams, J.

ing the goods into the stable *malo animo* with the intent of bargaining there more securely. If he had actually carried them, there would then have been joint possession; what he actually did was legally equivalent to carrying them himself.' (f) 'If the goods had been removed by the thieves from one part of the owner's premises to another part of those premises and there left, and the prisoner had taken them from the latter place jointly with the thieves, he would have been jointly liable as a thief. (g) If then he assisted the thieves in taking them elsewhere that was a joint taking by him, and as he did it *malo animo* he was criminally co-operating with them, and therefore guilty of receiving.' (h) 'There is a receiving whenever the prisoner, knowing the goods to have been feloniously stolen, has possession of them *malo animo*.' 'There need be no manual possession to constitute a receiving. The facts were that the sack was brought into the house and taken thence to the stable with the knowledge and co-operation of the three prisoners. Was not Williamson in possession of the sack? Straughan alone carried it; but it is agreed that, for the purposes of larceny, the possession of Straughan was the possession of Williamson. If so, why was not the possession of Straughan equally the possession of Wiley? There was a criminal intent in all three at that time, and a co-operation for the purpose of carrying that intent into execution. What difference can it make that one party alone had manual possession of the goods when, if they all had been on or near the owner's premises, such possession by one would have been clearly in law the manual possession of them all? There may be a joint possession in the receiver and the thief.' (i) The conviction, therefore, was held wrong by the majority of the judges. (j)

Upon an indictment against two principals for stealing goods, and against Miller and Holborne for receiving the goods knowing them to have been stolen, it appeared that the principals brought the goods to Holborne's warehouse, and left them with Miller, who, after some hesitation, accepted them; Holborne was at this time absent; but it was clear on the facts that, shortly after he came home, he was aware of the goods having been left, and there was strong ground for suspecting that he knew that they had been

(f) Erle, J. The learned judge added, '*The rules of the criminal and the civil law are in many respects different, and have little or no bearing on each other,*'—a dictum that ought ever to be kept in remembrance in considering criminal cases.

(g) See *R. v. Dyer*, 2 East, P. C. c. 16, a. 154, p. 767. *R. v. Atwell*, *ibid*.

(h) Cresswell, J.

(i) Lord Campbell, C. J.

(j) *R. v. Wiley*, 2 Den. C. C. 37. The minority were clearly right in this case. It is clear, upon the evidence, that the taking of the sack to the stable was by the direction of Wiley; the other two prisoners, therefore, were his agents in taking it, and trespass would have lain against all for a joint asportation of the goods at the suit of the owner of them. Again, Wiley, by lighting them, was aiding Straughan in carrying the bag, and the case is identically

the same as if the goods had been taken in a cart, and he had led the horse along the road to the stable, because it was too dark for the others to find the road. It is not necessary that the thief should part or intend to part with the possession. A. steals goods and meets with B., and informs him that he has stolen the goods, and asks B. to carry them for him, which B. does. It cannot be doubted that B. is a receiver, though he never was out of A.'s company, and it was never intended that he should buy or have the goods for his own use. A. steals goods and carries them to B., who was waiting for A. at a distance, and then B. accompanies A., who still carries the goods, with intent to assist B. in disposing of them, knowing them to be stolen, B. is clearly a receiver. See *R. v. Kelly*, R. & R. 421. *R. v. King*, R. & R. 332. C. S. G.

stolen; it was also clear that his servant Miller, soon after the goods were left with him, was aware they had been unlawfully procured, as he was found disguising the barrels in which they were contained; it was submitted for Holborne, that as the goods were in the first instance received by Miller in Holborne's absence, the indictment, alleging a joint act of receiving, could not be supported, even though the jury thought that Holborne, when he came in, assented to the unlawful act of his servant, and the preceding case was cited; for the prosecution, it was contended that there was some evidence to go to the jury, that Holborne, even before he went out, must have been aware that the goods were about to be left at the warehouse, and must have given orders for their reception, and if Miller took them in, in pursuance of previous orders from Holborne, the prisoners might be convicted of a joint receiving. Maule, J., thought there was sufficient evidence of this nature, and told the jury that if they were satisfied that Holborne had directed the goods to be taken into the warehouse, knowing them to have been stolen, and that Miller, in pursuance of that direction, had actually received them into the warehouse, he also knowing them to have been stolen, they might properly convict both of the prisoners. (*l*)

Where on an indictment charging Miller and Connors with stealing and also with receiving, M. Geary stated that she was in the employment of Miller, and had pawned a piece of cotton, and that she got it from Connors, who came into her mistress's shop, and her mistress called the witness into the shop, and Connors had then the cotton in her hand, and her mistress desired the witness to take the cotton to the pawn-office and pawn it for Connors, and she did so, and brought back the money, and gave it in her mistress's presence to Connors, who was still in the shop with her mistress; but her mistress had not the cotton at any time in her own hands, nor did she receive any part of the money. It was held, on a case reserved, that this was virtually a receiving by Miller, as her servant, by her order and direction, received the goods from the thief, took them to the pawn-office, and brought the money back to the thief. This was virtually as much a receiving of stolen goods as if her own hand, and not that of her servant, had received them. No question could be raised in this case involving the necessity of these subtle distinctions taken on former occasions with respect to the continuance of the goods in the thief; for the goods here were clearly transferred to hands which were virtually those of Miller herself. (*m*)

Where a husband and wife were jointly indicted for receiving stolen goods, and the jury found that the wife received them without the control or knowledge of and apart from her husband, and that the husband afterwards adopted his wife's receipt, it was held that, upon this finding, the conviction could not be supported. The word 'adopted' might mean that the husband passively consented to what his wife had done without taking any active part in the matter, and in that case he would not be guilty of receiving. Or

(*l*) *R. v. Parr*, 2 M. & Rob. 346.(*m*) *R. v. Miller*, 6 Cox, C. C. 353.

it might mean that he did take such active part; but this rigid construction ought not to be put upon the word 'adopted.' (n) But where on an indictment against a husband for receiving, the actual delivery of the stolen property was made by the principal to the wife in the absence of the husband, and she then paid sixpence on account, but the amount to be paid was not then fixed, and afterwards the husband and the principal met, agreed on the price, and the husband paid the balance; it was objected that when the wife received the stolen property, guilty knowledge could not have come to the husband; but the jury were told that until the subsequent meeting, when the act of the wife was adopted by the husband, the receipt was not so complete as to exclude the effect of guilty knowledge acquired at that meeting; and, upon a case reserved upon the question whether this direction was correct, it was held that it was. The contract for the sale of the goods was not complete until the husband and the principal met; the husband then acquired a guilty knowledge, and ratified the receipt; which amounted to a receipt at that time with guilty knowledge. (o)

Where husband and wife are jointly indicted for receiving stolen goods, and there is no evidence to shew that the wife was present, or of her conduct when they were received, she ought not to be convicted if the husband is. (p) Other cases in which a husband and wife were engaged will be found in the first volume. (q)

An indictment charged S. with stealing 18s. 6d., and C. with receiving the same. The facts were: S. was a barman at a refreshment bar, and C. went up to the bar, called for refreshments, and put down a florin. S. served C., took up the florin, and took from his employer's till some money, and gave C., as his change, 18s. 6d., which C. put in his pocket and went away with it. On leaving the place he took some silver from his pocket, and was counting it when he was arrested. On entering the bar signs of recognition took place between S. and C., and C. was present when S. took the money from the till. The jury convicted S. of stealing and C. of receiving. It was held that there was no evidence which the judge ought to have left to the jury of receiving, although there was evidence upon which C. might have been convicted as a principal in the second degree; and that therefore the conviction of C. for receiving could not be sustained. (r)

In some cases, upon the repealed statutes, the distinction between a receiver and a principal was the subject of attentive consideration.

Dyer and Disting were indicted for stealing a quantity of barilla, the property of M. Hawker. The barilla was on board a foreign ship at Plymouth, consigned to Hawker; Hawker employed Dyer, who was the master of a large boat, for the purpose of bringing it on shore; and Disting, together with several others, was employed as labourers, in removing it to Hawker's warehouses, after it was landed.

(n) *R. v. Dring*, D. & B. 329.

(o) *R. v. Woodward*, L. & C. 122. Blackburn, J., 'If a thief were to leave stolen goods with a pawnbroker's apprentice in the absence of the master, and the pawnbroker, on his return, being told of the circumstances, and knowing that the goods were stolen, were to say, "It is all right;

put them away," no one could doubt that he would be rightly convicted of receiving stolen property.'

(p) *R. v. Archer*, R. & M. 143.

(q) P. 146, *et seq.*

(r) *R. v. Coggins*, 12 Cox, C. C. 517. The case was distinguished from *R. v. Hilton*, 1 Bell, C. C. 20, *post*, p. 430.

And the jury found that, while the barilla was in Dyer's boat, some of his servants, without his privity, consent, or participation, severed some of it from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found that Dyer afterwards assisted the other prisoner and the persons on board, who had before separated this part from the rest, *in removing it from the boat, for the purpose of carrying it off*. It was objected, for the prisoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or accessory after the fact. But Graham, B., was of opinion that, though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would have been complete by the severance and removal of the barilla to another part of the boat, as being an asportation in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit; and that Dyer, having assisted in the act of carrying it off, was therefore guilty as principal. (s)

Another case arose out of the same transaction. The rest of the barilla was lodged in M. Hawker's warehouse; while it was there several persons, employed as labourers or servants by Hawker, entered into a conspiracy to steal some of it; accordingly, some of them, who had access to the warehouse, removed a parcel of it nearer to the door than it was before, in the course of the morning; and about nine at night these persons, together with the prisoners Atwell and O'Donnell, who had in the meantime agreed to purchase it of the others, came to the warehouse yard and assisted the others, who took it out of the warehouse, in carrying it away from thence. They were all indicted as principals in the felony; and the same objection was made as before, that Atwell and O'Donnell were only receivers or accessories after the fact, the felony being complete before their participation in the transaction. But it was ruled that, so long as the goods remained in the warehouse, which was the lawful place of their deposit, although to some purposes, as to those who severed this parcel from the rest for the purpose of stealing it, and more conveniently removing it afterwards, the felony might be said to be complete; yet it was a continuing transaction as to those who joined in the same plot before the goods were finally carried away from the premises; and that all the defendants, having concurred in, or being present at the act of removing them from the warehouse wherein they were lawfully deposited, were principals. (t)

But where the goods had been so entirely taken away from the premises or actual possession of the owner, that their further removal

(s) *R. v. Dyer*, Graham, B., conferred with Le Blanc, J., and afterwards said that he was fully satisfied that his opinion was well founded. 2 East, P. C. c. 16, s. 154, pp. 767, 768. See per Cresswell, J., in *R. v. Wiley*, 2 Den. C. C. 47.

(t) *R. v. Atwell*, tried by Graham, B., at the same time as *R. v. Dyer*, and decided after the like consideration. See other cases on this subject, vol. i. p. 161, *et seq.*

could not be deemed a continuing part of the original taking, the case was holden to come under a different consideration; and the party concerned only in such further removal was decided not to be guilty of stealing the goods. Upon an indictment for larceny, in stealing several firkins of butter and some cheeses, the facts proved were, that two men, in the absence of the prisoner, broke open the warehouse of the prosecutor, stole the butter and cheese in question, carried them into the adjoining street, and deposited them at a distance of about thirty yards from the door of the warehouse: after which they went for the prisoner, brought him to the place, and informed him of what they had done; and he assisted in carrying the property to a cart, which was kept in waiting at some distance to be ready to convey it away. It was objected that the prisoner could not be found guilty of stealing, as the felonious taking of the property was complete before he had any part in the transaction. Bayley, J., however, in the first instance, thought that he might properly be found guilty; on the ground that as every continuation of a larceny is so far a new larceny and a new taking, as to sustain an indictment for larceny in any county into which the property is carried, and as the possession in law of the property in this case remained in the prosecutor, notwithstanding the removal of it from his warehouse to the place where it was deposited in the street, so that he might have brought trespass against any stranger taking it from the place in the street without any felonious intent; it might be considered that the prisoner, who was present aiding and abetting in a continuation of the larceny, was a principal in the larceny so continued; and the prisoner was accordingly convicted. But, on a case reserved, the judges were of opinion that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as a principal; and that the conviction of him as a principal was therefore wrong. (u) So going towards the place where a felony was to be committed in order to assist in carrying off the property, and assisting accordingly, was held not to make the party a principal, if he was at such a distance at the time of the felonious taking as not to be able to assist in it. The prisoner, and J. S., went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking. (v) But where a man committed a larceny in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion, and held that such accomplice was a principal, and that the conviction of him as a receiver was wrong. (w)

An indictment against Hilton and M'Evin charged them in one count with stealing a purse containing money from the person of the prosecutrix, and in another with receiving the purse containing the

(u) *R. v. King*, R. & R. 332. And see *R. v. M'Makin*, R. & R. 333, note (b).

(v) *R. v. Kelly*, MS. Bayley, J., and R. & R. 421.

(w) *R. v. Owen*, R. & M. 6.

money, knowing it to have been stolen. Hilton was walking by the side of the prosecutrix, and M'Evin was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone, and on looking round saw Hilton behind her walking with M'Evin in the opposite direction, and saw Hilton hand something to M'Evin. The jury were told that if they did not think from the evidence that M'Evin was participating in the actual theft, it was open to them on these facts to find him guilty of receiving; which they did, and, on a case reserved, it was held that the direction to the jury was right. (x)

Where a servant is entrusted with goods by his master, the possession of the servant is the possession of the master, but such possession is determined by the felonious act of the servant, and in cases where the servant delivers his master's goods to another person, who is his accomplice, it frequently becomes material to ascertain at what time the servant committed the felonious act, because if he committed it at the time when he delivered the goods to his confederate, both are guilty of larceny as principals; but if he committed it in the absence of his confederate, and afterwards delivered the goods to him, the servant is the principal, and his confederate a receiver. Butteris and Grove were indicted as principals for stealing some fat. Butteris, being in the service of the prosecutor, was sent by him to deliver some fat to A. B., but he did not deliver all the fat to A. B., having previously given part of it to Grove; it was objected that Grove ought to have been charged as a receiver; but it was held that it was a question for the jury whether Grove was present at the time of the separation, as the fat was in the master's possession till the separation; and the case was left to the jury to say whether Grove was present at the time when the separation was made, or received the fat afterwards. (y) So where Gruncell was indicted for stealing a quantity of hay, and Hopkinson for receiving the hay, knowing it to have been stolen, and it appeared that Gruncell, who was a carter, and allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, took from his master's stables two trusses of hay above the quantity which was allowed for the horses; and that Hopkinson, who was the ostler at a public-house where the waggon stopped on the journey, came to the tail of the waggon and received the two trusses of hay from Gruncell, and carried them to the stable: it was objected that, if Hopkinson had committed any offence at all, it was that of stealing, as the hay being in the master's waggon was in the master's possession, and the act of the prisoner in removing it from the waggon constituted a larceny and not a receiving; but it was held that the indictment was properly framed, on the ground that as the hay was not hay appropriated by the master for the horses, the moment it got into the waggon, *animo furandi*, the larceny was complete. If, however, it had been hay allowed for the horses which had been stolen, it would have been otherwise. (z)

(x) *R. v. Hilton*, Bell, C. C. 20. See *ante*, p. 427, note (r).

(y) *R. v. Butteris*, 6 C. & P. 147, Gurney, B.

(z) *R. v. Gruncell*, 9 C. & P. 365.

*Mirehouse*, C. S., after consulting Pattenon, J., who went very carefully through the cases on the subject, and was clearly of opinion the indictment was properly framed.

See *R. v. Roberts*, 3 Cox, C. C. 74.



B. Brett, having stolen a cheque, went to her father, and they and Mrs. Brett went to a lodging-house some forty miles off, where they met with Ralph; there they all got drunk, and quarrelled; the next day Ralph tried to change the cheque, but was apprehended, and said before the magistrate that he met the Bretts by accident, and that they quarrelled, and that he picked up the cheque in the room after the Bretts had gone to bed, and that, not knowing whose it was, he had tried to change it. When Brett, the father, was told of Ralph's being taken up for presenting the cheque, he said that he could only have obtained it by robbing him or his wife when they were all drunk. Parke, B., held that this evidence did not support the charge of receiving against Ralph. There was nothing to contradict his statement, and that was all the case against him as a receiver. If the case amounted to anything it shewed a larceny to have been committed, either by stealing the cheque from Brett, or by finding it and appropriating it under such circumstances as would amount to a larceny. (a)

Upon an indictment against Wade for stealing, and Leigh for receiving a watch, it appeared that Wade and Leigh had been in custody together, and that Leigh was discharged, and afterwards again apprehended, and that he then stated that while he was before in custody with Wade, Wade had told him that he had planted the watch under a flag in the soot-cellar in Leigh's house, and that when he, Leigh, was discharged he had gone and taken the watch, and desired his wife to pawn it for as much as she could get upon it; Pollock, C. B., 'I doubt whether, when the possession had been transferred by an act of larceny, the possession can be considered to remain in the owner. (b) Were it so then every receiver of stolen goods, knowing them to be stolen, would be a thief; and so on, in series from one to another, all would be thieves. (c) If this act was done by Leigh in opposition to Wade, or against his will, then it might be a question whether it were a receiving, (d) but if Leigh took the article in consequence of information given by Wade, Wade telling Leigh in order that the latter might use the information by taking the goods, then it is a receiving.' (e)

Where on an indictment for receiving stolen goods it appeared that the goods were found in the pockets of the thief by the owner, who sent for a policeman, who took the goods and wrapped them in a handkerchief, the owner, the thief, and the policeman going towards the prisoner's shop, and, when they came near it, the policeman gave the thief the goods, and the latter was then sent by the owner to sell them where he had sold others; and the thief then went to the prisoner's shop, and sold them, and gave the money to the owner as the proceeds of the sale; it was contended that the owner had resumed possession of the goods, and therefore there was no receiving of stolen goods within the Act; but the jury were directed, on the authority of the preceding case, that the prisoner was liable to be convicted of

(a) *R. v. Brett*, 1 Cox, C. C. 261.

(b) There is no ground for this doubt. See 1 Hale, 507.

(c) The reason why they are not thieves

is that the property is delivered to them. 1 Hale, 507.

(d) It would clearly be larceny. See 1 Hale, 507.

(e) *R. v. Wade*, 1 C. & K. 739.

receiving; but, upon a case reserved, it was held that the conviction was wrong. Lord Campbell, C. J., 'I do not see how it could be supported unless the doctrine were laid down that if at any period of the history of a chattel, which has been stolen and has been restored to the owner, who has long had it in his possession, the same chattel should be received from the owner by a person who knew that it had been once stolen, such a receiving would be an offence within the statute. I think such a receiving could never be said to be an offence within the statute, any more than it could make the receiver an accessory at common law to the felony. If an article once stolen has been restored to the master of that article, and he, having had it fully in his possession, bails it for any particular purpose, how can any person, who receives the article from the bailee, be said to be guilty of receiving stolen goods within the meaning of the Act?' In this case 'the owner had possession of the goods just as much as if he had taken them into his own hands, and had delivered them from his own possession to another person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that the goods are carried by the thief by the direction of the master of the goods to the prisoner, who receives them. That is not a receiving within the meaning of the Act.' (f)

**Where goods had ceased to be stolen goods.** — The prisoner was convicted of feloniously receiving stolen goods under the following circumstances: The goods were stolen, and sent by the thief in a parcel by railway, addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station at the place of its destination, and stopped it. It was called for by one of the thieves on the day of its arrival, and refused to him. A porter of the company, the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and it was there received by the prisoner. Held, by Martin, B., Keating and Lush, JJ., that the conviction was wrong, as the goods had ceased to be stolen goods, within the statute, at the time of the receipt by the prisoner. Erle, C. J., and Mellor, J., *dissentientibus*. (g)

(f) *R v. Dolan*, Dears. C. C. 436. The other judges agreed in holding the conviction wrong; but Cresswell, J., said, 'If it were necessary to hold that the policeman, by taking possession of the stolen goods from the pocket of the thief, restored the possession of the master, I should dissent from that proposition. I think we cannot put the policeman out of the question. The goods were in the custody of the law for the purposes of the administration of the criminal justice of the land, and the master could not have demanded them of the policeman. But I think that when the goods were given back by the policeman to the thief, and the master desired him to go

and sell them, it may be considered that the master employed the thief as his agent for that purpose, and that the prisoner did not receive them as stolen goods within the meaning of the statute.' This case has been followed in *R v. Villensky* (1892), 2 Q. B. 597. See also *R v. Hancock*, 14 Cox, C. C. 119. It is submitted there are two cases in which a receiving is not within the Act, — 1, where the owner has had the goods again in his possession, whether actual or constructive; 2, where they are delivered to the prisoner by the authority of the owner. C. S. G.

(g) *R v. Schmidt*, 35 L. J. M. C. 94; L. R. 1 C. C. R. 15.

## SEC. IV.

*Form of Indictment — Venue.*

The indictment must shew on the face of it that the Court has jurisdiction to try the receiver. (*h*)

Upon an indictment, which charged one prisoner with stealing at Leeds in Yorkshire, and another with receiving in the same county, it appeared that the property was stolen in Yorkshire and received in Lancashire, and it was objected that the indictment should have laid the receiving in Lancashire, and then have introduced averments to shew that the 7 & 8 Geo. 4, c. 29, s. 56, (now repealed) applied; but Maule, J., held that that section justified this method of indictment. (*i*)

Upon an indictment in Wiltshire for receiving the half of a £5 note knowing it to have been stolen, it appeared that the half note was posted by a tradesman at Swindon in Wiltshire in a letter to a person in Bristol, and stolen in its transit by some one in some way unknown. The prisoner had received the half note with a guilty knowledge, and enclosed it in a letter to the bank at Swindon requesting payment of it, and posted the letter at Bath, and it arrived with its contents in due course at Swindon; but there was no evidence that the half note was received by or ever in the possession of the prisoner in Wiltshire, unless the bankers at Swindon to whom the half note had been remitted, or the post-office servants in that county could be regarded as his agents, and their possession in that county treated as his possession; and, upon a case reserved, it was held that the prisoner was triable in Wiltshire under sec. 56 (now repealed) of the 7 & 8 Geo. 4, c. 29. It was plain that if he had employed a private agent to give the half note to the bankers in order to get it cashed, the possession, in point of law, would all along have remained in the prisoner, and there was no reason why it should the less be considered in his possession because it was transmitted through a public agent by means and on behalf of the prisoner. (*j*)

It will be seen that under sec. 92, noticed *ante*, p. 419, counts for stealing and receiving may be joined. (*k*)

Where an indictment contained five counts, all alleging a breaking into the house of J. Mason; but each count describing the goods stolen as the property of a different person; and the indictment also contained five other counts for receiving the goods, in which the property was laid in the same manner as in the five counts for stealing; it was objected that the 11 & 12 Vict. c. 46, s. 3, only made it lawful

(*h*) *R. v. Martin*, 1 Den. C. C. 398. 2 C. & K. 950.

(*i*) *R. v. Hinley*, 2 M. & Rob. 524. And since the 14 & 15 Vict. c. 100, s. 23, the indictment in such a case would be sufficient if it merely had the venue, Yorkshire, in the margin. In what county or place the receiver may be tried, see 24 & 25 Vict. c. 96, s. 96, *ante*, p. 420.

(*j*) *R. v. Cryer*, D. & B. 324. See *R. v. Jones*, 1 Den. C. C. 551, *post*, *False Pretences*. See sec. 96, *ante*, p. 420. *R. v. Rogers*, *ante*, p. 423.

(*k*) As to the practice before this Act, see *R. v. Galloway*, R. & M. 234. *R. v. Madden*, R. & M. 277.

to add one count for receiving; but the sessions held that that section made it lawful to add as many counts for receiving as there were counts charging a stealing; and, on a case reserved, the judges were unanimously of opinion that the objection was groundless, and Alderson, B., said, 'Why may there not be as many counts for receiving as for stealing? There is only one stealing and one receiving, but the offence is laid in different ways, because there is a doubt to whom the property belonged.' (*l*)

In one case it was contended that a count for stealing certain goods could not be joined with a count for receiving the same and other goods. Willes, J., after consulting Pollock, C. B., thought it better to put the prosecutor to elect as to which he would proceed with. (*m*)

The first count charged the stealing '£100 in money, one purse, &c.,' from the dwelling-house of R. Gilbert; the second the receiving '£35 in money, one smelling-box, one purse, one opera-glass, and one bag of the money, &c., of the said R. Gilbert, then lately before feloniously stolen.' It was objected that it did not appear that the property mentioned in the second was the same as that in the first count, which was necessary under the 11 & 12 Vict. c. 46, s. 3, and it was held that the Crown must elect on which count to proceed. (*n*)

The indictment charged four prisoners with a burglary and stealing a number of articles, and the fifth prisoner with receiving a part of the stolen goods from the other prisoners, and another count charged the fifth prisoner with a substantive felony in receiving the same part of the goods from a certain evil-disposed person. It was objected that there was a misjoinder of counts; that the statute allowed the party to be indicted in one way or the other, but not in both; and that by joining the two counts in one indictment, the prisoner was deprived of the benefit of pleading *autrefois acquit*, which was given him by the 7 & 8 Geo. 4, c. 29, s. 54; but it was held that there was no misjoinder. And Parke, B., afterwards said, 'There was an objection taken on the ground of a misjoinder of counts, where a count for receiving was added as for a substantive felony. I had some doubt on the point; but I have conferred with my Brother Bolland, and looked at authorities, and I now find that it is a matter quite in the discretion of the judge. It is not open to a demurrer; neither is it a ground for quashing the indictment. Therefore, whenever it is clear that there is only one offence, and the joinder of the counts cannot prejudice the prisoner, we think that the objection ought not to prevail. We have accordingly directed the officer to draw these indictments in the manner which we understand has prevailed on the circuit, and at the Old Bailey.' (*o*)

An indictment charging the principal with killing a sheep with intent to steal one of the hind legs of the sheep, and the accessory with receiving nine pounds of the mutton so stolen as aforesaid, cannot be supported against the accessory, but if such an indictment also contain a count for a substantive felony in receiving the mutton

(*l*) R. v. Beeton, 1 Den. C. C. 414. 2 final decision, but that he would consult the other judges.

(*m*) R. v. Ward, 2 F. & F. 19. Willes, J., said, 'this was not to be taken to be a

(*n*) R. v. Sarsfield, 6 Cox, C. C. 12. Pigot, C. B., and Richards, B.

(*o*) R. v. Austin, 7 C. & P. 796.

from a certain evil-disposed person, the accessory may be convicted upon it. The first count charged that Wheeler killed a sheep 'with intent to steal one of the hind legs of the said sheep.' The second count charged Cowley with receiving nine pounds weight of mutton part of the goods and chattels 'so stolen as aforesaid.' The third count charged Cowley with receiving the nine pounds weight of mutton from a certain evil-disposed person; and it was held that the second count could not be supported, as it stated the mutton to have been 'so stolen as aforesaid;' and there was no stealing mentioned, but only an intention to steal; but it was held that Cowley might be convicted on the third count. (*p*)

A count charging a person with being accessory before the fact may be joined with a count charging him with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, as the party may be found guilty upon both. (*q*) And so a count charging the prisoner as accessory before the fact may be joined with a count for receiving, and the prisoner may be convicted on both; (*r*) or a count charging the prisoner as principal may be joined with a count for receiving, and the prisoner may be convicted on both. (*s*) And a case has occurred, in which a party was indicted for receiving stolen goods, and also for receiving, harbouring, and comforting the felons, and the prisoner was convicted. (*t*)

It was settled upon the repealed statutes, that a party might be indicted for receiving goods stolen by a person unknown, when such person was unknown; and where an indictment was objected to because it did not ascertain the principal thief, and did not therefore state to whom in particular the prisoner was accessory, the judges were unanimously of opinion that it was good; the great view of the statutes being to reach the receivers, where the principal thieves could not easily be discovered. (*u*) But where the principal was known, it ought not to have been stated in the indictment that he was unknown. (*v*)

In an indictment against a receiver, as an accessory after the fact to the felony, where the principal had been convicted, it was decided to be sufficient to state the conviction, without stating the attainder of the principal. (*w*)

(*p*) *R. v. Wheeler*, 7 C. & P. 170. Coleridge, J., who at first doubted, first, whether, if the principal were known, his name should not be stated, and if not known, whether it should not be charged that he was not known; secondly, that the count was for receiving stolen goods, and was joined not with a count for stealing, but with a count for killing with intent to steal, which seemed to be an offence of a different nature. His lordship, however, left the case to the jury, and the prisoners were found guilty, and afterwards sentenced.

(*q*) *R. v. Blackson*, 8 C. & P. 43, Parke, B., and Patteson, J.

(*r*) *R. v. Hughes*, Bell, C. C. 242.

(*s*) *Ibid.*

(*t*) Anon., mentioned by Parke, B., *ibid.* In many cases it is advisable to insert such counts, as the evidence may fail to prove

the receipt of the stolen property, and yet may be sufficient to obtain a conviction for comforting and assisting the felon. See *R. v. Lee*, 6 C. & P. 536; vol. i. p. 177, and see *R. v. Caspar*, *post*.

(*u*) *Thomas's case*, 2 East, P. C. c. 16, s. 164, p. 781.

(*v*) 2 East, P. C. c. 16, s. 164, p. 781. *R. v. Walker*, 8 Campb. 264. And *S. P.* by Dallas, J., Anon. Worcester Lent Ass. 1815. *R. v. Caspar*, 2 Moo. C. C. R. 101. See *R. v. Bush*, R. & R. 372. See a case, *infra*, from which it seems the indictment need not have stated the name of the principal felon.

(*w*) *Hyman's case*, 2 Leach, 925. 2 East, P. C. c. 16, s. 164, p. 782. *R. v. Baldwin*, 3 Campb. 265, MS. Bayley, J. MS. Bayley, J., and R. & R. 241.

The indictment against the receiver of stolen goods charging him as an accessory, need not have alleged time and place to the fact of stealing the goods; a statement of them to the offence of the receiver was sufficient. (x)

The second count of an indictment charged the prisoner with having received goods stolen by 'a certain evil-disposed person,' and it was objected that it ought either to have stated the name of the principal, or else to have stated that he was unknown. Tindal, C. J., 'It will do. The offence created by the Act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, will be whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. The objection is founded on the too particular form of the indictment. The statute makes the receiving the goods, knowing them to have been stolen, the offence.' (y)

It is sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination; so that where the indictment charged the principal with stealing a live sheep, and the accessory with receiving 'twenty pounds of mutton, part of the goods,' &c., the conviction was holden to be proper. (z)

But where an indictment charged one prisoner with stealing six promissory notes of £100 each, and the other prisoner with receiving the said promissory notes, knowing them to have been stolen, and the only evidence against the receiver was that at one time he shewed a number of £20 notes, which he said were part of the prosecutor's money, and at another time he threw down a sovereign, saying, 'I had a hundred sovereigns of the captain's money, and this is one of them;' it was held that if the prisoner never received either of the £100 notes into his possession, he must be acquitted upon that indictment. He was not here charged with the receiving the proceeds; this indictment imputed that he received 'the said promissory notes;' now the only notes mentioned in the indictment were the notes of £100 each. (a)

The averment of the guilty knowledge, which is the gist of the offence, should be correctly made; as where an indictment against a receiver who was tried with the principal, contained a defective statement, that the receiver knew the goods to have stolen (omitting the word 'been') the judges thought the indictment bad, this being the gist of the offence; but they afterwards took time to consider. (b)

(x) *Stott's case*, 2 East, P. C. c. 16, s. 144, p. 753, and s. 163, p. 780. See 5 Q. B. 35, that no decision was ever come to in *Stott's case*.

(y) *R. v. Jervis*, 6 C. & P. 156.

(z) *R. v. Cowell*, 2 East, P. C. c. 16, s. 48, p. 617.

(a) *R. v. Walkley*, 4 C. & P. 132. *Taddy*, Serjt. It is conceived that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving the chattel stolen, knowing that chattel to have been stolen. In the case of gold, silver, &c., if it were

melted after the stealing, an indictment for receiving it might be supported, because it would still be the same chattel, though altered by the melting; but where a £100 note is changed for other notes, the identical chattel is gone, and a person might as well be indicted for receiving the money, for which a stolen horse was sold, as for receiving the proceeds of a stolen note. C. S. G. See *R. v. Chapple*, 9 C. & P. 355.

(b) *R. v. Kernon*, Hil. T. 1788. MS. Bayley, J.; but see *Redman's case*, 1 Leach, 477, *contra*.

Where a count alleged that D. Larkin feloniously received certain steel of the goods and chattels of A. Brooksbank, then lately feloniously stolen, he the said A. Brooksbank knowing the same to have been feloniously stolen; it was held that the count was bad on the face of it, in not correctly alleging the scienter, and that the count could not be amended after verdict by substituting D. Larkin for A. Brooksbank, so as correctly to allege a guilty knowledge in the prisoner. (c)

In a case where an indictment charged the prisoner by the name of Francis Morris with receiving stolen goods, 'he the said Thomas Morris knowing, &c.,' it was holden that the words 'the said Thomas Morris' might be rejected as surplusage. (d)

An indictment upon the 7 & 8 Geo. 4, c. 29, s. 55, for receiving goods obtained by false pretences, must have alleged the goods to have been obtained by false pretences, and that the receiver knew that they were so obtained. (e) And it was held, before the 24 & 25 Vict. c. 96, that an indictment for receiving goods obtained by false pretences must have alleged the particular false pretences. (f)

An indictment under 24 & 25 Vict. c. 96, s. 95, charged that defendant 'unlawfully did receive goods which had been unlawfully, and knowingly, and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned, but omitting to set out what the particular false pretences were. Held, that the objection, if any, not having been taken before plea, was cured by the verdict of guilty. (g)

These cases have recently been considered, and it has been laid down that the gist of the offence being the receipt of the goods with knowledge that they had been unlawfully obtained by *some* false pretence, it is now sufficient to allege this in the indictment without specifying the nature of the false pretence. (gg)

## SEC. V.

### Trial — Evidence.

In prosecutions for the *misdemeanor* in receiving stolen goods, on the repealed statute 22 Geo. 3, c. 58, it was settled that the principal felon, though not convicted or pardoned, was a competent witness against the receiver. (h)

(c) *R. v. Larkin*, Dears. C. C. 365.

(d) *Morris's case*, 1 Leach, 109. And see also *Redman's case*, 1 Leach, 477, and note (v), *ante*, p. 42.

(e) *R. v. Wilson*, 2 Moo. C. C. R. 52. It is essential to prove that the prisoner knew that the goods were obtained by false pretences. *R. v. Rymes*, 3 C. & K. 326, but he need not know what the false pretences were. *R. v. Goldsmith*. Per Bovill, C. J., see report in 12 Cox, C. C. 479, p. 481.

(f) *R. v. Hill*, Gloucester Spr. Ass. 1851. MSS. C. S. G.

(g) *R. v. Goldsmith*, 42 L. J. M. C. 94. L. R. 2 C. C. R. 74. See also *R. v. Stroulger*, 17 Q. B. D. 327. (See vol. i. p. 36.)

(gg) *Taylor v. R.* (1895), 1 Q. B. 25.

(h) *Haslam's case*, 1 Leach, 418. 2 East, P. C. c. 16, s. 166, p. 782. *Patram's case*, 1 Leach, 419, note (a). 2 East, P. C. *ibid.* Grose, J.

Where the only evidence against the alleged receiver is that of the thief, the judge will advise the jury to acquit. (*i*)

In cases where the principal and receiver are joined in the same indictment, and tried together, there is no doubt that the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; and in cases where the principal has been previously convicted, though the record of the conviction will be sufficient presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet according to great authority, it is competent to the receiver to controvert the guilt of the principal, and to shew that the offence of which he was convicted did not amount to felony in him, or not to that species of felony with which he was charged. (*j*)

Upon an indictment for receiving stolen goods there should be some evidence to shew that the goods were in fact stolen by some other person, and recent possession of the stolen property is not alone sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving. (*k*)

On an indictment for receiving a stolen shirt it appeared doubtful whether the principal felony had not been committed by several persons, and the only evidence against the prisoner was the possession of the shirt, and a statement made by her that she had received it from another person; it was objected that there was no evidence of receiving; Littledale, J., 'In a case on the early part of this circuit the only evidence was recent possession, and the counsel for the prosecution urged that that was evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the possession of some one else before it came to the prisoner; here the prisoner said some one brought the shirt to her; that is an admission that it had been in the possession of some one else. That is evidence of receiving.' (*l*)

The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that the person who stole them was a certain ill-disposed person to the jurors unknown; it was proved that the person who stole the property handed it to J. S., and that J. S. delivered it to the prisoner; and Parke, J., held that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether the person from whom he was proved to have received it was an innocent agent or not of the thief. (*m*) So where an indictment charged Woolford with stealing a gelding, and Lewis with receiving it, knowing it to have been 'so feloniously stolen as aforesaid,' and Woolford was acquitted; Patteson, J., held that Lewis could not be convicted upon this indictment, and that he might be tried on another

(*i*) *R. v. Robinson*, 4 F. & F. 43. *R. v. Pratt*, 4 F. & F. 315.

(*j*) *Fost.* 365. *Smith's case*, 1 Leach, 288. *R. v. Dunn*, 4 C. & P. 377, where Bosanquet, J., thought that the record of the principal's conviction on his own confession was *prima facie* evidence against the

accessory; but see *R. v. Turner*, R. & M. 347, vol. i. p. 190.

(*k*) *R. v. Densley*, 6 C. & P. 399. See *Arundel's case*, 1 Lew. 115. *R. v. Deer*, L. & C. 240, *ante*, vol. i. p. 158.

(*l*) *R. v. Sarah Cordy*, Gloucester Lent Ass. 1832, MSS. C. S. G.

(*m*) *Elsworthy's case*, 1 Lew. 117.



indictment, charging him with having received the gelding, knowing it to have been stolen by some person unknown. (*n*)

Where the thief, who had pleaded guilty, had admitted to a constable in the presence of the prisoner, who was indicted as a receiver, that he had stolen the property, and this was the principal evidence of the larceny; Crowder, J., left this confession of the thief to the jury as evidence against the receiver. (*o*)

A father and son were jointly indicted, the son as the thief, and the father as the receiver of a large quantity of boots, shoes, and leather. There was only one count against the son; but two against the father, the one for receiving the goods stolen by the son, the other for receiving the goods stolen by an evil-disposed person. The son had been in the prosecutor's employ from March to November, and the prisoners lived together till April, when the father removed to Preston, and took a hamper with him, which passed and repassed repeatedly between them until October. On the 10th of November, the day laid in the indictment, a quantity of shoes and leather belonging to the prosecutors was found in the son's lodgings, and sundry letters from the father to the son, the contents of which caused the shop of the father at Preston to be searched, and there was also found property of the prosecutors, consisting of boots, shoes, and leather, of the value of £150, and also letters of the son to the father. The letters from the father to the son, and from the son to the father were stated to bear dates at various periods between May and October, and to refer to the transmission of goods of the nature of those found in the father's shop. It was urged that these letters could not all be read, but that the prosecution must elect one offence, and give evidence on that alone. It was answered that the letters were all evidence against the father to shew guilty knowledge, and *R. v. Dunn* (*p*) was relied on. Maule, J., 'It is true that judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where the effect of doing so will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place; the whole, according to the opening, seems to constitute a continuous transaction; therefore I shall admit the evidence relating to any takings and receivings, under the circumstances suggested, provided the indictment contains corresponding charges.' (*q*)

Where upon an indictment for receiving stolen re-issuable notes, the prisoner's counsel in cross-examination attempted to shew that no means had been taken to inform the public of the number and particulars of the notes, and the counsel for the prosecution then proposed to read an advertisement from the *British Traveller*; it was objected to, unless it could be shewn that it had come to the knowledge of the prisoner; but Gaselee, J., held that as by the cross-examination it was attempted to be shewn that no means had been taken

(*n*) *R. v. Woolford*, 1 M. & Rob. 384.

(*o*) *R. v. Cox*, 1 F. & F. 90. A confession of the principal in the absence of the

receiver is not evidence against the latter. *R. v. Turner*, 1 Moo. C. C. 347.

(*p*) *Ante*, p. 438.

(*q*) *R. v. Hinley*, 2 M. & Rob. 524.

to apprise the public that any notes had been stolen, or guard them against taking them, it was admissible; and, upon a case reserved, the judges were clearly of opinion, that, under the particular circumstances of the case, it was properly received. (*r*)

By Sec. 19 of the Prevention of Crimes Act, 1871, (*s*) it is enacted that where proceedings are taken against any person for having received goods (*t*) knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, (*tt*) and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; (*u*) provided that not less than seven days' notice in writing shall have been given to the person accused, that proof is intended to be given of such previous conviction: and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

Before this Act it seems that in order to shew guilty knowledge other instances of receiving goods of the prosecutor from the same person might be proved, (*v*) but that evidence of the receipt of other stolen goods from other persons was not admissible. (*w*)

The other stolen property must, however, be found in the possession of the prisoner; and evidence that before stealing the property in respect of which he is being tried he had been in possession of other similar stolen property which he had disposed of before this larceny had been committed, is inadmissible. (*ww*)<sup>1</sup>

The necessary evidence of the offender knowing the goods which he has received to have been originally stolen may be collected from the circumstances of the particular case; and it is said, that the buying goods at an under value is presumptive evidence that the buyer knew they were stolen. (*x*)

(*r*) *R. v. Vyse*, R. & M. C. C. R. 218. See this case *ante*, p. 239.

(*s*) 34 & 35 Vict. c. 112.

(*t*) It was doubted whether bank notes were goods within the similar section of 32 & 33 Vict. c. 99. See *R. v. Harwood*, 11 Cox, C. C. 388, per Keating, J.

(*u*) And this may be so notwithstanding that the property forms the subject of another indictment. *R. v. Jones & Hayes*, 14 Cox, C. C. 3.

(*u*) See *R. v. Davis*, 39 L. J. M. C. 134.

(*v*) *R. v. Dunn*, 1 Moo. C. C. 146. *R. v. Dawes*, 6 C. & P. 177. *R. v. Nicholls*, 1 F. & F. 51.

(*w*) *R. v. Oddy*, 20 L. J. M. C. 198. 2 Den. C. C. 264.

(*ww*) *R. v. Carter*, 12 Q. B. D. 522. *R. v. Drage*, 14 Cox, C. C. 85.

(*x*) 1 Hale, 619; 2 East, P. C. c. 16, s. 153, p. 765.

#### AMERICAN NOTE.

<sup>1</sup> As to the admissibility of such evidence in America, see *P. v. Rando*, 3 Parker, C. R. 335. *M'Intyre v. S.*, 10 Ind. 26.

On an indictment for receiving stolen lead, Bramwell, B., told the jury that 'the knowledge charged in the indictment need not be such knowledge as would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances accompanying the transaction were such as to make the prisoner believe that it had been stolen.' (y)

Where on an indictment for receiving the silver tops of a whip and of two walking-sticks, a boy had been convicted of stealing them, and the prisoner, a general dealer, had proved on the trial of the boy that he gave three shillings for the articles, and that the boy said he got them from the coachman of B.; but it appeared that the boy had been in the service of B., whose man had sent him repeatedly to the prisoner with articles of a very varied character to sell, and that on the first occasion the prisoner asked him who he was, and had a note of introduction from B. or his man, and the boy had never told the prisoner that he had left the service of B., but said that the prisoner only gave him seventeen pence for the articles, the value of which was stated to be three times the sum the prisoner said he gave for them; Martin, B., told the jury that if they thought the prisoner did not know that the boy had left B.'s service, they should acquit him. (z)

Upon an indictment for receiving stolen tin it was held that evidence might be given that when the constable went to search the prisoner's warehouse for stolen iron, he saw the prisoner endeavouring to conceal some brass in some sand, and that after he was taken away in custody, his wife carried some tin under her cloak from a warehouse on the premises. (a) In the same case it was held that what the prisoner said to the constable not only relating to the tin which was stolen, and for which the constable was not searching, but also relating to the iron for which he was searching, was admissible in evidence. (a)

The first count charged H. Craddock with stealing a promissory note for £10 from the person of R. Harvey; the second count with stealing a bank note for £10 from the person of the said R. Harvey; and the last count with feloniously receiving 'the goods and chattels aforesaid, *so as aforesaid feloniously stolen*.' The jury found the prisoner not guilty upon the two first counts, but guilty of receiving under the third count; and, upon a case reserved, it was contended that the judgment ought to be arrested, because the words 'so as aforesaid' were descriptive, and meant 'stolen by H. Craddock aforesaid.' (b) Pollock, C. B., 'The several counts are wholly independent of each other. The fact of the prisoner having been acquitted on the two first counts has no bearing whatever on the charge contained in the third, and it cannot be used as evidence on that count either for or against him. That case stands or falls on its own merits. If it must mean the goods so stolen by H. Craddock, still if *in rerum naturâ* a man can possibly be a receiver of goods stolen by himself,

(y) R. v. White, 1 F. & F. 665.

(z) R. v. Wood, 1 F. & F. 497.

(a) R. v. Mansfield, C. & M. 140, Coleridge, J.

(b) R. v. Woolford, *supra*. Wightman, J., 'Are those words necessarily de-

scriptive of *all* the incidents of the stealing stated in the other counts? Because, if they are capable of being construed so as to avoid a repugnancy, the Court will give them a construction which will support the indictment, rather than one which will vitiate it.'

which he clearly may be, then there is no objection to this indictment on its face. The objection, being merely technical, may be met by an answer equally technical. Assuming the count to allege the goods to have been stolen by the said H. Craddock, then after verdict we must assume that such allegation was proved. It is quite immaterial that there may seem to be a contradiction on the face of the record owing to the acquittal on the other counts.' 'The Court are all of opinion that the judgment ought not to be arrested. If we hold that the words must be construed as is suggested, then after verdict it must be taken that such a stealing was proved; if, on the other hand, as some of the Court think, the words need not be construed so as to create such seeming repugnancy, the objection is wholly groundless. (c) So where a prisoner was charged, in the first count with stealing twenty yards of tweed, and in the second count with receiving the goods and chattels aforesaid "so as aforesaid feloniously stolen," and acquitted on the first count, but convicted on the second; it was contended that the conviction could not be sustained, because a person cannot be said to have feloniously received goods stolen by himself; but it was held, on a case reserved, that "so as aforesaid feloniously stolen," might be construed to mean simply "stolen goods," and therefore such goods as the prisoner might be convicted of receiving.' (d)

An indictment charged three prisoners with stealing a carpet bag and a number of articles therein contained, and two other prisoners with receiving separately certain of the goods so stolen as aforesaid, and there were two other counts, each of them charging one of the two last-mentioned prisoners with a substantial felony in separately receiving portions of the same goods, and the jury acquitted the three principals, but found the receivers guilty; it was moved, in arrest of judgment, that the principals having been acquitted, no judgment could be given against the receivers; that a larceny committed by another person could not be given in evidence upon this indictment; and although a count for a substantive felony might be inserted, such count was only introduced to prevent an acquittal, if it turned out that the property was received from some other person, but still the principal must be proved to have committed the felony; but the objection was overruled, and judgment given against the receivers. (e)

Where several prisoners are jointly indicted for receiving stolen goods, and one of them convicted and the others acquitted, and one of the prisoners who was acquitted is afterwards separately indicted for receiving the same goods, a plea of *autrefois acquit* on the former indictment is good. (f)

As to the restitution of the stolen property upon the conviction of the receiver, see the 24 & 25 Vict. c. 96, s. 100, Vol. I. p. 86.

The 24 & 25 Vict. c. 110, 'an Act for regulating the business of dealers in old metals,' contains provisions for the summary conviction of such dealers in whose possession any old metal stolen or unlawfully obtained is found under the circumstances therein specified.

(c) R. v. Craddock, 2 Den. C. C. 31.

(d) R. v. Huntley, Bell, C. C. 238. It is clear a person may steal, hand over to another, and afterwards receive from him again, and so be both a principal and a receiver, just as a person may be an accessory before the fact, and afterwards receive

the goods knowing them to have been stolen. See R. v. Hughes, Bell, C. C. 242, vol. i. p. 180.

(e) R. v. Pulham, 9 C. & P. 80. Gurney, R. See R. v. Austin, *ante*, p. 434.

(f) R. v. Dann, R. & M. C. C. R. 424. See this case, vol. i. p. 47.

## CHAPTER THE TWENTY-NINTH.

### OF TAKING A REWARD FOR HELPING TO THE DISCOVERY OF STOLEN PROPERTY.

AN offence nearly connected with that of receiving stolen goods, is that of taking a reward to help any person to goods which have been stolen.

By the 24 & 25 Vict. c. 96, s. 101, 'Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, as in this Act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding seven years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of eighteen years, with or without whipping. (b)

In a case upon the 4 Geo. 1, c. 11 (now repealed), it was considered proper to aver, that the defendant had not apprehended or caused to be apprehended the principal, &c., such reservation being in the enacting clause, and part of the description of the offence. (c) In a case where the principal felon was dead, and had not been convicted of the offence, it was objected that the person receiving the reward to help to the stolen goods could not be convicted, and the point was reserved for the consideration of the judges: but their opinion was never publicly communicated, though it was presumed, from the prisoner being discharged after remaining some time in gaol, that the objection prevailed. (d) With respect, however, to another objection, that the principal felon had not been convicted of the offence, it was well observed that this could not have been the ground of the prisoner's discharge, inasmuch as the statute, by the very terms of it, precluded

(a) The words in brackets are repealed, but the punishment as to solitary confinement remains the same, see *ante*, p. 50, note (o).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 58, and 9 Geo. 4, c. 55, s. 51 (1), and extended to all cases of extorting, embezzling, and disposing of property within the meaning of any of the sections of this Act. The words of the former enact-

ment were 'unless he caused the offender to be apprehended and brought to trial for the same.' That might be an impossibility, and therefore the words have been altered.

(c) 2 East, P. C. c. 16, s. 155, p. 771.

(d) Drinkwater's case, 1 Leach, 15. 2 East, P. C. c. 16, s. 155, p. 770. And see Wild's case on the 5 Anne, c. 31, s. 6. 2 East, P. C. c. 16, s. 142, p. 746.

the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender; for it stated that the offender should be guilty of felony, &c., 'unless he did apprehend, or cause to be apprehended, the felon who stole the goods, and cause such felon to be brought to his trial for the same, and give evidence against him.' And it was therefore suggested, that the true ground of the doubt was, that by the death of the principal, the stipulated condition had become impossible to be performed without any default of the defendant. (e)

There is a case where the principal felon was admitted as a witness against the party indicted for taking the reward; namely, the case of the notorious Jonathan Wild, whose extensive traffic in the taking of such rewards is said to have been the occasion of the passing of this clause in the repealed statute. (f)

It was held to be an offence within the 4 Geo. 1, c. 11, s. 4 (now repealed) to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them. (g)

The prisoner was indicted for receiving from H. Turley certain reward under pretence of helping her to certain cheeses which had before been stolen, he not having caused the person by whom the cheeses were stolen to be apprehended. The prosecutrix had had her house broken open and fourteen cheeses stolen. The prisoner, who was a tradesman employed by the prosecutrix, called on her in the course of his business, and told her that he had some suspicion of the persons who had broken open her house. He proposed and executed a plan, by which he brought to her house the persons whom he suspected of being concerned in the robbery; and upon the prosecutrix seeing them she at once recognised them as persons who had been in her house the day previous to the night on which the robbery was effected. The prisoner asked the prosecutrix if she did not think they were implicated in the robbery; she said, 'Yes;' he said, 'So do I.' She said, 'I wish you would try if you could buy a bit of cheese of them;' to which he assented; and she gave him three pounds for that purpose. The prosecutrix saw the prisoner several times, when he told her that the cheese would come. The prosecutrix said, 'You have got the money, and you don't mean to send me the cheese;' he said she might have the money back whenever she pleased. Three questions were left to the jury. First, Did the prisoner mean to screen the guilty parties or to share the money with them? Secondly, Did the prisoner know the thieves, and intend to assist them in getting rid of the cheese by procuring the prosecutrix to buy it? On either of the above suppositions the jury were directed that the case was within the statute. Thirdly, Did the prisoner know the thieves and assist the prosecutrix as her agent, and at her request, in endeavouring to purchase the cheese from them, not meaning to bring the thieves to justice? To the first two questions the jury answered,

(e) 2 East, P. C. c. 16, s. 155, p. 770.

P. C. c. 16, s. 155, p. 770. 4 Blac. Com.

(f) 4 Blac. Com. 132. Wild's (Jonathan) case, 1 Leach, 17, note (a). 2 East,

132. See Haslam's case, *ante*, p. 437.

(g) R. v. Ledbitter, R. & M. C. C. R. 76.

'No.' To the third, 'Yes.' Whereupon the jury were directed to find the prisoner guilty, and, upon a case reserved, the judges were of opinion that, upon the facts found by the jury, the receipt of the money by the prisoner was a corrupt receiving of such money within the meaning of the statute, the facts found being that the prisoner knew the thieves, and assisted in endeavouring to purchase the stolen property from the thieves, not meaning to bring them to justice; and this finding established all the facts necessary to constitute the offence described in the statute. (*h*)

On an indictment for feloniously receiving £6 on account of helping the prosecutor to a mare which had been stolen, without causing the stealer to be brought to trial, it appeared that the prosecutor's son went to the prisoner's with the mare to assist him in drawing out manure, and at night turned out the mare in the prisoner's field, from which she was shortly afterwards missed. The prosecutor had bought a farm from the prisoner, and had paid part of the purchase money to an agent, being the amount of rent due by the prisoner, and the residue to the prisoner. The day after the mare was missed the prisoner proposed to the prosecutor, that if he would get the agent to return £8 or £9 of the money paid to him, three or four of the neighbours would go and find the mare, and that unless the matter was settled the mare would be removed a day's journey; the prosecutor proposed to the prisoner to pay him £5 or £6 if he would get the mare for him; this the prisoner declined, and proposed that one Sweeney should decide how much the prosecutor should pay; at length the prisoner proposed to take £12, which the prosecutor refused to give, but he gave Sweeney £6 to give the prisoner, desiring him to be very careful not to part with the money till he saw the mare coming home. Sweeney told the prisoner that he could not part with the money till the mare was returned, and the mare was in fact at home before he gave the money to the prisoner. It was objected that as the mare was returned before the money was paid the case was not within the 9 Geo. 4, c. 55, s. 51; (*i*) but upon a case reserved it was held that, as the prisoner was aware he was to get the money, and return the mare on that account, and afterwards get the money, it came within the words 'upon account of helping any person to any chattel.' (*j*)

On an indictment on the 7 & 8 Geo. 4, c. 29, s. 58, for corruptly receiving money from C. Sabin under pretence of helping him to a watch which had been stolen from him, Sabin proved that he was robbed of his watch, and mentioned the robbery in the presence of the prisoner and others, and offered five shillings to any one who would recover it for him. The prisoner said he thought he could, and on that account obtained about ten shillings from Sabin, but did not restore the watch, or money, or do anything towards the prosecution of the thief. It was urged that there was no evidence to connect the prisoner with the thief, and that some such evidence was necessary to make out the offence. Tindal, C. J., told the jury that 'the taking of money here intended is certainly a corrupt and dishonest taking

(*h*) *R. v. Pascoe*, 1 Den. C. C. 456. 2 C. & K. 927.

(*i*) This clause corresponds with the 7 & 8 Geo. 4, c. 29, s. 58.

(*j*) *R. v. O'Donnell*, 7 Cox, C. C. 337. See this case, *ante*, p. 215, as to the larceny.

under false pretences; for the word "pretence" in itself implies that something has been done with a false and sinister design. You must, therefore, be satisfied that when the prisoner took the money, he took it dishonestly, with some corrupt motive; for which many grounds might be suggested. A person may believe himself capable of finding out the thief, and if he obtains the money for that purpose, then he is not guilty of this offence. But there are also many instances in which he would be guilty; if, for instance, he saw the thief take the watch, it would be very corrupt in him to wait and take money for helping the person who had been robbed of his property, instead of immediately apprehending the thief, whose guilty act he had seen; or again, if he had anything to do with the commission of the theft itself, it would not be otherwise than corrupt to receive money for the restitution of the property. The questions for you are — first, whether the watch was stolen; and secondly, whether the prisoner did take the prosecutor's money under a corrupt pretence, and not honestly meaning to detect the thief if possible. If you think that he had any object of a wicked nature at the time, then you will say that he is guilty; but if you believe that he honestly meant to use such means as he could to bring the offender to justice, then your verdict must be "not guilty." (k)

Where before the 24 & 25 Vict. c. 96, an indictment alleged that the prisoner received certain money on account of helping the prosecutor to certain goods lately stolen, the prisoner not *then* having caused the offenders to be apprehended, it was urged that the Act specified no time within which the party was to cause the offenders to be apprehended; and at any rate he must have a reasonable time so to do; and therefore the indictment was bad; but Erle, J., overruled the objection. (l)

As a further means of putting a stop to this pernicious traffic in stolen goods, it is enacted by the 24 & 25 Vict. c. 96, s. 102, that 'Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no question will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person, who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered, with full costs of suit.' (m)

By 33 & 34 Vict. c. 65, s. 3, every action against the printer or publisher of a newspaper, (n) to recover a forfeiture under Sec. 102 of The

(k) *R. v. King*, 1 Cox, C. C. 36.

(l) *R. v. Hicks*, 1 Cox, C. C. 145.

(m) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 59; 9 Geo. 4, c. 55, s. 52; and 8 & 9 Vict. c. 47, s. 4.

(n) In this Act the term 'newspaper' means a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post.



Larceny Act, 1861, shall be brought within six months after the forfeiture is incurred, and no such action against the printer or publisher of a newspaper shall be brought unless the assent in writing of Her Majesty's attorney-general or solicitor-general for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of such action.

## CHAPTER THE THIRTIETH.

### OF UNLAWFULLY RECEIVING OR HAVING POSSESSION OF PUBLIC STORES. (a)

By the Public Stores Act, 1875, 38 & 39 Vict. c. 25, which consolidates and amends the Acts relating to the protection of public stores.

Sec. 3. 'This Act shall apply to all stores under the care, superintendence, or control of a Secretary of State or the Admiralty, or any public department or office, or of any person in the service of Her Majesty, and such stores are in this Act referred to as Her Majesty's stores. The Secretary of State, Admiralty, public department, office, or person having the care, superintendence, or control of such stores, are hereinafter in this Act included in the expression public department.'

Sec. 4. 'The marks described in the first schedule (b) to this Act may be applied in or on stores therein described in order to denote Her Majesty's property in stores so marked; and it shall be lawful for any public department, and the contractors, officers, and workmen of such department, to apply those marks, or any of them, in or on any such stores; and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores he shall be guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding two years, with or without hard labour.'

(a) Some decisions on the repealed Statutes will be found in Appendix G to this volume.

#### (b) FIRST SCHEDULE.

##### *Marks appropriated for use in or on Her Majesty's Stores.*

| Stores.   | Marks.   |
|---|--|
| Hempen cordage and wire rope  | White, black, or coloured worsted threads laid up with the yarns and the wire respectively.  |
| Canvas, fearnought, hammocks, and seamen's bags .                             | A blue line in a serpentine form.  |
| Buntin . . . . .  | A double tape in the warp.   |
| Candles . . . . .   | Blue or red cotton threads in each wick or wicks of red cotton.  |
| Timber or metal . . . . .   | The name of Her Majesty, her predecessors, her heirs or successors, or of any public department, or any branch thereof, or the broad arrow, or a crown, or Her Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name. |
| Any stores not before enumerated, whether similar to the above or not . . . } |  |

Sec. 5. 'If any person with intent to conceal Her Majesty's property in any stores takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, or any mark whatsoever denoting the property of Her Majesty in any stores, he shall be guilty of felony, and shall on conviction thereof be liable, in the discretion of the Court before which he is convicted, to be kept in penal servitude for any term not exceeding seven years, (c) or to be imprisoned for any term not exceeding two years, with or without hard labour.' (d)

Sec. 6. 'A constable of the metropolitan police force may, within the limits for which he is constable, and any constable, if deputed by a public department, may, within the limits for which he is constable, stop, search, and detain any vessel, boat, or vehicle in or on which there is reason to suspect that any of Her Majesty's stores stolen or unlawfully obtained may be found, or any person reasonably suspected of having or conveying in any manner any of Her Majesty's stores stolen or unlawfully obtained.

'A constable shall be deemed to be deputed by a public department within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorised to sign documents on behalf of such department.'

Sec. 7. 'If any person is brought before a Court of Summary Jurisdiction charged with conveying or with having in his possession or keeping any of Her Majesty's stores reasonably suspected of being stolen or unlawfully obtained, and does not give an account to the satisfaction of the Court how he came by the same, he shall be deemed guilty of a misdemeanor, and shall be liable, on summary conviction, to a penalty not exceeding five pounds, or, in the discretion of the Court, to be imprisoned for any term not exceeding two months, with or without hard labour.' (e)

Sec. 10. 'For the purposes of this Act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or enclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit, or for the use or benefit of another.' (f)

Sec. 11. 'A conviction in England under any provision of this Act of a dealer in old metals shall, for the purposes of registration and its consequences under the Old Metal Dealers Act, 1861, (g) be equivalent to a conviction under that Act.'

Sec. 12. 'The following sections of the Larceny Act, 1861, are hereby incorporated with this Act, and shall for the purposes of this Act be read as if they were here re-enacted, namely, sections ninety-eight to one hundred, (h) one hundred and three, (i) one hundred and seven

(c) As to penal servitude, see vol. i. p. 72.

(d) The repealed enactment is 27 & 28 Vict. c. 91, s. 6.

(e) Secs. 8 & 9 create offences punishable on summary conviction.

(f) The repealed enactment as to this is the 27 & 28 Vict. c. 91, s. 12.

(g) The 24 & 25 Vict. c. 110.

(h) Section 98 relates to the punishment

of principals in the second degree, and accessories. See this section, vol. i. p. 190. Section 99 provides for the punishment of aiders and abettors of any offence punishable on summary conviction. See this section, vol. iii. Appendix. Section 100 provides for the restitution of property stolen, &c. See this section, vol. i. p. 85.

(i) This section provides for the apprehension of offenders and for search warrants.

to one hundred and thirteen, (*j*) and one hundred and fifteen to one hundred and twenty-one, (*k*) all inclusive; and for this purpose the expression, "this Act," where used in those sections, shall be taken to include the present Act.'

Sec. 13. 'The provisions of this Act relative to the taking out, destroying, or obliterating of marks, or to the having in possession or keeping Her Majesty's stores, shall not apply to stores issued as regimental necessities or otherwise for any soldier, militiaman, or volunteer: but nothing herein shall relieve any person from any obligation or liability to which he may be subject under any other Act in respect of any such stores.'

Sec. 14 states how proceedings are to be taken for the punishment of offences for which a person is liable under this Act on summary conviction, and for the recovery of penalties.

Sec. 15. 'Any pecuniary penalty or other money recovered under this Act in relation to any stores shall, in such manner as the Treasury from time to time direct, be paid into the receipt of the Exchequer, and carried to the Consolidated Fund; and this section shall supersede any enactment to the contrary contained in any Act relating to municipal corporations or the metropolitan police, or in any other Act.'

Sec. 16. 'Nothing in this Act shall prevent any person from being indicted under this Act or otherwise for any indictable offence made punishable on summary conviction by this Act, or prevent any person from being liable under any other Act or otherwise to any other or higher penalty or punishment than is provided for any offence by this Act, so that no person be punished twice for the same offence.'

Sec. 17. 'Section forty-five (*l*) of the Greenwich Hospital Act, 1865, shall be read and have effect as if this Act, instead of the Naval and Victualling Stores Act, 1864, were referred to in that section.'

By 30 & 31 Vict. c. 128, (*m*) sec. 3. 'In this Act the term, "the

(*j*) These sections relate to summary convictions before justices, and to proceedings against persons acting under the Act. By sec. 109 of 24 & 25 Vict. c. 96, 'In case any person convicted of any offence punishable upon summary conviction, by virtue of this Act, shall have paid the sum adjudged to be paid, together with the costs, under such conviction, or shall have received a remission thereof from the Crown, or from the lord-lieutenant, or other chief governor in Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.'

(*k*) Section 115 provides for the trial of offences committed within the jurisdiction of the Admiralty. Section 116 provides for the form of an indictment for a subsequent offence. Section 117 states when offenders may be fined or required to find sureties. Section 118 states when offender may be sentenced to hard labour. Section 119 re-

lates to solitary confinement and whipping. Section 120 relates to summary proceedings. Section 121 relates to the costs of prosecutions for misdemeanors.

(*l*) By this section the following mark may be applied in or on stores used, or intended to be used, for the purposes of Greenwich Hospital, to denote Her Majesty's property in stores so marked, namely, an anchor surmounted with a naval crown, with two flags over the crown, and the letter G. on one side, and the letter H. on the other side; and stores used, or intended to be used, as aforesaid, shall be deemed naval stores within the meaning of The Naval and Victualling Stores Act, 1864, and that Act shall apply thereto as if the mark in the present section described were described in the schedule to that Act; and that Act shall apply to all stores so marked before the commencement of this Act, becoming, by virtue of this Act, the property of Her Majesty.

(*m*) This Act is repealed, except secs. 1 and 2, so much of sec. 3 as defines 'Secretary of State for War,' and 'stores,' and sec. 20. See 38 & 39 Vict. c. 25, s. 18.

Secretary of State for War" means such one of Her Majesty's Principal Secretaries of State, as Her Majesty is for the time being pleased to entrust with the Seals of the War Department.'

Sec. 20. 'The Secretary of State for War may institute and prosecute any action, suit, or proceeding, civil or criminal, concerning military or ordnance stores, or other Her Majesty's stores under the charge or control of the Secretary of State for War, or any stores sold or contracted to be delivered to or by the Secretary of State for War for the use or on account of Her Majesty, or the price to be paid for the same, or any loss or injury of or to any such stores as aforesaid, and may defend any action, suit, or proceeding concerning any such stores, matter, or thing as aforesaid; and in every such action, suit, or proceeding the Secretary of State for War may be so described, without more, and any such action, suit, or proceeding shall not be affected by any change in the person for the time being holding the office of Secretary of State for War. Provided always as follows:

'(1.) Nothing herein shall take away or abridge in or in relation to any such action, suit, or proceeding, any legal right, privilege, or prerogative of the Crown; and in all such actions, suits, and proceedings, and in all matters and proceedings connected therewith, the Secretary of State for War may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any proceeding in any Court of Law or Equity by the Crown, as if the Crown were actually a party to such action, suit, or proceeding.

'(2.) It shall be lawful for Her Majesty, her heirs and successors, if and when it seems fit, to proceed by information in the Court of Exchequer, or by any other Crown process, legal or equitable, in any case in which it would have been competent for Her Majesty, her heirs or successors, so to proceed if no provisions respecting procedure had been inserted in this Act.'

Upon the trial of any indictment for any offence mentioned in this chapter, which is capable of being attempted to be committed, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

## CHAPTER THE THIRTY-FIRST.

### OF UNLAWFULLY RECEIVING TACKLE OR GOODS CUT FROM OR LEFT BY SHIPS; AND OF RECEIVING GOODS STOLEN ON THE RIVER THAMES.

THE 1 & 2 Geo. 4, c. 75, contained various provisions relating to the unlawfully receiving tackle or goods cut from or left by ships, but it was repealed by the 9 & 10 Vict. c. 99, s. 2, and this Act contained provisions by which persons, who, with intent to defraud the owners, purchased or received any boat, anchor, cable, goods, or merchandize which had been obtained as therein mentioned, were made guilty of receiving stolen goods, and other provisions by which persons conveying, &c., any vessel, boat, anchor, chain, cable, or other article, to any foreign port, and there selling, &c., the same, were made guilty of felony. It was repealed by the 17 & 18 Vict. c. 126. The 57 & 58 Vict. c. 60, introduces new provisions. (a)

The 2 Geo. 3, c. 28, which contained various provisions relative to persons unlawfully receiving or having in possession ropes, materials, &c., of any vessel on the river Thames, is wholly repealed by the 2 & 3 Vict. c. 47, s. 24.

The 39 & 40 Geo. 3, c. 87, made further provisions for the more effectual prevention of depredations on this river and its vicinity, and recited that the said offences not being declared by the 2 Geo. 3, c. 28, to be felony, the trial might be traversed, and provided that the parties indicted under the 2 Geo. 3 should not traverse.

From this section of the statute, it appears to have been the opinion of the legislature that the offence of receiving, under the former Act, 2 Geo. 3, c. 28, s. 12, was only a misdemeanor. But a different construction was put upon the former statute, by the Court of King's Bench, in a case where a motion was made to bail a defendant, committed for receiving part of a cargo belonging to a vessel in the Thames, knowing it to have been stolen. The motion was opposed on the ground that the offence was a felony. And it was argued that by the 3 & 4 W. & M. c. 9, s. 4 (now repealed), receivers of stolen goods might be prosecuted as felons; and by the 1 Anne, st. 2, c. 9, s. 2 (also now repealed), might be punished as for a misdemeanor, where the principal felon was not convicted; that the statute under which the prisoner stood committed must be considered as *in pari materia*; and that although the twelfth section of it did not, in express words, declare that such offenders should be *felons*, yet it was evident they were intended by the legislature to be so considered; for by the four-

(a) See *ante*, p. 318.

teenth section it was enacted, that any person stealing, or unlawfully receiving stolen goods, knowing the same to be stolen, should, on discovering two other offenders, be entitled to a pardon for all such felonies; and the Court was of opinion that it was a felony. (b) And upon this point it is observed, that the statute seems only to have made the receiving of the goods under such circumstances evidence of their having been received by the party, knowing them to have been stolen. (c) But the words of the statute appear to be very general in their expression, if in fact they were intended only to apply to the evidence of a receiving.

By the 2 & 3 Vict. c. 47, s. 26, 'Every person who within the metropolitan police district shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to any vessel lying in the river Thames or in any of the docks or creeks adjacent thereto, or any part of the cargo of any such vessel, or any stores or articles in charge of the owner or master of any such vessel, shall be deemed guilty of a misdemeanor.'

By sec. 27, 'Every person who shall unlawfully cut, damage, or destroy any of the ropes, cables, cordage, tackle, headfasts, or other the furniture of or belonging to any ship, boat, or vessel lying in the river Thames or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same or any part thereof, shall be deemed guilty of a misdemeanor.'

By sec. 28, 'It shall be lawful for any constable to take into custody every person who, for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandize, belonging to or having been part of the cargo of any ship, boat, or vessel lying in the river Thames or the docks or creeks adjacent thereto, or of any other articles unlawfully obtained from any such ship or vessel, shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, boat, or vessel, wharf, quay, or landing place, any such article, or who shall be accessory to any such offence, and also to seize and detain any boat in which such person shall be found or out of which any article shall be so let fall, thrown, or conveyed away; and every such person shall be deemed guilty of a misdemeanor.'

The provisions contained in the 24 & 25 Vict. c. 96, relating to the plundering shipwrecked vessels, have been already noticed, (d) and the receiving property so plundered, where the stealing of it amounts to felony, is punishable under sec. 91 of that Act. (e)

(b) *R. v. Wyer*, 1 Leach, 480. 2 T. R.  
77. 2 East, P. C. c. 16, s. 145, p. 753.  
(c) 2 East, P. C. c. 16, s. 145, p. 753.

(d) *Ante*, p. 316.  
(e) *Ante*, p. 418.

## CHAPTER THE THIRTY-SECOND.

### OF CHEATS, FRAUDS, FALSE TOKENS, AND FALSE PRETENCES.

WHERE the possession of goods was obtained, in the first instance, without fraud, upon a contract or trust, a subsequent dishonest conversion of them, while the privity of contract continued undetermined, was in general formerly only a breach of trust or civil injury, not the subject of a criminal prosecution. (a) But where the party obtaining the goods has recourse to fraudulent means in the first instance, and thereby succeeds to the extent of inducing the owner not only to deliver the possession of the goods to him, but absolutely to *part with the property* in them, though such a taking will not, as we have seen, be considered as felonious and amounting to larceny, (b) yet if effected by means of a false pretence, it will come within the 24 & 25 Vict. c. 96, s. 88, and be punishable as a misdemeanor. And that statute provides that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor. There are also other statutes which relate to particular cheats and frauds therein specified. And besides the offences of this kind punishable by statute, the common law also provides for the punishment of many of such cheats and frauds as may affect the public welfare. It was decided that, in order to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes (now repealed) of 33 Hen. 8, c. 1, and 30 Geo. 2, c. 24. (c)

#### SEC. I.

##### *Of Cheats and Frauds Punishable at Common Law.*<sup>1</sup>

Those cheats which are levelled against the public justice of the kingdom are indictable at common law. (d) Judicial acts done without

- (a) 3 Inst. 107. 2 East, P. C. c. 16, s. 113, p. 693. Ibid. c. 18, s. 1, p. 816. But see now the 24 & 25 Vict. c. 96, s. 8, *ante*, p. 133.  
(b) *Ante*, p. 141, *et seq.* And see Pear's case, 2 East, P. C. c. 16, s. 112, p. 689, note (a).  
(c) Ward's case. 2 Lord Raym. 1461. 2 Str. 747. 2 East, P. C. c. 19, s. 7, p. 860.  
(d) 2 East, P. C. c. 18, s. 4, p. 821.

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#### AMERICAN NOTE.

- <sup>1</sup> See *C. v. Moore*, 12 Mass. 139. *P. v. Babcock*, 7 Johns. 201. *R. v. Powell*, 1 Dall. 47. *P. v. Tompkins*, 1 Parker, C. R. 224. *C. v. Woodrun*, 4 Clarke, 207. *Hartmann v. C.*, 5 Barr. 60. *S. v. Stroll*, 1 Rich. 244. *P. v. Miller*, 14 Johns. 371. *S. v. Corbett*, 1 Jones (Law), 264. *P. v. Stone*, 9 Wend. 182.



authority, in the name of another, are cheats of this description; but as they are generally attended by a *false personating* of some one, they will come under consideration in a subsequent chapter. (e) It may briefly be mentioned in this place, that with respect to a precedent of an indictment against a married woman, for pretending to be a widow, and as such executing a bail bond to the sheriff for one arrested on a bailable writ, it is observed, that perhaps this was considered as a fraud upon a public officer, in the course of justice. (f) And another case should be noticed, where, upon an application to the Court of King's Bench to discharge a defendant who had been holden to bail under a judge's order, made upon an affidavit of debt sworn before a magistrate at Paris, the Court desired that the counsel would speak upon the point, how far the making, or knowingly using such an affidavit, if false, was punishable. (g) And after argument, Lord Ellenborough, C. J., said, that he had not the least doubt that any person making use of a false instrument, in order to pervert the course of justice, was guilty of an offence punishable by indictment. (h) In a former case it had been holden, that a person who, being committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, in thus effecting an interruption to public justice; although, the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. (i)

Those frauds which affect the Crown and the public at large are also clearly the subject of indictment, though they may arise in the course of some particular transaction or contract with private individuals.

Amongst offences of this description is the selling of *unwholesome provisions*. (j) And it is said, more largely, that the giving of any person unwholesome victuals, not fit for man to eat, *lucri causa*, or from malice and deceit, is undoubtedly, in itself, an indictable offence. (k)

Where the indictment charged the defendant that he knowingly, wilfully, deceitfully, and maliciously, did provide, furnish, and deliver

(e) *Post*, Chap. xlii. *Of Falsely Personating, &c.*

(f) 2 East, P. C. c. 18, s. 4, p. 821, citing *R. v. Blackburn*, M. 36, Car. 2. Trem. P. C. 101, Cro. Circ. Comp. 78.<sup>1</sup>

(g) The authorities referred to for the purpose of shewing that it was punishable were 2 Hawk. P. C. c. 22, ss. 1, 31, and 39 (which cites *Waterer v. Freeman*, Hob. 205, 266). *Worley v. Harrison*, Dy. 249 a, pl. 84. *R. v. Mawbey*, 6 T. R. 619, 635. *R. v. Crossley*, 7 T. R. 315, and 2 East, P. C.

821, which cites the authorities mentioned, *ante*, note (f).

(h) *Omealy v. Newell*, 8 East, 364, and his lordship said that the case of *R. v. Mawbey* (*ante*, note (g)), went the whole length of the proposition.

(i) *Fawcett's case*, 2 East, P. C. c. 19, s. 7, p. 862, and s. 45, p. 952. See the case cited more at large, *post*, Chap. *Of Forgery*, s. 2, upon the point of the offence being indictable as a forgery.

(j) 4 Blac. Com. 162.

(k) 2 East, P. C. c. 18, s. 4, p. 822.

#### AMERICAN NOTE.

<sup>1</sup> There is a curious American case where the Court held an indictment to be good against a woman for getting board and lodging by falsely affirming herself to be single,

and of the name of Fuller, when she was married to a man of the name of Hanson. *R. v. Hanson*, Say. 229.

to and for eight hundred French prisoners of war, whose names were unknown, and being under the protection of the King, confined in a certain hospital, called Eastwood Hospital, divers large quantities, to wit, five hundred pounds weight of bread, to be eaten as food, by the said French prisoners of war, such bread being made and baked in an unwholesome and insufficient manner, and being made of and containing dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten by man; and the said defendant well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of, and to contain dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten as aforesaid, whereby the said prisoners of war did eat of the said bread, and thereby became distempered in their bodies, and injured and endangered in their healths, to the great damage of the French prisoners, &c. (*l*) And the defendant having been convicted, it was objected, in arrest of judgment, that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty; and the judgment was respited to take the opinion of the judges upon the point; when they all held the conviction right. (*m*) In this case, the defendant was a contractor with government for the supplying of provisions to some of the French prisoners, then in this country: but the indictment did not state this fact; and it is observed that it was not material to state it otherwise than as matter of aggravation, if such a case wanted any; as there could be no doubt of the offence being in itself the subject of indictment upon the principles already mentioned. (*n*)

In a more recent case the indictment charged the defendant, a baker, with supplying to the Royal Military Asylum at Chelsea, as and for good wholesome household loaves, divers loaves mixed with certain noxious ingredients, not fit for the food of man, which he well knew so to be at the time he so supplied them. It appeared that many of the loaves delivered by the defendant at the Military Asylum on a particular day were strongly impregnated with *alum*, and that there were found in them several pieces of alum in its crystalline form as large as horse-beans; the tendency of alum to injure the health was also proved; and a statute 37 Geo. 3, c. 98, s. 21 (now repealed), referred to, by which the use of alum in the making of bread is prohibited under a penalty. On the part of the defendant it was proved that, though he permitted alum to be used to assist the operation of the yeast, and to make the loaves look white, yet, that very great care was employed in the use of it; that it was first dissolved, and then used in such small quantities, and so equally distributed, as not to be capable of occasioning injury; and that if, on any particular occasion, the loaves delivered at this asylum had alum put into them in a different manner, it was quite contrary to the directions and intentions, and wholly without the knowledge or privity of the defendant. And it was contended that these facts

(*l*) There were eight other counts in the indictment charging the offence to have been done at different times, and in different prisons.

(*m*) Treeve's case, 1796. 2 East, P. C. c. 18, s. 4, p. 821.

(*n*) 2 East, P. C. c. 18, s. 4, p. 822.

completely negatived the averment in the indictment that the defendant, at the time these loaves were delivered, well knew that they were not wholesome, and that they were unfit for the food of man: and it was urged that the defendant could not be criminally responsible for the acts of his servants. But by Lord Ellenborough, C. J., 'Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable, if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm. If a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself does not produce mischief to others. He is engaged in an illegal act, and he must abide the consequences.' The 37 Geo. 3, c. 98, shews the judgment of the legislature with regard to alum, and a medical gentleman has given evidence as to its deleterious effects. If taken in very minute quantities it is innocuous. The same may be said of calomel, and even of arsenic. But would not a baker be answerable for selling bread having these substances mixed with it in a dangerous form, although he intended they should be so equally subdivided over the whole mass which he baked at one time that no harm could follow? If the defendant was cognisant of the manner in which his business was carried on, and knew that alum was at all used in the making of the loaves sent to the Military Asylum, which are proved to have contained it to a very dangerous degree, he is guilty on this indictment.' And the defendant was accordingly convicted. (o) The point was afterwards brought under the consideration of the Court of King's Bench, who concurred in the direction given at the trial; and Lord Ellenborough said, 'He who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible.' (p)

A case is reported where the Court of King's Bench held that the *mala praxis* of a physician is a great misdemeanor and offence at common law (whether it be for curiosity and experiment, or by neglect) because it breaks the trust which the party has placed in the physician, and tends directly to his destruction. (q)

In some cases the rendering false accounts and other frauds practised by persons in official situations, have been deemed offences so affecting the public as to be indictable. Thus, where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government; and it was objected that it was only a private matter of account, and

(o) *R. v. Dixon*, 4 Campb. 12. Lord Ellenborough, C. J. See precedents for similar offences, 2 Chit. Crim. L. 556, *et seq.* 2 Stark. Crim. Plead. 682.

(p) *R. v. Dixon*, 3 M. & S. 11. And some exceptions to the indictment, taken in arrest of judgment, were overruled; and the Court held that the indictment was sufficiently certain without shewing what the noxious materials were, or stating that the defendant intended to injure the children's health. Upon the last point, Lord Ellenborough, C. J., said that it was an universal

principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act; and that in this case it was alleged that the defendant delivered the loaves for the use and supply of the children, which could only mean for the children to eat; for otherwise they would not be for their use and supply. And see *R. v. Bower*, *post*, p. 459, note (j).

(q) *Dr. Groenvelt's case*, 1 Ld. Raym. 213.

not indictable; the Court held otherwise, as it related to the public revenue. (r) And instances appear in the books of indictments against overseers of the poor for refusing to account, (s) and for rendering false accounts. (t) And a precedent is given of an indictment against a surveyor of the highways for converting to his own use gravel which had been dug at the expense of the inhabitants of the parish, and also for employing for his own private gain and emolument the labourers and teams of the parishioners, which he ought to have employed in repairing the highways. (u) A case is also mentioned of an application to the Court of King's Bench for an information against the minister and churchwardens of a parish, who had spent the larger part of a sum of money, collected by a brief for certain sufferers by fire, at tavern entertainments, and then returned, upon the back of the brief, that the smaller sum only was collected; and the Court, though they refused the information, yet referred the prosecutors to the ordinary remedy by indictment. (v) A fraud committed by a parish officer, in procuring the marriage of a pauper, so as to throw the burden of maintaining such pauper on another parish, may also, as we have seen, be an indictable offence. (w) And several precedents are given of indictments for misdemeanors in procuring sick and impotent persons, standing in need of immediate relief, to be conveyed into parishes where they had no settlements, and in which they shortly afterwards died, thereby causing great expense to the inhabitants of such parishes. (x)

Probably the fabrication and publication of news, likely to produce any public detriment, would be considered as criminal. (y)

Where an indictment charged that the defendant, being an apprentice, and fraudulently intending to obtain money from the paymaster of a regiment, and to defraud the King, &c., procured himself to be enlisted as a soldier, without the consent of his master, by means whereof he fraudulently obtained from the paymaster divers sums of money well knowing himself to be, without the consent of his master, disqualified from serving as a soldier, to the great deceit, fraud, &c., of the King, &c., it appears to have been admitted that this was an offence at common law. But the conviction was holden bad, on the ground that the necessary proof of the indenture of apprenticeship had not been given at the trial. (z) The offence is now made punishable by a provision of the Mutiny Acts.

A case is mentioned where a person, falsely pretending that he had power to discharge soldiers, took money from a soldier to discharge him; and being indicted for this offence, the Court held the indictment to be good. (a)

(r) *R. v. Bembridge*, cited 6 East, 136. Vol. i. p. 422. 22 St. Tri. (by Howell) p. 1.

(s) *R. v. Commings*, 5 Mod. 179. 1 Bott. pl. 370.

(t) *R. v. Martin*, 2 Campb. 269. 3 Chit. Crim. L. 701. 2 Nol. (2d ed.) 230, note (4). And as to falsification of accounts, see the 38 Vict. c. 24, *post*.

(u) 3 Chit. Crim. L. 666, *et seq*.

(v) *R. v. The Minister, &c.*, of St. Botolph, 1 Black. Rep. 443.

(w) Vol. i. p. 418. *R. v. Tarrant*, 4 Burr. 2106.

(x) 3 Chit. Crim. L. 698, *et seq*. And see vol. i. p. 299.

(y) Starkie on Lib. 546. *Et vide Hale's Sum.* 132, *et per Scroggs, C. J.*, *R. v. Harris*, 7 St. Tri. (by Howell) 929. See the 7 & 8 Vict. c. 24, s. 4.

(z) *Jones's case*, 1 Leach, 174. 2 East, P. C. c. 18, s. 4, p. 822.

(a) *Serlestead's case*, 1 Latch. 202.

It is laid down in the books that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted, and, on conviction, fined and imprisoned. (b)

Besides the offences which have been here mentioned, there are other instances of cheats clearly affecting the public, and therefore indictable; namely, such cheats as are effected by means of *false weights or measures*, (bb) which are considered as instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. And this reasoning is considered as applying to all cases where any species of false token is used which has the semblance of public authenticity: (c) as to a case where cloth was sold with the alneager's seal counterfeited thereon; (d) and to another case where a general seal or mark of the trade on cloth of a certain description and quality was deceitfully counterfeited. (e) And the instances mentioned in the books of cheating by means of false dice, &c., (f) are referred to the same principle. (g)

If, therefore, a person selling corn should measure it in a bushel short of the statute measure, or should measure it in a fair bushel, but put something into the bushel to help to fill it up, it seems that he might be indicted for the cheat. (h) And a precedent was given of an indictment against a baker, who had contracted with a guardian of the poor, in the city of Norwich, to supply bread for the use of the poor, for delivering bread deficient in weight. (i) And though the knowingly exposing for sale and selling wrought gold, under the sterling alloy, as and for gold of the true standard weight, was holden not to be an indictable offence, but a private imposition only, in a common person, where no false weight or measure was used; (j) yet, if in such case the stamps or marks, required by statute on plate of a certain alloy, had been falsely used, it should seem that an indictment might have been sustained. (k) In the case in question the gold was not marked; and Aston, J., in giving his opinion, said that it was not selling by false measure, but only selling under the

(b) 1 Hawk. P. C. c. 55. *Of Maiming*, &c., s. 4. 1 Hale, 412, Co. Lit. 127 a.

(bb) Various statutes impose penalties on summary conviction for using false weights and measures, and where proceedings are taken before any Court of summary jurisdiction, the Court may direct that instead of those proceedings being continued, proceedings shall be taken at common law. 52 & 53 Vict. c. 21, s. 33.

(c) 2 East, P. C. c. 18, s. 3, p. 820.

(d) Edwards's case, Trem. P. C. 103.

(e) Worrell's case, Id. 106. See 3 Burn's Just., *Linen Cloth*. 5 Burn's Just., *Wool-len Manufacture*.

(f) Leeser's case, Cro. Jac. 497. Mad-dock's case, 2 Roll. R. 107. 2 Roll. Ab. 78. The practice is now punishable under the 8 & 9 Vict. c. 109, s. 17, vol. i. p. 930.

(g) 2 East, P. C. c. 18, s. 3, p. 820.

(h) *Per Cur.* in Pinckney's case, 2 East, P. C. c. 18, s. 3, p. 820.

(i) 2 Chit. Crim. L. 559; but it has since been held bad, *ibid.* See the account of this case in Dears. C. C. 516, *et seq.*, and see R. v. Eagleton, *infra*.

(j) R. v. Bower, Cowp. 323. In this case the sale of the gold was by a servant of the defendant; but the Court agreed that the master was responsible for the act of his servant done in the course of his employment, and within the scope of his authority. And see as to this point, R. v. Dixon, *ante*, p. 457. That it would be indictable in a goldsmith so to sell gold (under the statute) see 2 East, P. C. c. 18, s. 3, p. 820, and Cowp. 324.

(k) 2 East, P. C. c. 18, s. 3, p. 820, note (b). And see 1 East, P. C. c. 4, s. 34, p. 194, where it is said that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

standard; and he cited a case in which it had been holden that selling coals under measure was not an indictable offence, but that selling by false measure was. (l) And the result of the cases upon this subject appears to be that if a man sell by *false weights*, though only to one person, it is an indictable offence; but if without false weights he sell to many persons a *less quantity* than he pretends to do, it is not indictable. (m)

The first seven counts of an indictment charged the defendant with a fraud at common law: he was alleged to have contracted with the guardians of the poor to deliver for a certain term to the out-door poor of their parish, in such manner as the guardians should direct, quantities of bread made of the best household flour, in loaves, each loaf weighing  $3\frac{1}{2}$  lbs., to be paid for at sevenpence a loaf; and was charged with having delivered loaves to different paupers of less weight, intending to deprive them of proper food and sustenance, and to endanger their healths and constitutions, and to defraud the guardians of the poor; and, upon a case reserved after a verdict of guilty, it was held that the conviction was wrong; as the delivering less than the quantity contracted for was a mere private fraud, no false weights or tokens having been used; and further that it did not appear to be indictable on the ground that the defendant delivered unwholesome provisions, nor was that offence charged in the indictment. (n)

A second count stated that one J. Linnell was an artist in painting of great celebrity, and had painted a valuable picture, whereon he had painted his name to denote that the picture had been painted by him, and that the prisoner, well knowing the premises, and intending to cheat, did keep in his shop a certain painted copy of the said picture, on which copy was unlawfully painted and forged the name of the said J. Linnell, with intent thereby to denote that the said copy was an original picture painted by the said J. Linnell, and that the prisoner, well knowing the said picture to be such copy, and the name of the said J. Linnell to be forged, fraudulently did offer and expose for sale the said copy with the said forged name upon it, and did offer, utter, sell, and dispose of the said copy as and for the genuine picture of the said J. Linnell, with intent to cheat H. F. of his valuable securities, and that the prisoner did so fraudulently cheat the said H. F. of a cheque and three bills of exchange, with intent to defraud. And, on a case reserved after conviction, it was held that this count was bad. Cockburn, C. J., 'We have carefully examined the authorities, and the result is that we think if a person in the course of his trade, openly and publicly carried on, were to put a false mark upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As, for instance, if a man sold a gun with a mark of a particu-

(l) The case cited was *R. v. Lewis*. And the learned judge also cited *R. v. Wheatly*, 2 Burr. 1125. See also *R. v. Driffeld*, Say. 146.

(m) Per Buller, J., in the case of *R. v. Young*, 3 T. R. 104. And see *R. v. Nichol-*

son, cited in *R. v. Wheatly*, 2 Burr. 1130, and *R. v. Dunnage*, 2 Burr. 1130, *R. v. Driffeld*, Say. 146.

(n) *R. v. Eagleton*, Dears. C. C. 376 and 515. The statement in the text is from the judgment of Parke, B., at p. 533.

lar manufacturer upon it, so as to make it appear like the genuine production of the manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment, if the indictment were fairly framed so as to meet the case; and therefore upon the second count the prisoner would have been liable to have been convicted, if that count had been properly framed; but we think that count is faulty in this respect, that, although it sets out the false token, it does not sufficiently shew that it was by means of such false token that the prisoner was enabled to pass off the picture and obtain the money. The conviction, therefore, cannot be sustained.' (o)

But though in the cases which have been thus mentioned an indictment may, and in most of them clearly is, maintainable as for a cheat or fraud at common law, on the ground that they consist of offences which affect, or may affect the public, being public in their nature, and calculated for the purposes of general fraud and deceit; yet, other cases, consisting of cheats or frauds, effected in the course of private transactions between individuals, fall under a different consideration. This distinction, however, does not appear to have been at all times properly noticed; and, in a book of great authority, cheats, punishable at common law, are defined as 'deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty.' (p) But this definition has been observed upon as not sufficiently distinct or accurate; and many of the authorities, from whence it seems to have originated, not involving considerations either of public justice, public trade, or public policy, have been said to be founded either in conspiracy or forgery, which are in themselves substantive offences, and the latter of which was usually, when successful, prosecuted as a cheat, before the various statutes, by which forgeries were, in so many instances, made capital offences. (q)

Thus the case mentioned where the suppression of a will was holden to be indictable as a cheat, (r) is said to have been probably a case of conspiracy or combination. (s) And the same explanation is given (t) of the case where several persons were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written: (u) and also of the case of a person who was convicted upon a charge of having run a foot race fraudulently, and with a view to cheat a third person, by a previous understanding with the running competitor to win. (v)

In another case of a cheat at common law, which has undergone

(o) *R. v. Closs*, D. & B. 460. See the 25 & 26 Vict. c. 88, *post*.

(p) 1 Hawk. P. C. c. 71, s. 1.

(q) 2 East, P. C. c. 18, s. 2, *et seq.* p. 817, *et seq.* The distinction between forgery and the general class of cheats was well settled in Ward's case, 2 Lord Raym. 1461. 2 Str. 747. 2 East, P. C. c. 19, s. 7, p. 860. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced: but that to constitute a cheat, properly so

called, there must be a prejudice received both at common law and under the statutes, 33 Hen. 8, c. 1, and 30 Geo. 2, c. 24, now repealed.

(r) 1 Hawk. P. C. c. 71, s. 1, citing *R. v. Brereton*, Noy. 103.

(s) 2 East, P. C. c. 18, s. 5, p. 823.

(t) *Id.* *ibid.*

(u) *R. v. Skirret*, 1 Sid. 312, cited in 1 Hawk. P. C. c. 71, s. 1, and *R. v. Parris*, 1 Sid. 431.

(v) *R. v. Orbell*, 6 Mod. 42, cited in the note to 1 Hawk. P. C. c. 71, s. 1.

considerable discussion, the indictment charged Mackarty and Fordenborough that they, falsely and deceitfully intending to defraud one Chowne of divers goods, together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenborough, for a certain quantity of hats, of him the said Chowne; and upon such bartering, &c., the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines; and the said Mackarty, on such bartering, &c., pretended to be a broker of London, when, in fact, he was not; and that Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange, to Fordenborough, and did deliver to Mackarty, as the broker between Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of such a value, for so many hogsheads of the pretended new Portugal wine; and that Mackarty and Fordenborough, on such bartering, &c., affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenborough, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough; to the great damage of the said Chowne, and against the peace, &c. (*w*) Upon this case considerable doubts were entertained; but it seems that, ultimately, judgment was given for the Crown, and that the true ground of such judgment was, that it was a case of conspiracy. (*x*) And, even if it were not a case of conspiracy, yet, as the cheat was effected by means of bartering pretended port wine, which the indictment alleged was not wholesome, or fit to drink, the vending of such an article for drinking was clearly indictable, (*y*) and within the principle already mentioned, of cheats or frauds, by which the public may be affected. (*z*)

In one of the principal cases where the cheat was effected by means of a forged instrument, the indictment charged that the defendant, intending to cheat J. S., did deceitfully take upon himself the style and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and, in order to induce J. S. to believe the same, and to give him credit, the defendant deceitfully produced to J. S. several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches, and other goods, to the amount of £4000, by means whereof the defendant got into his hands two watches, the property of J. S.; whereas, in truth, the defendant was not a merchant; and the paper writings, containing such commissions,

(*w*) *R. v. Mackarty*, 2 Lord Raym. 1179. 3 Lord Raym. 325. 2 Burr. 1129.

(*x*) 2 Lord Raym. 1184. 2 Burr. 1129. 2 East, P. C. c. 18, s. 1, p. 824. Upon a discussion of this case (in *R. v. Southerton*, 6 East, 133) it was objected to such construction that the word conspired was not in the indictment; but in 2 East, P. C. *ubi supra*, it is said that, though the indictment did not charge that the defendants conspired *eo nomine*, yet it charged that they, together, &c., did the acts imputed to them; which might be considered to be tantamount.

(*y*) By Lord Ellenborough, C. J., in *R. v. Southerton*, 6 East, Rep. 133.

(*z*) *Ante*, p. 454, *et seq.* The sale of corrupted wine, contagious or unwholesome flesh, &c., was prohibited by the 51 Hen. 3, st. 6, and the ordinance for bakers, c. 7, under severe penalties. (Repealed by the 7 & 8 Vict. c. 24.) And by the 12 Car. 2. c. 26, s. 11, any brewing or adulteration of wine was punished with a forfeiture, but this Act is repealed by the 26 & 27 Vict. c. 125. See 4 Blac. Com. 162.



were false and counterfeit. And it does not appear that the indictment concluded against the form of the statute, though the false tokens made use of came directly within the 33 Hen. 8, c. 1 (now repealed). (a) But it is observed, that if this were sustained as an indictment at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that the 33 Hen. 8, c. 1, was merely declaratory of the common law, is, that the cheat was effected by means of a forgery (in which all are principals at common law); and that the publication of such forged instruments, for the purpose of deceit, was in itself a substantive offence indictable at common law. (b) And, in a case where the defendant was indicted for falsely and deceitfully obtaining £450, from one W. Harle, by a false token, viz. a promissory note, in the name of R. Hales, payable to J. E. &c., with a counterfeit endorsement thereon, the jury were directed that they must find the defendant guilty if it appeared to be a forged instrument, the instrument being a false token. (c) But a forgery could not, it seems, be prosecuted at common law as a cheat, unless it were successful; as in a case where the defendant was convicted of forgery at common law of an acquittance, the Court said, that there was no reason why the offence should not be punished as a forgery, as well as if the thing fabricated had been a deed, but that it could not be prosecuted as a cheat at common law without an actual prejudice, which was an obtaining on the statute 33 Hen. 8. (d)

It does not appear, therefore, that these cases, when duly examined, are contrary to that which has been given as a more accurate definition of cheats and frauds, punishable at common law, namely, 'the fraudulent obtaining the property of another, by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.' (e)<sup>1</sup> And there are many cases by which it is supported, tending to shew that a cheat or fraud, effected by an unfair dealing and imposition on an individual, in a private transaction between the parties, cannot be the subject of an indictment at common law.

In several of these cases of impositions upon individuals in private transactions, which have been holden not to be indictable, the cheat was effected by a mere false affirmation, or bare lie. Thus an indictment was quashed, upon motion, which charged the defendant with

(a) *R. v. Govers*, 2 Say. 206. 2 East, P. C. c. 18, s. 6, p. 824.

(b) 2 East, P. C. c. 18, s. 6, p. 825.

(c) *Hales's case*, 9 St. Tri. 75, 2 East, P. C. c. 18, s. 6, p. 825: a case of misdemeanor at common law, before the statute making the offence felony.

(d) *Ward's case*, 2 Str. 747. And see further the authorities collected upon this

subject in 2 East, P. C. c. 18, s. 2, p. 817, note (a), and *Id.* s. 6, p. 825.

(e) 2 East, P. C. c. 18, s. 2, p. 818. In *R. v. Lewis*, 11 Cox, C. C. 404, Willes, J., is reported to have said, 'If a number of persons set up an auction for sale of articles of inferior value, having people present pretending to bid, and thereby induce "yokels" to buy, they are engaged in an offence against the law.'

#### AMERICAN NOTE.

<sup>1</sup> The above definition is in substance adopted by Mr. Bishop (vol. ii. s. 143), except that he omits the words "which affects or may affect the public."

selling at market a sack of corn, which he falsely affirmed to be a Winchester bushel, whereas it was greatly deficient, and the Court said that this was no more than telling a lie. (*f*) And an indictment was also quashed which charged the defendant with selling to a person eight hundredweight of gum at the price of £7 by the hundredweight, falsely pretending and affirming that the gum was gum seneca, and that it was worth £7 by the hundredweight, whereas, in truth, the gum was not gum seneca, but a gum of an inferior kind, and was not worth more than £3 by the hundredweight. (*g*) And a case was holden not to be indictable where the defendant obtained money of another, by pretending that he was sent by a third person for it; and Holt, C. J., said, 'Shall we indict one man for making a fool of another? Let him bring his action.' (*h*) In another case the indictment set forth, that the defendant came to the shop of a mercer, and affirmed that she was a servant to the Countess of Pomfret, and was sent by her from St. James's to fetch silks for the Queen, endeavouring thereby to defraud the mercer, whereas, in fact, she was no servant of the Countess of Pomfret, nor was sent upon the Queen's account; and it was moved, in arrest of judgment, that this was not an indictable offence, there being no false token, nor any actual fraud committed, and the Court arrested the judgment, saying, that the case was no more than telling a lie. (*i*)

And it appears that the same construction will prevail, though the defendant make use of an apparent token, which in reality is, upon the very face of it, of no more credit than his own assertion. (*j*) An indictment at common law charged that the defendant deceitfully intending, by crafty means and devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, for payment of money subscribed by him the defendant, &c., purporting to be a draft upon his banker for the amount, knowing that he had no authority to draw it, and that it would not be paid, but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained possession of tickets, and defrauded the prosecutor of the value; and the defendant having been convicted, the Court of King's Bench arrested the judgment. Grose, J., said, 'That,

(*f*) *Pinckney's case*, 2 East, P. C. c. 18, s. 2, p. 818, cited in 2 Burr. 1129. But see *ante*, p. 459; that this case might have come under a different consideration if the vendor had fraudulently measured the corn.

(*g*) *R. v. Lewis*, Say. 205. Indictments quashed upon motion may be considered as authorities; but no stress can be laid on several cases to be found in the books, particularly in Mod. Rep., where indictments of this kind were refused to be quashed upon motion, because it was the practice of the Court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, but leave the defendants to plead; 2 East, P. C. c. 18, s. 2, p. 818, note (*a*), citing 5 Mod. 13. 6 Mod. 42. 12 Mod. 499.

(*h*) *R. v. Jones*, 1 Salk. 379. 2 Lord Raym. 1013. And see also *R. v. Hannon*, 6 Mod. 311, and 2 Hawk. P. C. c. 71, s. 2; and *Nehuff's case*, Salk. 151, where the defendant borrowed £600 of a feme covert, and promised to send her fine cloth and gold dust as a pledge, and sent no gold dust, but some coarse cloth, worth little or nothing; and the Court said that it was not a matter criminal, and that it was the prosecutor's fault to repose such a confidence in the defendant.

(*i*) *R. v. Bryan*, 2 Str. 866. In the case as cited in 2 East, P. C. c. 18, s. 2, p. 819, it is said that the defendant obtained the goods.

(*j*) 2 East, P. C. c. 18, s. 2, p. 819.

in order to make this case something more than a bare naked lie, it had been said that the defendant used a false token, for that he gave a cheque on his banker; but that was only adding another lie; and that if the Court should determine that this case was indictable, he did not know how to draw the line, for it might equally be said that every person who overdrew his banker used a false token, and might be indicted for it.' Lawrence, J., said, 'It is admitted that a mere false assertion, unaccompanied by a recommendation, is not indictable, and, I think, there is nothing in this case beyond the defendant's own false assertion.' (k) So in a case where the defendant, a brewer, was indicted for a cheat, in sending to the keeper of an ale-house so many vessels of ale *marked* as containing such a measure, and writing a letter to him, assuring him that they did contain that measure, when, in fact, they did not contain such measure, but so much less, &c.; the indictment was quashed upon a motion, after argument, as containing no criminal charge. (l) Foster, J., indeed doubted concerning this case when it was cited, because it seemed to him that the vessels being *marked* as containing a greater quantity than they really did, were *false tokens*. (m) But as it does not appear that cheating, by means of mere private or *privy* tokens, was punishable at common law, without the aid of the 33 Hen. 8, c. 1 (now repealed), (n) it is well observed, upon this doubt of the learned judge, that possibly the Court, in deciding the case, thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did, in effect, resolve themselves into no more than the dealer's own affirmation, that the vessels contained the quantity for which they were marked. (o)

Where an indictment charged the defendant, for that he, keeping a common grist-mill, and being employed by one Bare to grind three bushels of wheat, did, with force and arms, unlawfully take and detain forty-two pounds weight of wheat, judgment was given for the defendant upon a demurrer, there being no actual price laid, nor any charge of taking as for unreasonable toll, and it being a matter of a private nature, for which an action would lie. (p)

The following case has been considered to have clearly established the true boundary between those frauds that are, and those that are not indictable at common law. (q) The defendant, a brewer, was charged, by an indictment at common law, for that he, intending to deceive and defraud one R. Webb of his money, falsely, fraud-

(k) *R. v. Lara*, 1796, 6 T. R. 565. 2 Leach, 852. 2 East, P. C. c. 18, s. 2, p. 819. *R. v. Hazelton*, *post*, p. 495.<sup>1</sup>

(l) *R. v. Wilders*, cited by Lord Mansfield, and supplied by Denison, J., in *R. v. Wheatly*, 2 Burr. 1128.

(m) 2 Burr. 1129.

(n) 2 East, P. C. c. 18, s. 2, p. 833, 834.

(o) 2 East, P. C. c. 18, s. 3, p. 820.

(p) Channell's case, 2 Str. 793. 2 East, P. C. c. 18, s. 2, p. 818. And see *R. v. Haynes*, *post*, p. 466.

(q) By Lord Kenyon, C. J., in *Lara's case*, 6 T. R. 569.

#### AMERICAN NOTE.

<sup>1</sup> In *Hawkins*, 1 P. C. p. 318, s. 1, it is said that, "causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in

which it was written, &c.," is a cheat, and the same seems to have been held in America. See *Hill v. S.*, 1 Yerg. 76; 24 Am. D. 441.

ulently, and deceitfully sold and delivered to him sixteen gallons of amber, for and as eighteen gallons, of the same liquor, and received fifteen shillings as for eighteen gallons, knowing there were only sixteen gallons. And this was holden clearly not to be an indictable offence, but only a civil injury, for which an action lay to recover damages. Lord Mansfield, C. J., said, 'It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but from his own carelessness, in not measuring the liquor when he received it, whereas fraud, to be the object of criminal prosecution, must be of that kind which, in its nature, is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy.' (r)

The doctrine that an indictment for a cheat at common law cannot be maintained upon a mere false affirmation, has been subsequently recognised. (s)

And in a later case the doctrine of a transaction in the nature of an unfair dealing, and imposition upon any particular individual, not being an indictable offence at common law, was still further established. The indictment, in substance, charged the defendant, a miller, with receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome; and the defendant having been found guilty, it was assigned for error, amongst other things, that no indictable offence was charged against him. As to one of the grounds upon which it was contended that the offence charged was not indictable, namely, that the statement should have been, that the defendant delivered the barley 'to be eaten as for food,' and that it was 'not fit to be eaten by man;' (t) Lord Ellenborough, C. J., said, that if the indictment had alleged that the defendant delivered the barley as an article for the food of man, it might possibly have been sustained, but that he could not say that its being musty and unwholesome, necessarily, and *ex vi termini*, imported that it was for the food of man, and it was not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley meal. As to the other point, that this was not an indictable offence, because it respected a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; his Lordship said that, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this, his situation, had made it a colour for practising a fraud, this might have presented a different aspect, but, as it then stood, it seemed to be no more than the case of a common tradesman who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *R. v. Wheatly*, and the other cases, as not being indictable. (u)

(r) *R. v. Wheatly*, 2 Burr. 1125. 1 Blac. Rep. 273. 2 East, P. C. c. 18, s. 2, p. 818. And see *ante*, p. 459, *et seq.*

(s) By Lord Kenyon, C. J., in *R. v. Gibbs*, 1 East, R. 185.

(t) See Treeve's case, *ante*, p. 456.

(u) *R. v. Haynes*, 4 M. & S. 214. *Qu.*

therefore the case of *R. v. Wood*, 1 Sess. Cas. 217, where the defendant, being a miller, and indicted for changing corn delivered to him to be ground, and giving bad corn instead of it; a motion was made to quash the indictment, because the transaction was only a private cheat, and not of a public nature;

These cases seem sufficiently to support the definition above adopted, (v) and to shew that the cheat or fraud must be effected by some deceitful and illegal practice or token, which affects, or may affect the public, in order to be indictable at common law. And it seems also to result from these cases that a cheat or fraud, in order to be punishable by the common law, must be such against which common prudence could not have guarded. (w) Indeed it can hardly be supposed that a cheat will much affect the public which is open to the detection of any man of common prudence.

**Indictment.** — With respect to the indictment for a cheat or fraud at common law, it may be briefly observed, that where the transaction has been effected by false tokens, and the offence is so charged, it is necessary to specify and set forth what the false tokens were; and it is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences. (x) But it does not seem to be necessary to describe them more particularly than they were shewn or described to the party at the time, and in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth shew a false token. (y) An objection appears to have been made to one of the counts of an indictment for a cheat at common law, that it charged the false pretence to have been made to one person, and the deceit to have been practised on another. (z)

**Punishment.** — The punishment of this offence at common law is, as in other cases of misdemeanor, by fine, imprisonment, or further, by infamous corporal pain, in aggravated cases. (a) And by the 14 & 15 Vict. c. 100, s. 29, the Court may sentence any person convicted of 'any cheat or fraud punishable at common law, to be imprisoned for any time now warranted by law, and to be kept to hard labour during the whole or any part of such term of imprisonment.'

## SEC. II.

### *False Pretences by 24 & 25 Vict. c. 96.<sup>1</sup>*

#### *Statutes in Force.*

**False Pretences.** — By the 24 & 25 Vict. c. 96, s. 88, 'Whosoever shall by any false pretence<sup>2</sup> obtain from any other person any

but it was answered that, being a cheat in the way of trade, it concerned the public; and the Court were unanimous not to quash it. And see the observations as to the authority of cases of this kind, in which the Court refused to quash the indictment, *ante*, p. 464, note (g).

(v) *Ante*, p. 463.

(w) 1 Hawk. P. C. c. 71, s. 1. R. v. Wheatly, 2 Burr. 1125, *ante*, p. 466. By Fielding *arguendo* in the case of R. v. Young,

3 T. R. 99, assented to by Buller, J., id. 104; but see R. v. Young, 3 T. R. 98, *post*, p. 472.

(x) 2 East, P. C. c. 18, s. 13, p. 837.

(y) 2 East, P. C. c. 18, s. 13, p. 838.

(z) *Lara's case*, 2 Leach, 647, but see R. v. Douglas, 1 Campb. 212, where the pretence was made to a servant, but the money of the mistress obtained. See *post*, p. 533.

(a) 1 Hawk. P. C. c. 71, s. 3. 2 East, P. C. c. 18, s. 13, p. 838.

#### AMERICAN NOTES.

<sup>1</sup> See P. v. Genung, 11 Wend. 18. C. v. Burdick, 2 Burr. 163. P. v. Crissie, 4 Denio, 525. C. v. Shain, 10 Metc. 521. Barrow v. S., 7 Eng. 65. Fessett v. Smith, 23 N. Y. 252. S. v. Evers, 49 Mo. 542. C. v. Hutch-

inson, 1 Clark, 302. Clarke v. P., 3 Lans. 329. S. v. Phifer, 65 N. C. 321.

<sup>2</sup> Some American statutes add the words "symbol or token" to the word "pretence." Bishop, ii. s. 416.

chattel, money, or valuable security,<sup>1</sup> with intent to defraud, shall be guilty of a misdemeanor,<sup>2</sup> and being convicted thereof shall be liable, [at the discretion of the Court,] (*aa*) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement]. Provided, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.' (*c*)

Sec. 89. 'Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel, or valuable security, to be delivered to any other person, for the use or benefit or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section.' (*d*)

(*aa*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*c*) This clause is framed from the 7 & 8 Geo. 4, c. 29, s. 53; 9 Geo. 4, c. 55, s. 46 (*I*); and 14 & 15 Vict. c. 100, s. 8. The former enactments had 'cheat or defraud;' but as the 14 & 15 Vict. c. 100, s. 8, had 'defraud' only; and as to 'defraud means to cheat a person out of something,' per Pollock, C. B., in *R. v. Ingham*, Bell, C. C. 181, the word 'cheat' has been omitted. Although there must be an intent to defraud, yet such intent is consistent with an intent to pay for the things obtained when able to do so. *R. v. Naylor*, 35 L. J. M. C. 61. See *R. v. Gray*, 17 Cox, C. C. 299, *post*, p. 524. In *R. v. Sill*, 1 E. & B. 533, and other cases, *post*, p. 537, it was held that an indictment, which omitted to state the ownership of the property obtained was bad. The words in *italics* were introduced to prevent such a decision again.

(*d*) This clause is new. It is intended to meet all cases where any person by means of any false pretences induces another to part with property to any person other than the party making the pretence. It was introduced to get rid of the narrow meaning which was given to the word 'obtain' in the judgments in *R. v. Garrett*, Dears. C. C. 232, *post*, p. 551; according to which it would have been necessary that the property should either have been actually obtained by the party himself or for his benefit. See also *The Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. R. 422. This clause will include every case where a defendant by any false pretence causes property to be delivered to any other person for the use either of the person making the pretence, or of any other person. It therefore is a very wide extension of the law as laid down in *R. v. Garrett*, and plainly includes every case where any one, with intent to defraud, causes any person by means of any false pretence to part with any property to any person whatsoever.

#### AMERICAN NOTES.

<sup>1</sup> Some American statutes have the words "valuable thing." See *S. v. Thatcher*, 6 Vroom, 445; *Tarbox v. S.*, 38 Ohio, 581,

and some add "other effects." *P. v. Stone*, 9 Wend. 182, 190.

<sup>2</sup> This offence is generally a felony in the United States. *Bishop*, ii. s. 486.

Sec. 90. 'Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment,<sup>1</sup> in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, [at the discretion of the Court,] (e) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](f)

*What a Chattel or Valuable Security within the Statute.*

As a dog is not the subject of larceny at common law, it seems that it is not a chattel within the meaning of the Act. (g)

As to its being necessary that the chattel should be in existence when the false pretence is made, see *R. v. Martin*, *post*, p. 496.

By 24 & 25 Vict. c. 96, s. 1, 'the term "valuable security" shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any funds of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore (gg) defined.'

(e) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(f) This clause is principally new; it was framed long before the 21 & 22 Vict. c. 47 was passed. It is very much more extensive than that Act, and will include all such cases as *R. v. Danger*, D. & B. 307. There the prisoner falsely represented to the prosecutor that a person was baling up for him a quantity of leather, which was to come into his warehouse that afternoon, and the prosecutor, relying on such false statement, agreed to buy the leather and accept a bill for the amount of the purchase money. The prisoner handed to the

prosecutor a bill duly stamped, signed by himself as drawer, addressed to the prosecutor, and payable to the prisoner's order. The prosecutor accepted the bill, and returned it to the prisoner, who negotiated it, and applied the proceeds to his own use; and it was held that the prosecutor had no property in the bill as a security, or even in the paper on which it was written, and therefore the prisoner could not be convicted of obtaining it by false pretences. And see now *R. v. Gordon*, 23 Q. B. D. 364, *post*, p. 516.

(g) *R. v. Robinson*, Bell, C. C. 34; 28 L. J. M. C. 58.

(gg) By this section, the term 'document of title to land' shall include any deed,

AMERICAN NOTE.

<sup>1</sup> There are similar provisions in many of the American States. Bishop, ii. s. 484. The section gets rid in a great measure of a somewhat vexed question in America, viz. whether a person, who by fraud induces another to sign a document, which it is per-

fectly competent for such person to sign if he pleases, but of the contents or effect of which he is by fraud kept ignorant, commits a forgery. It seems to be the better opinion that it is forgery. See Bishop, ii. s. 589.

Upon an indictment for obtaining an order for the payment of £2 10s., it appeared that there was a Burial Society, the rules of which had not been certified or enrolled, and the prisoners were the secretary and collector and also members of the society and interested in its funds, and B. Beswick was the president, and W. A. Entwistle the treasurer of the society. In case of the death of a member it was the duty of the prisoners to view the body, report the death to the president, and apply to him for an order upon the treasurer for the amount to which the representatives of the deceased were entitled, and to receive the same upon such order for the benefit of the representatives. The prisoners falsely pretended to the president that a death had occurred, and thereby obtained from him the following order:—

‘Bolton, United Burial Society, No. 23.

‘Bolton, September 1st, 1853. — Mr. W. A. Entwistle, Treasurer — Please to pay the bearer £2 10s., Greenhalgh, and charge the same to the above society. — ROBERT LORD.

‘BENJAMIN BESWICK, President.’

The prisoners took this order to the treasurer's daughter, and by means of it obtained £2 10s. from her on account of her father as such treasurer; and, upon a case reserved after a verdict of guilty, it was held that the conviction was right; for the order was clearly a valuable security as interpreted by sec. 5 of the 7 & 8 Geo. 4, c. 29, and came within the words ‘order or other security whatsoever for money or for the payment of money.’ (*h*) Such an order would be a valuable security within the meaning of the present enactment.

#### *What are False Pretences within the Act.<sup>1</sup>*

There must be a false pretence, that a fact exists or did exist, to bring the case within the statute. A promissory pretence to do some act is not within the statute. (*i*)

The cases decided under the repealed statutes, as to what was a false pretence within them, in general, apply to cases arising under the present Act.

In an indictment framed on 30 Geo. 2, c. 24, the first count charged that the four defendants, Young, Randall, Mullins, and Osmer, fraudulently intending to obtain the money of the King's subjects, by false colours and pretence, unlawfully and knowingly, &c., did falsely pretend to one Thomas, that Young had made a bet of five hundred guineas on each side, with a colonel in the army, then at Bath, that

map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate.

(*h*) *R. v. Greenhalgh*, Dears. C. C. 26. The Court also were clear that there was nothing in an objection that the society was not enrolled.

(*i*) *R. v. Giles*, L. & C. 502.

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#### AMERICAN NOTE.

<sup>1</sup> See *Ranney v. P.*, 22 N. Y. 413; *Dillingham v. S.*, 5 Ohio (N. S.), 280. *In re*

*Greenough*, 31 Verm. 279. *S. v. Penley*, 27 Conn. 587.



one Wm. Lewis would, on the next day, run on the high road, leading from Gloucester to Bristol, ten miles in length, within one hour; and that Young and Mullins did go two hundred guineas each in the bet, and Randall did go the other hundred guineas: and that, under colour and pretence of such bet, they obtained from Thomas, as a part of such pretended bet, twenty guineas of the five hundred guineas; by which said false pretences the defendants unlawfully, &c., obtained from the said Thomas the said twenty guineas, with intent to cheat and defraud him thereof; whereas, in truth, no such bet had been made, &c., against the form of the statute, &c. A second count stated the bet to have been made between Young and Osmer. The defendants having been convicted, it was objected upon error that the supposed false pretences shewn in the first and second counts were neither contrary to the 33 Hen. 8, c. 1, (now repealed,) or the 30 Geo. 2, c. 24, (now repealed,) or any other statute. And it was argued that the transaction itself was not the subject matter of a criminal prosecution, for that it did not affect the public; and that it was one against which common prudence might have guarded; for, as it was the representation of a *future* transaction, the party had an opportunity of inquiring into the truth of it, and that therefore it was his own fault if he were deceived: but the objection was overruled. Lord Kenyon, C. J., said, 'Undoubtedly this indictment, being founded on the 30 Geo. 2, c. 24, is different from a common law indictment. When it passed it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit. The 33 Hen. 8, c. 1, requires a false seal, or token, to be used in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the 30 Geo. 2, c. 24, introduced another offence, describing it in terms extremely general. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it.' His Lordship then adverted to the facts of the case before the Court; and after saying that the defendants, morally speaking, had been guilty of an offence, proceeded thus: 'I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the Act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute.' Ashurst, J., said, in giving his opinion, 'The 30 Geo. 2, c. 24, created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind. (j) The words of it are very general, "All persons who knowingly by false pretences shall obtain from any person money, goods, &c., with intent to cheat or defraud, &c.," and we have no power to restrain their operation.' And Buller, J., after observing upon the 33 Hen. 8, said, 'The legis-

(j) See the observations of Lord Denman, C. J., in *R. v. Wickham*, *post*, p. 519.

lature thought that the former statute was too limited ; and therefore the 30 Geo. 2, c. 24, was passed ; which enacts, "That all persons who shall obtain money from others, by false pretences, with intent to cheat or defraud such persons, shall be deemed offenders against the public peace." The statute, therefore, clearly extends to cases which were not the subject of an indictment at common law. The ingredients of this offence are, the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient ; but some pretence must be used, and that pretence false : and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute.' (*k*)

Upon an indictment for obtaining money by false pretences, it appeared that the prisoner had represented that he belonged to a club and was canvassing for members ; it was called the 'Instant Benefit,' he said it was a very strong club ; they had about £7000 in the bank. The prisoner was the superintending director of the society, but no sum of £7000, or indeed any sum of money whatever, belonging to the society, had ever been in any bank. And, upon a case reserved, it was held that this was a sufficient pretence within the statute. 'To support an indictment for false pretences there must be a knowingly false statement of a supposed bygone or existing fact, made with intent to defraud, and an obtaining of the money by means of that false representation. Here the statement that the society had £7000 in the bank was an untrue one, and, had it been true, it was a fact calculated to have influenced the mind of the party to whom it was made, and the jury have found by their verdict that it did so influence the mind of the prosecutrix.' (*l*)

Where a count stated that the defendant pretended to A. Crellin, a single woman, that he was an unmarried man, and having thereby obtained a promise of marriage from A. Crellin, that she refused to marry the defendant, and that he falsely pretended, at the time of such refusal, that he was an unmarried man, and entitled to bring an action against her for the breach of promise of marriage, by means of which he obtained from her £100 ; whereas in truth he was not an unmarried man, and not entitled to maintain an action for the breach of promise of marriage against her ; the prisoner was a married man, and A. Crellin stated that she being a single woman, and possessed of considerable property, the prisoner had paid his addresses to her, and that she had consented to marry him, she being then ignorant that he was a married man, and afterwards changed her mind, and intimated as much to the defendant, and that he thereupon threatened her with an action at law for breach of promise of marriage, and he added, that, by means of such proceeding, he could take half of her fortune from her ; and that she believing that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, paid him a sum of money, under a written stipulation, that in consideration of such payment he would forego proceedings at law against the prosecutrix for breach of promise

(*k*) R. v. Young, 3 T. R. 98.

(*l*) R. v. Welman, Dears. C. C. 188.

A. D. 1853. The ground of the decision is given in the words of Jervis, C. J.

of marriage; that but for the prisoner's threat of bringing an action, she would not have paid the money; and that she was induced by such threat to pay the money; and that had she known he was a married man she would not have paid the money. The case was left to the jury to say whether the money was, in fact, obtained by the false pretence that the defendant was single, and they found the prisoner guilty; and Lord Denman, C. J., and Maule, J., were both clearly of opinion that there was evidence to go to the jury, that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix; and Maule, J., was further of opinion that there was also evidence of the money having been obtained by the false pretence of the defendant that he was entitled to maintain an action for breach of promise of marriage; and that such latter false pretence was a sufficient false pretence within the statute. (*m*)

An indictment alleged that the prisoner pretended that a paper writing was a lease of a certain messuage for the term of nine years, whereas it was not a lease for the term of nine years or for any other term, nor was the same a lease of the said messuage or of any messuage. The lease appeared to be a valid lease for three years, but the figure 3 had been crossed by a pencil, and 9 substituted. It was urged that, as the lease was good for three years, the allegation negating the pretences was bad in part, and therefore bad altogether; but the objection was overruled. (*n*)

Upon an indictment for falsely pretending that there was one J. Smith, an ironmonger at Newcastle, and that the said J. Smith was a person to whom the prisoner durst trust one thousand pounds, and that Smith went out twice a year to New Orleans to take different kinds of goods to his sons, and that the prisoner wanted some cotton warp cloths for the said J. Smith; the evidence proved that the pretences were made as alleged, and the jury found that the prosecutors believed the representations, and in consequence of such belief, thinking that the prisoner was a person with whom they might safely contract, as being connected with J. Smith, and employed by him to obtain goods, did mean to contract with the prisoner, and not with J. Smith, and did, in pursuance of such contract, deliver the goods to the prisoner for the prisoner himself and not for J. Smith; and it was contended, that this being so, the prisoner was entitled to be acquitted; but, upon a case reserved after a verdict of guilty, the conviction was held right. There was a false representation that the prisoner was connected with a person of opulence, and that was sufficient to sustain the conviction, it being a misrepresentation of an existing fact, upon the faith of which the property was obtained. (*o*)

In the case of *R. v. Young*, mentioned, *ante*, p. 472, Buller, J., cited the following, as a case in point: the defendant, Count Villeneuve, applied to Sir T. Broughton, telling him that he was entrusted by the Duke de Lauzun to take some horses from Ireland to London,

(*m*) *R. v. Copeland*, C. & M. 516. A.D. 1842.

(*n*) *R. v. Gruby*, 1 Cox, C. C. 249. Bul-

lock, Comr., who consulted some of the judges.

(*o*) *R. v. Archer*, Dears. C. C. 449. A.D. 1855.

and that he had been detained so long by contrary winds that his money was spent; by which representation Sir T. Broughton was induced to advance some money to him: after which it turned out that the prisoner never had been employed by the Duke de Lauzun, and that his whole story was a fiction. For this offence he was convicted, and sentenced to hard labour on the Thames. (*p*)

An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T. and induced prosecutor to part with goods on the representation that he had just come from abroad, and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T. and was going to furnish it. Held, that the false pretences charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction. (*q*)

Where an indictment alleged that the prisoner, being a common carrier, had received goods to carry and deliver at a certain place: and that afterwards intending to cheat the consignor of his money, he pretended to him that he had carried and delivered the goods to the consignee, and that the consignee had given to him (the said carrier) a receipt expressing the delivery of the goods: but that he had lost, or mislaid, the receipt; and then demanded sixteen shillings for the carriage of the goods, and by means of such false pretences (which were duly negatived) obtained the sum of sixteen shillings from the consignor; it was holden that the offence was sufficiently brought within the words and meaning of the statute. (*r*) So where the defendant in the assumed character of a porter from an inn, delivered a parcel as from the country, with a printed ticket, with writing charging carriage and portorage, and received the money charged; and the parcel turned out to be a mock parcel, worth nothing; and part of the false pretences charged in the indictment was taken from the porter's ticket; and it was objected that the defendant had not uttered these words; Lord Ellenborough, C. J., said, 'I take the defendant to have uttered every word contained in the ticket which he brought with the parcel.' (*s*)

Where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half-a-guinea's worth of silver, and that she would send the half guinea presently; upon which she obtained the silver, went away with it, and never returned; the case was holden not to amount to felony. (*t*) And it is said that, in truth, this was a loan of the silver, upon the faith that the amount would be repaid at another time; it was money obtained by a false pretence; and that the same determination had been made in similar cases at the Old Bailey. (*u*) So where the prisoner borrowed half a sovereign of the prosecutor under

(*p*) Villeneuve case, *cor.* Moreton, C. J., of Chester, and Buller, J., Chester, 1778. 3 T. R. 104, 105. R. v. Willott, 12 Cox, C. C. 88.

(*q*) R. v. Howarth, 11 Cox, C. C. 588.

(*r*) R. v. Airey, 2 East, R. 30.

(*s*) R. v. Douglas, 7 C. & P. 785, note (*a*).

(*t*) Coleman's case, 2 East, P. C. c. 16, a. 104, p. 672. 1 Leach, 303, note (*a*).

(*u*) 2 East, P. C. c. 16, s. 104, p. 678.

the pretence that he wanted to buy some tea, but never returned any money to the prosecutor, and the pretence made use of was stated to be fictitious: Parke, J., told the grand jury, who asked his opinion on the case, that he thought this was not a larceny, and advised them to ignore a bill for larceny of the half sovereign. (v)

The prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston and said he had come from Mr. Parker for some hams and bacon, and produced the following note:—

‘Have the goodness to give the bearer ten good thick sides of bacon, and four good shewy hams at the lowest price. I shall be in town on Thursday next and will call and pay you.

‘Yours respectfully,

‘T. PARKER.’

Aston believing the note to be the genuine note of Parker, who occasionally dealt with him, delivered the hams to Adams. The jury convicted, but, upon a case reserved upon the question whether the offence was larceny, the judges were all of opinion that the conviction was wrong. (w)

An indictment alleged that the prisoner pretended that a person, who lived in a large house down the street, and had had a daughter married some time back, had been at him, the prisoner, about some carpet, and had asked him to procure a piece of woollen carpet. The prisoner went to the prosecutor's shop in a village, and said that he wanted some carpeting for a family living in a large house in that village, who had had a daughter lately married. On this the prosecutor gave the prisoner about twenty yards of carpeting, which the prisoner sold for his own benefit. The only evidence to negative the false pretence charged was that of a lady living in the village, whose daughter was married about a year ago, who stated that she had not sent the prisoner for the carpet. It was urged that the indictment did not sufficiently state any false pretence, and that on the evidence there was nothing to go to the jury, and that the pretence alleged had not been sufficiently negatived; but the sessions held that there was a sufficient pretence stated, and that there was evidence to go to the jury in support of it: and, on a case reserved, the conviction was affirmed. (x)

Where the prisoner purchased goods and gave in payment for them a bill drawn on and accepted by himself on the day of the purchase, payable one month after date at the London and Westminster Bank, and when he gave the bill he stated that it would be paid the next day at a bank in Taunton, and that he had made arrangements that it should; but the manager proved that the prisoner had not made arrangements for the payment of the bill, and had not been at the

(v) *R. v. George Bromley*, Hereford Spr. Ass. 1829. MSS. C. S. G. An indictment was afterwards preferred for obtaining the half sovereign by false pretences, and on the trial it appeared that the pretence was true. C. S. G.

(w) *R. v. Adams*, 1 Den. C. C. 38. Therefore the offence was obtaining goods

by false pretences. See *R. v. Middleton*, *ante*, p. 149, from the judgment given by some of the judges in this case, it seems they thought that *R. v. Adams* was not correctly decided. See 42 L. J. M. C. 78. Some of the judges took a different view.

(x) *R. v. Burnside*, Bell, C. C. 282. See *R. v. Franklin*, 4 F. & F. 74.

bank, and was not known there; Watson, B., said, 'If the representation made by the prisoner was false and the prosecutrix parted with her goods on the faith of its being true, the prisoner is guilty of obtaining money by false pretences.' (y)

The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk. The jury found that the prisoner was not carrying on that business at all. Held, that this was an indictable false pretence. (z)

Upon an indictment for obtaining a cheque for £80 by false pretences, it appeared that the prisoner had employed the prosecutor, a solicitor, to prepare a contract for building a house and workshop upon land near Sheffield. He afterwards asked him for the loan of £80. He told him the builder had finished the house and workshop, and that he was short of money to pay for extras, and that he should have the lease in a day or two. Shortly afterwards the prisoner brought a lease from the governors of the Free Grammar School Estates, Sheffield, to the prisoner of certain land, with a plan in the margin, and left it with the prosecutor, and said, 'I have built a very capital house on the land, and some workshops, and it is a very nice piece of land. Can you lend me the £80 on it without putting me to the expense of a formal mortgage? They are worth near £300, and I hope you will save me the expense of a mortgage.' He also said he had to pay the builder for some extras. In consequence the prosecutor agreed to let him have the money on the deposit of the lease, and on his executing an agreement to execute a mortgage of the lease, and a bond for £80. The prisoner called the next day, and executed the agreement and bond; after which the prosecutor gave him the cheque for £80. The prosecutor was induced to give him the money on the representation that the house and workshops were worth £300, and built upon the land in the lease. He would not have given him the money unless he had signed the bond and agreement and deposited the lease; nor would he have given him the money on his bond, agreement, and deposit of the lease, unless for the false pretence that the house and workshops had been built on the land. It turned out that no house or workshop had been built on the land in the lease, but on an adjoining piece of land a house and workshop had been built and mortgaged by the prisoner for £250. The land in question could not be found by the description in the lease, and was of much less value without buildings. It was contended that the proximate cause of obtaining the cheque was the agreement, the bond, and equitable mortgage, and that the false pretence was only an antecedent inducement to enter into these contracts; but, upon a case reserved after a verdict of guilty, it was held that the case could not be distinguished from *R. v. Abbott*, (a) and that the conviction was right. (b)

Obtaining as a loan from the drawer of a bill accepted by the prisoner part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the

(y) *R. v. Hughes*, F. & F. 355.

(z) *R. v. Crab*, 11 Cox, C. C. 85.

(a) *Post*, p. 501.

(b) *R. v. Burgon*, D. & B. 11. A.D. 1856.

amount, is within the statute, if it be proved that the prisoner was not so prepared, and did not intend so to apply the money. The indictment stated that the prosecutor had drawn a bill of exchange upon the prisoner for £2638, which the prisoner had accepted, and that when it became due the prisoner, by falsely pretending that he was then provided with sufficient funds to pay the full amount of the bill, excepting £300, obtained the last-mentioned sum from the prosecutor; and it was proved that the prisoner had accepted a bill, drawn on him by the prosecutor for £2638, the amount he then owed to the prosecutor; the bill was put into circulation, and when it became due, the prosecutor became anxious about its being duly taken up by the prisoner, and applied to him on the subject, asking him whether he was prepared to pay it. The prisoner answered that he was prepared with sufficient funds all but £300, and that he expected to get the loan of that sum from a friend. The prosecutor expressed his willingness to advance the £300 himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the £300 to his own purposes, and suffered the bill to be dishonoured, and the prosecutor ultimately had to pay it. There was evidence that at the time the prisoner obtained the money he was not in possession of funds sufficient to make up the balance between the £2638 and the £300, but was in insolvent circumstances. It was objected that the prisoner's statement, that he could take up the bill, formed a mere misstatement; at the worst a naked lie; and *R. v. Wakeling* (c) and *R. v. Codrington* (d) were cited. Secondly, that the statute did not extend to cases where the prosecutor had only lent, not parted with the property of the money. Patteson, J., 'The words of this Act are very large, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the £300 by a deliberate falsehood, averring that he had all the funds to take up the bill except £300, when in fact he knew that he had not, and meaning all the time to apply the £300 to his own purposes and not to take up the bill, the jury ought to convict the prisoner. In *R. v. Codrington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate that he was selling. Then as to the money being advanced by the prosecutor only as a loan, the terms of the Act embrace every mode of obtaining money by false pretences, by loan as well as by transfer.' (e)

An indictment for false pretences alleged that the prisoner pretended to one Waters that he had received an order for the payment of £25 from one Cosser, for the payment of a quarter's salary then due to the prisoner in respect of his curacy. Waters proved that the pris-

(c) *R. & M.* 504, *post*, p. 490.

(d) 1 C. & P. 661.

(e) *R. v. Crossley*, 2 M. & Rob. 17. But *qu.* the last point. The correct distinction between larceny and false pretences seems to be that in the former the property was not parted with, in the latter it was. See the cases, *ante*, p. 145, *et seq.* But if these cases shew that it would not be obtaining by false pretences, still if the jury found that the prisoner obtained the loan with

intent to steal, that would be larceny, and he might be convicted of that upon this indictment. C. S. G. On this note being cited in *R. v. Burgon*, *infra*, Crompton, J., said, 'Where a chattel is lent, the chattel does not pass; but money that is lent passes as much in case of a loan as on a sale. There was no expectation that the same money which was obtained would be returned.'

oner came to him, and told him he had received an order that morning to go and receive his quarter's salary, £25, of Mr. Leighton; that he had been there, and finding Leighton ill in bed, he could not do it for him. He asked Waters if he could oblige him with the money, and shewed him a paper to this effect: 'Received of Mr. Leighton the sum of £25 for the Rev. W. M. Cosser's note.' It was in the prisoner's writing, and signed by him. The prisoner asked him if he could oblige him with part. Waters gave him £15, and the prisoner gave him a written receipt for that sum. He gave him the money on account of his knowing Mr. Cosser. The prisoner told him he had an order, but he did not see it; but he believed his word. On cross-examination Waters said, 'I had no doubt the paper he produced was genuine; I acted on that as much as on the other part of the transaction. It contributed to produce confidence, and it was in consequence of what I saw, and what he said, and what he gave me, that I was induced to let him have the money. Without the receipt I should not have let him have the money. He first told me he had received a letter from Mr. Cosser that morning. That was part of my inducement to let him have the money. He had the paper in his hand at the time, which he had taken to Mr. Leighton, and said the letter was wishing him to go to Mr. Leighton, and draw his quarter's salary.' It was objected that there was a variance between the pretence laid and that proved; that the proof was that the prisoner said he had received a letter and not an order; and that the receipt drawn for Mr. Leighton and the receipt given to Waters had been essential parts of the inducement to part with the money, and were not stated in the indictment as they ought to have been. The Court overruled the objections, and left the following points to the jury:—1. Did the prisoner make use of the pretence alleged in the indictment? 2. Did Waters part with his money in consequence of that pretence? 3. Was it false? 4. Did the prisoner obtain the money with intent to defraud? The jury found the prisoner guilty, and, upon a case reserved on the questions whether the ruling of the Court, and the direction to the jury in conformity therewith, were right, Jervis, C. J., after argument for the prisoner, delivered judgment. 'We are asked whether the ruling of the Court and the direction to the jury were right, and our answer is that they were right. Because it came out on cross-examination that the prisoner said that he had received a letter, therefore it seems to be contended that he did not say that he had received an order, and that there is a variance between the pretence laid and the pretence proved. I do not think that there is any variance. The objection was, that it was not proved that the prisoner pretended that he had received an order for money then due and payable; but what can be the meaning of saying that he had received an order for a quarter's salary, but that it was due and payable? Another objection is, that part of the inducement to the prosecutor to part with his money was the receipt, and that that inducement is not averred in the indictment; but the actual substantial pretence was that he had received the order; the order and not the receipt was the main inducement upon which the money was parted with. The pretence was correctly found by the jury. The ruling direction and verdict are right.' (f)



A count alleged that the prisoner falsely pretended to D. Owen that he had a letter of recommendation from the Rev. Mr. G. of K., and that he had engaged to make for Mrs. P. and her niece nine new teeth for the sum of seven pounds, and that Mrs. P. had refused to advance any money to him until the teeth were completed, and that he wanted thirty shillings to complete the teeth. The prisoner had stated to Mr. Owen that he was a dentist in search of employment, and had produced a letter of recommendation purporting to be written by Mr. G., and Mr. Owen gave him a letter to Mrs. P., and afterwards the prisoner called on Mr. Owen, and said that Mrs. P. had given him a job of seven pounds, but he could not accomplish it without some money to buy gold, and Mrs. P. would not advance a single farthing until the job was done, and he therefore asked Mr. Owen to lend him thirty shillings. Mr. Owen, not having change, advanced him two pounds. Mrs. P., in consequence of Mr. Owen's letter, had agreed with the prisoner to make nine teeth, six for herself and three for her niece, at five shillings each; he asked for money on account, and Mrs. P. gave him thirty shillings. He never made the teeth. Coleridge, J., told the jury that if they believed the witnesses, it was clearly established that the prisoner had made a false assertion as to not having received any money from Mrs. P. (g)

The prisoner was indicted for falsely pretending that a piece of paper of no value, which he produced to the prosecutrix, was a Bank of England note for £5, and of the actual value of £5. The note was a Bank of Elegance note tendered for £5. The prisoner told the prosecutrix it was a Bank of England note. The prosecutrix had bad eyesight, and generally used spectacles, but had them not with her when she changed the note. The prisoner was convicted. (h)

The indictment alleged that the prisoner unlawfully did falsely pretend that a certain printed paper then produced was a good and valid promissory note for the payment of five pounds. The prisoner offered to the prosecutor in payment of three pounds seventeen shillings and sixpence, for certain pigs agreed to be sold by him to the prisoner, a printed paper, commonly called a flash note, containing the words and figures following, arranged so as to have the appearance of a Bank of England note:—

‘£5.                                      Bank of Elegance.                                      No. 230.

‘I promise to pay on demand the sum of five pounds, if I do not sell articles cheaper than anybody else in the whole universe.

‘January 1st, 1850.

‘For Myself and Co.,

‘Five.

‘M. CARROLL,

‘56, Allison Street, Birmingham.’

(g) *R. v. Jones*, 6 Cox, C. C. 467. Another count alleged that the prisoner pretended to J. B. that he was a dentist, and that he was willing to make a gold palate for J. B. for £2, if he, the prisoner, before making the said gold palate, should receive from J. B. thirteen shillings in cash down, and a false palate of J. B., to be allowed for at the sum of seven shillings. The prisoner had agreed to make J. B. a new palate for £2, of which £1 was to be paid down. J. B. gave him thirteen shillings and an old palate, for which the prisoner agreed to allow seven shillings. The prisoner never made the palate, and was apprehended

twelve miles off. Coleridge, J., told the jury that if the agreement had been a *bona fide* agreement, although not performed, the prisoner could not be indicted for the breach of it. But the supposition put forward on the part of the prosecution was that the prisoner never intended to make the new palate at all. That was a question for the jury to determine. The prisoner was not defended.

(h) *R. v. Wells*, tried before Littledale, J., in 1840, cited D. & B. 36; and there was a similar conviction before Lord Denman, C. J., in 1841, *R. v. Pindle*, cited, *ibid*.

The prosecutor said to the prisoner, 'I think it is not a good one.' The prisoner said, 'It is a five pound Bank of England note, and will go anywhere.' Prosecutor then took the note, and gave the prisoner the change, £1 2s. 6d., and delivered up the pigs. The prosecutor said he could only read very badly, and being requested in court to read the note said he could not read it at all. The prisoner was convicted, and, upon a case reserved upon the question whether the act of putting off the printed paper in question as a five pound Bank of England note in payment of goods amounts to a false pretence within the statute; it was contended, that it was not a false pretence, but only a misdescription of an article, which carried the refutation or correction of such misdescription on its face. *Wilde, C. J.*, 'The misdescription was in a very material particular. It amounted to a total misstatement of the nature of the article itself. There can be no doubt that it was a false pretence.' (i)

Upon an indictment for falsely pretending that a piece of paper was a £5 note, it appeared that the prisoner produced an Irish note for one pound. 'One' was at each corner of the note, and 'one pound' clearly printed in the middle. He gave it to E. Perkin, and said, 'I only want this £5 note changing.' She looked at the note, and thought it was a £5 note, and took it to her mother, who did not look particularly at the note, and had no idea of its being a £1 note, and gave £4 19s. 10½d. to the prisoner for the note; both mother and daughter could read: it was objected that the prosecutrix by using common prudence had the means on the face of the note of detecting that it was not a £5 note, and, therefore, that the case was not within the statute; but, on a case reserved, it was held that the conviction was right. In many cases a person giving change would not look at the note, but, being told it was a £5 note, and asked for change, would believe the statement of the party offering the note, and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretences. (j)

An indictment charged the prisoner with obtaining money by falsely pretending that a five pound bank note was of the value of £5. It appeared in evidence that the note was the note of a bank which had been made bankrupt forty years before, and had not re-opened, and the prisoner knew it. The bankruptcy proceedings were not produced, and there was no evidence as to what dividend, if any, had been paid: held, that the evidence was sufficient to justify the conviction of the prisoner. (k)

The prisoner was tried on an indictment, which charged that he did falsely, fraudulently, and deceitfully, deliver to one Joseph Blood, certain papers, purporting to be promissory notes of bankers at Oundle, as and for good and available notes (one of which was set out);

(i) *R. v. Coulson*, 1 Den. C. C. 592. A.D. 1850.

(j) *R. v. Jessop*, D. & B. 442. It was also objected that the note was of the same species as a £5 note, differing only in quality and value; *R. v. Bryan*, D. & B. 265; but the Court held there was nothing in this point.

(k) *R. v. Dowey*, 37 L. J. M. C. 52, et

*per Cockburn, C. J.*: 'I have no doubt upon this point. The evidence stated in the case clearly shews that the prisoner passed off the notes of the Stockton and Cleveland Bank as good £5 notes, well knowing that the bank had stopped payment forty years ago, and had not re-opened, and that is, I think, amply sufficient.'

and that Blood, believing them to be good and available, delivered to the prisoner a gelding, of the price of £12, his property; whereas the notes were not good and available, but of no value, as the prisoner then well knew; and so the prisoner, by colour of the said papers, unlawfully, &c., did obtain, and get into his possession from Blood, the said gelding, with intent to cheat him of the same, and of his said gelding did cheat and defraud him, &c. It appeared that the prisoner, on the 4th of June, 1821, bought of the prosecutor, at Rugeley fair, the gelding in question, for the price of £12, and tendered in payment notes to that amount on the Oundle bank. On the prosecutor's objecting to accept these notes, the prisoner assured him they were good notes, and upon this assurance the prosecutor parted with the gelding. These notes had never been presented by the prosecutor at Oundle, or at Sir James Esdaile's, in London, where they were made payable. A witness stated, that he recollected Rickett's bank at Oundle stopping payment upwards of seven years ago; but that he knew nothing but what he saw in the papers, and heard from people who had bills there. The notes appeared to have been exhibited under a commission of bankrupt against the Oundle bank; the words importing the memorandum of exhibit, had been attempted to be obliterated; but the names of the commissioners remained on each of them. The jury found the prisoner guilty; and said, they were of opinion, that when he bargained for, and obtained the horse, he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor of his horse. But, upon a case reserved, the judges were unanimously of opinion that the evidence was defective, in not sufficiently proving that the notes were bad. (*l*)

So where an indictment stated that the prisoner unlawfully pretended that a promissory note of Coleman, Smith, and Morris, for the payment of £1 as copartners and bankers trading under the firm of Coleman, Smith, and Morris, was a good and available note, whereas it was not a good and available note, &c., and it appeared that the prisoner had been told that the bank from which the note issued had stopped payment; and the banking house was shut up, and Coleman and Morris had become bankrupts, but Smith had not become bankrupt; it was objected that as one of the partners had not become bankrupt, the note remained an available note as it respected him; and *non constat* that if presented to him it would not have been paid. Gaselee, J., said, 'On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away.' (*m*) So where on an indictment for obtaining a bull by falsely pretending that a promissory note of Vincent and Co. was a good note, it appeared that the prisoner uttered the note to the prosecutor at Bracknell fair, in payment for his bull, and in answer to his inquiry whether the note was good, said it was a very good one: and, when asked where he lived, he gave a false address. The bank of Vincent and Co. had ceased business above twenty years ago, and one of their then clerks swore that the note uttered by the prisoner had been regularly cancelled and withdrawn from circulation, by the makers having drawn a large cross across the face of it; and the note was old and dis-

(*l*) *R. v. Flint*, B. & E. 460.(*m*) *R. v. Spencer*, 3 C. & P. 420.

coloured, of the date of 1816, and a large hole through the middle had taken away the middle part of the cross, leaving however the ends of it quite distinct. The proceedings in bankruptcy against Vincent and Co. were not produced. Coleridge, J., held that there was no evidence to go to the jury that the prisoner knew the note to be cancelled and unavailable at the time he uttered it, so as to constitute a false pretence within the statute. (n)

The prisoner was indicted for pretending that a certain promissory note was a good and valid valuable security for the payment of £10 and of the value of £10. The prisoner agreed to buy a pony, and produced three notes, one of them a £10 note on the Romford bank, which the prisoner said was as good as gold. This note was dated in 1840, and purported to be payable on demand where it was issued, or at Messrs. Glyn and Co., bankers, London. The cashier of the Romford Bank proved that the note was a genuine note, but that the bank had stopped payment in 1844, and had not issued any notes since. The note had been presented at the bank of Messrs. Glyn and Co., but no payment could be obtained. It was held that it was unnecessary to adduce any formal evidence of the bankruptcy, and that the evidence of the worthlessness of the note was sufficient to go to the jury. Besides, the note was more than six years old, and therefore no action could be maintained on it. (o)

(n) *R. v. Clark*, Dick. Q. S. by Talf. 315. The first count stated that the prisoner did deliver to one J. F. N. a certain paper writing, partly written and partly printed, purporting to be a promissory note, made by one O. V., for certain persons therein described, as using the names, style, and firm of Vincent, Bailey, and Vincent, for the payment by the makers thereof to A. G., or bearer on demand of five pounds, at the Hon. B. D. &c., bankers, London, or on demand in Newbury, value received, as and for a good and available promissory note of the said makers thereof, and the said prisoner then and there unlawfully and falsely did pretend to the said J. F. N. that the said paper writing was a good and available promissory note of the said persons so using the names, style, and firm of the said V. B. and V.: by means of which said false pretence the said prisoner did then and there unlawfully obtain from the said J. F. N. a bull, the property of the said J. F. N., with intent then and there to cheat and defraud him, the said J. F. N., of the same: whereas in truth and in fact at the time the said prisoner so delivered the said paper writing, and made the said false pretence as aforesaid, the said paper writing was not a good and available promissory note of the said persons using the names, style, and firm of V. B. and V., but on the contrary thereof, at that time was and from thence hitherto hath been and still is a cancelled, bad, and unavailable promissory note of the said V. B. and V., and of no value, as he the said prisoner then and there well knew. The second count was like the first, except in omitting the makers' names, and stating them to be 'certain persons therein more

particularly described as makers thereof, for the payment by the makers thereof,' &c. The third count was for a cheat at common law, and charged the prisoner with uttering and delivering to the prosecutor a certain other paper writing (setting it out as in the first count), as and for a good and available promissory note, to the payment of which to the holder or holders thereof, the said persons so therein particularly described as the makers thereof were there and at that time liable, with intent then and there to cheat and defraud the said prosecutor; and did then and there and thereby cheat the said prosecutor to the amount of the said sum of £5; the prisoner then and there, well knowing that the said last-mentioned paper writing was there, and at that time a bad, cancelled, and unavailable promissory note, to the payment of which to the holder or holders thereof, the said persons so therein particularly described as the makers thereof, were not there and at that time liable, against the peace, &c. The next case tried was *R. v. Meshech Ferris*, on a similar indictment. As the evidence closely resembled that in the last case, the counts for the false pretences were abandoned, and the opinion of the Court was taken whether the facts did not constitute a cheat at common law as laid in the last count; and the third count in *R. v. Freeth*, to which no objection was made at the trial or before the judges, was mentioned. Coleridge, J., was of opinion that the facts did not constitute an indictable cheat, and the prisoner was acquitted.

(o) *R. v. Smith*, 6 Cox, C. C. 314. Tal-  
fourd, J., and Williams, J., A.D. 1854.

The prisoner was charged with pretending that a note of the Newport old bank was a good and valid note, he well knowing that the bank had long before stopped payment. The note was uttered by the prisoner, who said it was a good one, and he received change for it. The note was issued by Messrs. Williams of the old bank, Newport, in 1847. The prisoner had said that he had taken the note at Abergavenny, and had afterwards heard that the bank had stopped. The old bank stopped payment in 1851, and Messrs. Williams were made bankrupts the same year. *R. v. Spencer (p)* was cited, and it was said that in this case there was no solvent partner. Martin, B., 'The case which you cite is against you. How can the fact of one partner being solvent make any difference? The estate might pay twenty shillings in the pound. When I read the depositions I thought that there was no offence within the statute, and my Brother Bramwell, to whom I spoke on the subject, thought so too. The officer of the court informs me that a case of the same kind was tried some time ago at Shrewsbury, and that the judge ordered an acquittal. I think that decision was correct, and I hold that the prisoner must be acquitted.' (g)

The prisoner was indicted for falsely pretending that a piece of paper was a bank note then current, good, and of the value of five pounds, whereas it was not a bank note then current, or good, or of the value of five pounds, or of any value whatever. The prisoner tendered to S. Thomas a paper purporting to be a five pound note of the Newport old bank, and obtained five pounds in change. A witness proved that he remembered the Newport old bank; that that bank does not now exist: he saw the doors of it shut; it was a private bank, and paid a dividend of two shillings and fourpence in the pound in 1852 or 1853; there is no bank at Newport to which the note could be presented. The note had been tendered to a bank at Merthyr-Tydfil after the prisoner passed it, but change could not be got for it. It was objected that the evidence was not sufficient to go to the jury in support of the allegation that the note was not good, or of the value of five pounds, or of any value whatever. But the jury were told that there was some evidence from which they might infer that the note was not of any value; but, on a case reserved, on the question whether there was sufficient evidence before the jury to sustain the said allegations in the indictment, it was held that the conviction was wrong. Pollock, C. B., 'Probably this case might have been left to the jury in such a way that the verdict of guilty might have warranted the sustaining the conviction. Had the prisoner represented the note to be of £5 value when she knew it was not of that value, and the jury had found the false pretence, and that the

(p) *Ante*, p. 481.

(-) *R. v. Williams*, 7 Cox, C. C. 351. No evidence was given, and the case went off on the opening. The facts are said to have been taken from the depositions, and no case was cited. It deserves consideration whether these cases have ever been dealt with on the proper ground. Assuming that the evidence shews that the prisoner was guilty of a fraud in passing the note, it should seem that the only proper question is, 'was the note at the time it was passed

an available note for the sum mentioned in it?' The representation of the prisoner is that it was; and the truth or falsehood of that representation depends on the state of facts at that time. Suppose a prisoner believes a note to be valueless, and passes it for full value, how can his guilt be turned into innocence by the possibility that years afterwards some dividend may be paid on the note? See the remarks of Pollock, C. B., Williams, and Crowder, JJ., *infra*, in *R. v. Evans*. C. S. G.

note was of less value than £5 to her knowledge, it would have been sufficient to justify a verdict of guilty. But as the case is stated, the only question for us is whether there was evidence that the note was of no value. There is no reasonable evidence that the note was not of any value; for although 2s. 4d. in the pound had been paid upon it, it might still be of some value.' (r)

Where, in Ireland, on an indictment for obtaining goods by false pretences it appeared that the prisoner enclosed the half of a five pound bank note to one tradesman and the other half to another tradesman, on the same day, and requested each to forward goods to him, which each of them did, and he then set off for America; Pennefather, B., 'was of opinion that the indictment could not be sustained, as the prisoner had not received the goods under a false pretence, though such an offence was to be implied from the circumstance of each half of the £5 note being sent to different individuals on the same day: but there was no direct promise in either of the letters, which had been sent to the traders, that the other half would be forwarded to him.' (rr)

This decision, however, can no longer be considered good law, as the Irish Court for Crown cases reserved have held a conviction for false pretences good under precisely similar circumstances. (s)

Upon an indictment for obtaining by false pretences from J. Buxton a sum of money, it appeared that Buxton was a member of 'The Earl of Uxbridge Lodge of Odd Fellows at Burton-on-Trent;' and his contribution was ninepence per fortnight. The prisoner was secretary of the lodge, and it was his duty to receive money from the members in lodge hours; but he had no authority to receive any out of the lodge; on the 17th of November, the prisoner tendered to Buxton out of the lodge the following writing:—

'Earl of Uxbridge Lodge, Burton-on-Trent.

'Sir and Br. (Brother).

'Nov. 14th, 1848.

'I hereby give you notice that you owe to your lodge for contributions, &c., the sum of 13s. 9d., due on the 20th inst.

'Yours respectfully,

'To Mr. Joseph Buxton.

'WILLIAM WOOLLEY.'

The 20th of November was the next lodge night after the 14th. Prisoner said, 'I have brought you a summons for the money you owe the lodge.' Buxton opened the paper, and said, 'Do I owe that amount, thirteen shillings and ninepence?' Prisoner said, 'You do.' Buxton said, 'It is not very long since I paid a sum at the lodge to you.' Prisoner said, 'That is what you owe.' Buxton said, 'Very well,' and paid him fourteen shillings, and received threepence in

(r) *R. v. Evans*, Bell, C. C. 187. Williams, J., said, 'I wish to guard myself against being supposed to hold that a person might not be convicted on an indictment for obtaining money by false pretences by means of such a note as this, provided it were proved that the prisoner, knowing that the bank had stopped payment, and could not pay its notes in full, represented the

note to be of full value, and the note of a solvent bank.' Crowder, J., 'If a person presents a note for £5 as a good note for that amount, knowing that the bank has stopped, it would amply support an indictment for obtaining money by false pretences.'

(rr) *R. v. Masterson*, 2 Cox, C. C. 100. Perrin, J., was also present.

(s) *R. v. Murphy*, 13 Cox, C. C. 298.

change. It appeared by the books of the lodge in the prisoner's writing that Buxton had paid three shillings and ninepence on the 23rd of October at the lodge, and that on the 20th of November two sums of ninepence and a subscription of eightpence were due from him. The prisoner accounted to the treasurer on the 20th of November, and paid him four pounds eleven shillings and one penny, but no sum of thirteen shillings and ninepence from Buxton. It was objected, first, that there was no false pretence within the statute, and that the fact of what was due was as much within the knowledge of Buxton as of the prisoner. Secondly, that if there were any false pretence it was the written paper which ought to have been set out in the indictment. In answer to the second objection, it was contended that the false pretence was the oral representation of the prisoner. The objections were overruled, and the prisoner convicted; and, upon a case reserved, it was contended that there was no false pretence within the meaning of the statute; in all the cases the money had been obtained by a false representation of a fact, of which the party could not possibly have been cognisant, and the truth of which he had no means of ascertaining; but the judges were unanimously of opinion that this was a false pretence within the statute. And Alderson, B., said, 'If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretence; for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due; that would be a false pretence; yet the matter might easily be inquired into and ascertained. Or take the common case. The prisoner says, "I am sent by Mrs. T. for a pair of shoes." Is not that a false pretence? yet inquiry can be made, and after the thing has happened usually is made, and the falsehood detected. Mrs. T. might live five miles off, or she might be a next-door neighbour; but false pretence or no cannot depend on mileage.' 'The old law about a false token was a much more stringent rule. Why should we not hold that a mere lie about an existing fact told for a fraudulent purpose should be a false pretence?' (ss)

It was agreed upon by all the judges, that a case was within the 30 Geo. 2, c. 24, where the credit was created by means of the false pretence; and they held that in the following case the prisoner would not have obtained the credit but for the false account which he delivered. The prosecutors, from whom the prisoner was charged with obtaining money by false pretences, were clothiers; the prisoner was a shearmen, in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; at the end of each week he was supplied with money to pay the different shearmen, by the clerk of the prosecutors, who advanced to him such sum as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorised to draw from the clerk for money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not author-

(ss) *R. v. Woolley*, 1 Den. C. C. 559. 3 C. & K. 98, A.D. 1850; see also *R. v. Jessop, Dears. & B.* 422, *post*. No notice was

taken of the point about setting out the paper writing; but as to that point, see *R. v. Coulson*, 1 Den. C. C. 592, *ante*, p. 480.

ised to pay him any sums except what he carried in his account or note as the amount of what was due to the shearmen for the work they had done. The prisoner on the 9th of September, 1796, delivered to the prosecutor's clerk a note in writing in the following form, '9th September, 1796, Shearmen £44 11s. 0d.' which was the common form in which he made out his account of the amount of their week's wages. And in a book in his handwriting, which it was his business to keep (of the men employed, of the work they had done, and of their earnings), there were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed; so as to make out the sum stated in the note to be due to the shearmen. Upon this evidence the jury found the prisoner guilty; but sentence was respited in order to take the opinion of the judges, whether this case were within the 30 Geo. 2, c. 24, the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here. The judges, after some difference of opinion, ultimately all agreed on the principle, that if the false pretence created the credit, the case was within the statute; and they considered that in this case the defendant would not have obtained the credit, but for the false account which he had delivered in, and, therefore, that he was properly convicted. (t)

The first count charged the prisoner with falsely pretending that a certain account was correct, whereby he obtained an order for the payment of £14 1s. 2d. from the prosecutor with intent to cheat him of the same; the second count charged the prisoner with falsely pretending that a workman of the prosecutor was entitled to £1 4s. 3d., for work done by him; whereby the prisoner obtained an order for the payment of £16 12s. 3d. from the prosecutor, with intent to cheat him of part of the proceeds thereof, to wit, six shillings and sixpence. It was the prisoner's duty as foreman of the prosecutor to keep an account of the work done by his master's men, and of the wages due to them, and on the Friday in each week to lay this account before his master; on which his master gave him a cheque on his banker for the total sum shewn to be due. In support of the first count it was proved that the prisoner one week produced an account amounting to £14 1s. 2d., which included a false charge of seven shillings, which was not in fact due. The master confiding in the accuracy of the account gave him a cheque for £14 1s. 2d., which he cashed, and applied seven shillings to his own use, but properly disposed of the remainder. The second count was supported by similar evidence, and had reference to a cheque for £16 12s. 3d., out of which the prisoner applied to his own use six shillings and sixpence, falsely stated to be due to a workman; but properly disposed of the residue. It was objected that the first count was not proved, as the intent was not to cheat of the cheque, but of a small portion of the proceeds: and that the second count charged no offence within the Act. But,

(t) *Witchell's case*, 2 East, P. C. c. 18, s. 8, p. 830. One of the judges observed, that the prisoner was not to have any sum he thought fit, on account; but only so much as was worked out. See *R. v. Hunter*, *post*, p. 495.



on a case reserved, the judges were unanimously of opinion that the first count was proved; but they gave no opinion as to the other count, as the objection was on the face of the record. (*u*)

Upon an indictment for larceny it appeared that the prisoner was the servant of Messrs. Neame, grocers, who were in the habit of purchasing large quantities of what was called 'kitchen stuff.' The course of business was for the sellers of the 'kitchen stuff' to take it to the prisoner on Messrs. Neame's premises. It was his duty to weigh it, and if the chief clerk was in the counting-house to give the seller a ticket containing the weight, price, and name of the seller. The seller then took the ticket to the chief clerk, who paid him the price out of moneys furnished to him by Messrs. Neame for the purpose. In the absence of the chief clerk the prisoner had authority to pay the seller, and, on producing a ticket containing the above particulars, the chief clerk repaid the prisoner out of the moneys so furnished to him by Messrs. Neame, without any inquiry as to whether any stuff had been really bought, or the quantity. One evening the prisoner went to the counting-house, and demanded two shillings and threepence of the chief clerk, which he said he had been paid for eighteen pounds of 'kitchen stuff.' He produced a ticket in the usual form containing the name of Scott as the seller, and two shillings and threepence as the price, and received that sum from the clerk from the moneys so furnished to him, and applied it to his own use. There had been no such dealing as that alleged by the prisoner, nor any such payment by him. The prisoner was convicted, but, upon a case reserved, the judges were of opinion that as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him, the latter was not liable to be indicted for larceny, but only for obtaining money by false pretences. The conviction for larceny, therefore, was wrong. (*v*)

On an indictment for larceny it appeared that the prisoner was the clerk of the prosecutors, and it was part of his duty to pay dock and town dues, which might be due on goods exported by his masters. On ascertaining the amount required for that purpose on each day's export, it was his duty, before paying it, to apply for and obtain it from his master's cash-keeper, and having obtained it, to pay it over. On a certain day there was required to pay dock and town dues upon goods exported by his masters the sum of £1 3s., and no more was paid by the prisoner for such dues; but he fraudulently represented to the cash-keeper that £3 10s. 4d. was really due for such dues, and fraudulently obtained that sum from the cash-keeper by such representation, with intent to appropriate the difference to his own use, which he did. And, on a case reserved, it was held that the prisoner was guilty of obtaining money by false pretences, and not of larceny. (*w*)

(*u*) *R. v. Leonard*, 1 Den. C. C. 304. 2 C. & K. 514, A.D. 1848. The questions in this case are got rid of by the new clause, *ante*, p. 468.

(*v*) *R. v. Barnea*, 2 Den. C. C. 59. A.D. 1850. *R. v. Wittchell*, *supra*, was cited.

(*w*) *R. v. Thompson*, L. & C. 233. A.D. 1862. This case was commented on in *R. v.*

*Cook*, *ante*, p. 329, *et per* Bovill, C. J., in the latter case, 'The case of *R. v. Thompson* proceeded upon whether there was larceny in the first instance, but that does not arise here. No point was made in that case as to the effect of the Bailee Act, or that the possession of the prisoner was the possession by a servant.'

An indictment stated that certain goods liable to the duties of customs, consigned to J. Tritschler, had been imported, and that he had authorised the prisoner, as his agent, to transact the business at the custom-house relating to the entry and clearance of the said goods, and to pay the duties payable on the said goods on his behalf; and that the prisoner had caused to be passed a sight entry for the said goods, &c., and that the prisoner delivered to J. Tritschler three accounts in writing, purporting to be the accounts relating to the entry and clearance of the said goods, and of moneys payable as duties upon the said goods so consigned to J. Tritschler, (x) and that the prisoner pretended to J. Tritschler that the said accounts were true and correct accounts of the business transacted by him relating to the entry and clearance of the said goods, and of moneys payable by J. Tritschler to the prisoner for the duties payable upon the said goods, and that £42 8s. was payable for the said duties; by means whereof he obtained that sum, with intent to cheat Tritschler of £10 19s. 10d., part thereof. When goods liable to duty are landed at the wharf, what is called a sight entry is made by some one on behalf of the importer. This entry contains a general statement of the nature, quantity, and value of the goods, and is merely preparatory to passing a perfect entry, which is done within three or four days, the goods being then examined and the duty paid. At the time the sight entry is made, the particulars as given in are entered by the landing-waiter in a blue book. The prisoner was a custom-house agent, and employed by Tritschler to clear the goods in question; when landed a sight entry was made by a brother of the prisoner, and the quantity and value alleged at far less than their real ones, and a like entry was made in the blue book, and the duty eventually paid on the goods was £31 8s. 2d., the amount really due being £42 8s. The three accounts were presented by the prisoner to Tritschler, after the sight entry had been made, but whether before or after the duty had been paid did not distinctly appear. He paid the prisoner £42 8s., the amount of the bills. It was urged that no fraud had been committed against Tritschler, as he had paid the amount really due; but the fraud was against the revenue. Secondly, as it was not proved that the money had been paid for duty before the accounts were presented, there was no pretence of a past or existing fact. It was answered, first, that the loss would not fall on the revenue, for Tritschler was still liable to make up the deficiency; secondly, that if the money was received before the duty was paid, the fraud began with

(x) One of them was —

‘ William Joliffe Middleton, Calais.  
Mr. J. Tritschler.

|                              | £  | s. | d. |
|------------------------------|----|----|----|
| Duty . . . . .               | 14 | 4  | 6  |
| 5 per cent. . . . .          | 0  | 14 | 6  |
| Lighterage . . . . .         | 0  | 14 | 0  |
| Entry and clearing . . . . . | 0  | 7  | 6  |
| Watching, &c. . . . .        | 0  | 2  | 0  |
| Cartage . . . . .            | 0  | 5  | 0  |
|                              | 16 | 7  | 6  |

The two others were similar, but differed in amount.

the false sight entry. Williams, J., 'Myself and my Brother Patteson think that the sole question is, what was the prisoner's meaning when he presented the three accounts to Tritschler? If it was merely that he had put down the amount charged on speculation, as a mere guess as to what the duties might really amount to, then the case must fail; but if he intended to represent that the accounts contained an account of what had been done by him as the agent of Tritschler, or what would be done, (y) and he obtained the money on the faith of such statement, we think that sufficient to sustain the indictment. (z)

A count alleged that the prisoner pretended that he had an account with the Limerick Savings' Bank, and that £34 2s. 10d. was then due to him on the said account, and that a book which he deposited was the genuine pass-book in which the account was kept, and that it shewed truly the state of his account with the bank; by means of which false pretences, &c., he obtained ten yards of cloth. The prisoner went into a shop and obtained the cloth, stating that he had no money about him, and shewing a book which purported to be a pass-book between himself and the Limerick Savings' Bank, from which there appeared to be a balance of £34 2s. 10d. in his favour in the bank. The prisoner deposited the book, and at the same time gave a letter stating that he would pay for the goods within six weeks, or else forfeit a discount, which otherwise he was to obtain on the price. The entries in the book were proved to be false, and there was no balance due to the prisoner by the bank, but his account had been closed, and a letter of credit for £37, dated the day the account was closed, was found on the prisoner. It was urged that the false pretence alleged was a mere lie; that the indictment ought to have averred that by reason of the false pretence the prosecutrix had trusted the prisoner, or that the book had been deposited as a security; and, if these objections did not succeed, that the prisoner was entitled to be acquitted, if the jury believed that the prisoner did not intend to defraud the prosecutrix totally, but merely to obtain six weeks' credit. Richards, B., doubted the sufficiency of the indictment, but left the question of fraud to the jury, and they convicted. It was then further objected that the indictment did not state that the pass-book was false within the prisoner's knowledge. Richards, B., said, 'It is a startling thing to say that if a man goes into a shop and says, "I am a rich man and have money in the bank," and shews a book to corroborate his assertion, but does not give an order on the bank for payment, he is liable to be transported; but it is a different thing when a man says, "I have £500 in a bank, and if you give me goods I will give you an order on the bank," and, by so doing, obtains the goods. Then it is clearly an offence within the statute.' And having considered the case till a subsequent day, Richards, B., said that, though he thought some very grave questions of law arose upon this indictment, still as those objections appeared on the record, and the prisoner might have

(y) This is an inaccurate expression. No doubt what the judges meant was, an account of what was the amount of duty which was due and must be paid.

(z) *R. v. Christey*, erroneously reported,

1 Cox, C. C. 1, better reported, 1 Cox C. C. 239, A.N. 1844. There was a further point made as to the description of the money, which is immaterial since the 14 & 15 Vict. c. 100, s. 18.

the benefit of them on a writ of error, he felt that the proper course was not to arrest the judgment. (a)

The overseer of the prisoner's parish asked him why he did not work to support his family, which received parish relief; the prisoner said he had no shoes: upon which the overseer gave him a pair; but the prisoner had at the time two good pairs. Upon a case reserved, the judges thought that this was not within the Act, 30 Geo. 2, c. 24, and that the conviction was wrong; for it was rather a false excuse for not working, than a false pretence to obtain goods. (b)

As obtaining property by false pretences is a misdemeanor, and all persons engaged in a misdemeanor are principals, and the acts done by one of such persons in furtherance of the common object, are in contemplation of law the acts of the others, though they may be absent, if it appear that several persons are engaged in the common purpose of obtaining goods by false pretences, a false pretence made by one of them in furtherance of that purpose, is in contemplation of law a false pretence made by the others also, and will support an indictment, which alleges that the false pretence was made by such other persons, though they were absent at the time when such pretence was made. (c)

It was said, that though a man cannot be guilty of forgery, merely by passing himself off for the person whose real signature appears to a written instrument, although for the purpose of fraud, and in concert with such real person, there being no false making, yet that this appeared to be a false pretence within the 30 Geo. 2, c. 24. (d)

The first count charged that the defendant did unlawfully pretend that he was Mr. Hitchings, who had cured Mrs. Clarke at the Oxford Infirmary, and that he thereby obtained a sovereign from G. Palmer with intent to cheat him of the same. The second count charged the defendant with obtaining by similar pretences a sovereign from the said G. Palmer, with intent to cheat him 'of the sum of five shillings, parcel of the value of the said last-mentioned piece of the current gold coin.' It appeared that the defendant made the pretence charged, and thereby induced the prosecutor to buy a bottle containing something which he said would cure the eye of the prosecutor's child, for five shillings; the prosecutor gave him a sovereign, and the defendant gave him fifteen shillings in exchange. It was objected, first, that the first count was not proved, as the defendant did not intend to defraud of a sovereign but of five shillings. Secondly, that the second count ought to have charged that the defendant obtained five shillings with intent to defraud Palmer of the same. Thirdly, that this was not an obtaining by false pretences within the Act, as the money was obtained by the sale of the stuff in the bottle. And it was held, first, that it could not be taken that the defendant intended to defraud Palmer of a sovereign; because he not only gave silver coin to the amount of fifteen shillings to him, but it was all along a matter of bargain that he should do so. Secondly, that the allega-

(a) *R. v. Molony*, 2 Cox, C. C. 172. It is not stated what induced the prosecutrix to part with the cloth.

(b) *R. v. Wakeling*, R. & R. 504.

(c) *R. v. Kerrigan*, 9 Cox, C. C. 441. R.

*v. Moland*, 2 M. C. C. R. 276. See *R. v. Clayton*, 1 C. & K. 128.

(d) 2 East, P. C. c. 19, s. 5, p. 856. See *R. v. Wickham*, 10 A. & E. 34. *R. v. Story*, *post*, p. 494.

tions in the second count were proved. And lastly, that the only part of the pretence that was proved was that the defendant was Mr. Hitchings, and that the case must go to the jury. (e)

In July, 1850, the defendant told the prosecutrix that he belonged to a club, called the 'Instant Benefit,' and was canvassing for members: he said it was a very strong club; they had about £7,000 in the bank. The prosecutrix declined to enter. The defendant called on the prosecutrix again in about a month. He still praised the club, and said it was strong and respectable; that was all he said at that time; and she then entered herself, her husband, and her daughter as members, which she would not have done unless the defendant had made these representations, and she paid 3*d.*; for obtaining which the prisoner was indicted. The jury were told that they might take into account what passed at the first meeting as well as what passed at the time when the 3*d.* was paid, as one continuing representation; and, upon a case reserved, it was held that this direction was correct. For if the representations were connectible, it was for the jury to determine whether in fact they were connected. (f)

*False Pretence may be by Act or Conduct as well as by Words.*

If a person go to a shop dressed in the costume of a particular class of persons for the purpose of fraudulently obtaining goods, this is a pretending that he is a person of such class, although he makes use of no words. The indictment charged that the prisoner falsely pretended that he was an undergraduate of the University of Oxford and a commoner of Magdalen College, and it appeared that the prisoner went to a bootmaker's, wearing a commoner's cap and gown, and ordered boots, which were not sent to him, and straps, which were sent to him; and he stated that he belonged to Magdalen College. The prisoner, however, did not belong to that college. Bolland, B., 'If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the University, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence without any words being used.' (g)

There might be a sufficient false pretence within the 30 Geo. 2, by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature. (gg) A count upon that statute stated, that the prisoner, intending to cheat J. Beebee, of his moneys, did falsely, &c., utter, publish, offer, and tender to the said J. B. a false, forged, and counterfeit paper, as and for a true paper, and did falsely, knowingly, and designedly, pretend to the said J. B. that the

(e) R. v. Bloomfield, C. & M. 537. Cresswell, J. See R. v. Leonard, *ante*, p. 487.

(f) R. v. Welman, Dears. C. C. 188.

(g) R. v. Barnard, 7 C. & P. 784. And see R. v. Wickham, 10 Ad. & E. 34, where the defendant pretended that he was a cap-

tain in the East India service, and Coleridge, J., after citing this case, added, 'Suppose in the present case the defendant had not stated that he was an officer, but merely appeared in uniform.'

(gg) See R. v. Bull, 13 Cox, C. C. 608.

said false, &c., paper was a true paper, and signed by one Wm. Sparrow, which paper was as follows :—

‘Wolverhampton, 27 Feb., 1807.

‘I promise to pay the bearer on demand the sum of ten shillings and sixpence.

‘WM. SPARROW.’

With intent the moneys, goods, &c., of the said J. B. to obtain, well knowing such paper to be forged; by means of which false pretences, he did obtain from the said J. B. a sum of money, to wit, nine shillings and tenpence, against the form of the statute, &c. The third count stated, that the prisoner, intending to cheat the said J. B. of his moneys, &c., did fraudulently utter, publish, offer, and tender to the said J. B., a false, forged, and counterfeit paper, as and for a true paper, and which he then and there did pretend and represent to the said J. B. to be a true paper, subscribed, &c. (and setting forth the paper), with intent to cheat the said J. B., and the moneys of the said J. B. fraudulently to obtain, well knowing the said paper to be forged, &c.; by means of which last-mentioned false pretences, he did fraudulently obtain from the said J. B. nine shillings and tenpence, of the money of the said J. B. It appeared by the evidence of John Beebee, that the prisoner came to his shop at Bilston, on a Saturday night, and asked for a loaf; that he served him with one for fivepence; that the prisoner then asked for some tobacco, and the witness served him with an ounce for threepence, upon which the prisoner threw down a note for ten shillings and sixpence. The witness said he had no change, but in copper, which the prisoner said would do; and the witness then gave him nine shillings and tenpence, in copper, which he took, together with the loaf and tobacco, and went away. The note was that which was set forth in the indictment, and was a forged note: and it was proved that the prisoner, in the course of the same evening and the next morning, put off several other notes of the same kind and amount, and all forged. Sparrow was a person of good credit; and his notes under twenty shillings were generally circulated in that neighbourhood, as it was found impracticable to pay in cash, or larger notes, the wages of the numerous day-labourers engaged in the iron manufactories. But by the 15 Geo. 3, c. 51, s. 1, promissory notes, &c., negotiable for any sum less than twenty shillings, were declared absolutely void and of no effect; and the second section of that Act declared, that if any person should publish or utter such notes, &c., for a less sum than twenty shillings, or should negotiate the same, he should forfeit any sum not exceeding twenty pounds, nor less than five pounds; the third section gave directions as to the form of conviction. The counsel for the prisoner objected, first, that this was not a case within the 30 Geo. 2, c. 24, the general expressions of that statute being confined to cases of false suggestions of fact, as in *R. v. Young*; (*h*) to cases where the party falsely represents himself to be in a situation which he is not, as a servant of another, or as having his order or authority, or produces a false account of disbursements, on the face

(*h*) *Ante*, p. 471.

of which the party would be entitled to be reimbursed, as in *Witchell's case*; (i) and to those cases where credit is acquired, and the moneys, &c., are obtained by the false pretence. And it was urged, that in this case the credit was given to the note, and to no representation or pretence of the prisoner himself; that the fraud consisted in the fabrication of the instrument, not in any representation made by the prisoner. But the learned judge who tried the prisoner thought that the uttering it as a genuine note was tantamount to a representation that it was so. An objection was also taken, as to this being a cheat at common law, upon the ground that as a note of this sort was void, and prohibited by law, it was no offence to forge it, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The case was, however, left to the jury, with a direction that the evidence, if true, sustained both or one of the latter counts of the indictment: and the jury found the prisoner guilty on both these counts; and, on a case reserved, the majority of the judges thought that the conviction was right, and that it was a false pretence, although the note, upon the face of it, would have been good for nothing in point of law, if it had not been false. Lawrence, J., was of a different opinion, and thought that the shop-keeper was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing if true. (j)

The indictment charged that the prisoner fraudulently produced and delivered to E., the wife of J. Rayner, which J. Rayner was employed in the business of the post-office, as deputy postmaster of the town of Nottingham, an order for payment of money, commonly called a money order, to wit, for the payment of the sum of one pound, to one John Storer; and that he unlawfully, &c., pretended to the said E. Rayner, that he was the person named in the said order; by means of which false pretence he unlawfully, &c., obtained from the said E. Rayner the sum of one pound of the moneys of the said J. Rayner, with intent to cheat and defraud the said J. Rayner; averring also that the prisoner was not the person named in the order, nor the person entitled to receive the money therein mentioned. There was a second count differing from the first only in alleging the money to be John Storer's, and the intent to be to cheat him. It appeared that the prisoner went to the post-office at Nottingham, and inquired of Mrs. Rayner, who transacted the business there for her husband, if there were any letters directed to 'John Story, post-office, Nottingham, to be left till called for.' Mrs. Rayner finding amongst the letters one directed for 'John Storer, to be left till called for, Nottingham,' and supposing it to be the letter for which the prisoner inquired, delivered it to him. The direction then upon the letter was a redirection of it from Northampton, to which place it had been originally sent from Nottingham. The prisoner, on receiving it, objected to the payment of two shillings for the postage, saying, 'It was too much from Manchester;' but he paid the money, and went with the letter into the office passage, where he remained a sufficient time to have read it, after which he returned into the office with the money order in question, which had been enclosed in the letter, and

(i) *Ante*, p. 486.(j) *Freeth's case*, MS., and R. & R. 127.

offered it to Mrs. Rayner. Mrs. Rayner told him, he must write his name on the back of the order before she could pay him the money, upon which he wrote his real name, John Story, and she paid him with a one pound note. He then told her, that if she would look again she would find another letter for him, from Manchester, which she did, and he paid for it. The order in question (which was signed by Mrs. Rayner in the name of her husband), was in the following form : —

‘No. 52. Order given by one Deputy on another.

‘£1. Post-office, Nottingham, Augt. 2nd, 1804.

‘At sight, pay John Storer, according to my letter of advice of the number and date, the sum of one pound, and place the same to the account of the money order office,

‘J. RAYNER.’

‘To the Postmaster of Northampton.

‘This order must be signed by the person to whom it is made payable and sent up with the quarterly account, as a voucher for the payment.’

The terms of the letter clearly explained, that the order could not have been intended for the prisoner; and when he was first apprehended, he denied having received the money, or having ever seen Mrs. Rayner: but he afterwards assigned a want of money as a reason for his conduct. In the conversation with Mrs. Rayner, she never asked him if he was the person for whom the letter and order were intended; nor did he say that he was so. The prisoner's counsel contended, that as the order was given to the prisoner by Mrs. Rayner, herself, and the prisoner had merely presented it to her for payment, without making any untrue declaration or assertion, the case was not within the statute. The learned judge left it to the jury to find against the prisoner, if they were satisfied, that by his conduct he had fraudulently assumed a character which did not belong to him, although he had made no false assertions; and the jury found him guilty. And, on a case reserved, as well upon the objection made, as upon a doubt, whether the signature of the prisoner's name, under the circumstances, did not amount to a forgery of a receipt for money, in which the lesser offence was merged; all the judges were of opinion that this did not appear to be a forgery, the prisoner having signed his own name, which was not the same name as that of the person to whom the note was payable: and upon the other objection, they held that the prisoner was properly convicted of obtaining the money by a false pretence, because by presenting the order for payment, and signing at the post-office, he represented himself to Mrs. R. as the person named in the note. (*k*)

A man who makes and gives a cheque for the amount of goods purchased in a ready money transaction, saying that he wishes to pay ready money, makes a representation that the cheque is a good and valid order for the amount inserted in it, and if such person has only a colourable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonoured on presentation, and

(*k*) R. v. Story, East. T. 1805, MS., and R. & R. 81.



intends to defraud, he may be convicted of obtaining such goods by such false pretences. (l)

Hewers and putters in a colliery have tokens with distinctive marks, which they place on the tubs of coal drawn up the pit, and which are then taken off and put into a box, and their wages calculated according to the number of tokens sent up by them. The putter fetches the empty tub to the hewer, and takes it, when full, to the station to be drawn up to the bank; before the tub is filled, he places his token on it to denote the sum he is entitled to for his labour in putting and removing the tub to the station, and the hewer puts his token on it also to denote the amount he is entitled to for hewing the coal and filling the tub. The prisoner, a hewer, removed the putter's token after the tub was brought to him, and substituted one of his own, and then put an additional token of his own for hewing and filling the tub. The tub was then drawn up and the two tokens thrown into the box. The contents of the box were then taken away by the tokenman, and the accounts of the different workmen made up according to the number of tokens found with their initials on. In that way the prisoner obtained money for hewing and filling two tubs of coal instead of one only. Held, that this amounted to an indictable false pretence under 24 & 25 Vict. c. 96. (m)

A count alleged that the prisoner pretended to F. G., a person employed by the L. B. and S. C. Railway Co., that a certain box contained valuable articles, and that the prisoner was entitled to demand and receive 11s. 9d. for the said box, from the person to whom it was directed, and also to confer on the said company the right to demand and receive the said money on the delivery of the said box; by means whereof the prisoner obtained from the said company the said sum of money. The company, for the convenience of persons sending goods by the railway, and who would be entitled to receive small sums on the delivery of their goods at their destination, had been in the habit of advancing such sums when the goods were left at the station, and of receiving back the money when the goods were delivered. The amount asked for was usually trifling compared with the apparent value of the package. The prisoner went to a tavern near a station, and left a box there, saying he would go to the station, and get the carman to call for it, and that he would pay 11s. 9d. on the delivery of the box to him, and the prisoner would call for the money in the afternoon. The prisoner went to the station, and gave the clerk a card, on which there was 'Case to Brighton, 11s. 9d. to pay.' He said that the card was to be taken to the tavern, and the landlord would deliver the package. The clerk sent the card to the goods station, and a carman was sent to receive the box and pay 11s. 9d., which he did. The prisoner afterwards received the money. The box contained brickbats and rubbish. It was urged that no pretence within

(l) *R. v. Hazelton*, 44 L. J. M. C. 11, 13 Cox, C. C. 1. L. R. 2 C. C. R. 134, *et per* Quain, J., 'I think, on the authority of *R. v. Parker*, there was a representation made that the cheque was a good and valid order for the amount inserted in the cheque, and of that value, and on the facts stated, it was shewn to be false, and therefore this

conviction should be supported.' See *R. v. Walne*, 11 Cox, C. C. 647; *R. v. Parker*, 2 M. C. C. R. 1; 7 C. & P. 825; *R. v. Henderson*, C. & M. 328; *R. v. Jackson*, 3 Camp. 370; *Lockett's case*, 1 Leach, 94, 6 T. R. 567, note (c); 2 East, P. C. c. 19, s. 38, p. 940.

(m) *R. v. Hunter*, 10 Cox, C. C. 642.

the Act was shewn. 2nd, that there was no pretence that the box contained valuable property. 3rd, that the pretence was not made to the person advancing the money. It was held that the evidence did not support the indictment. The case was not like that of presenting a false cheque, because there the cheque was shewn to the party paying the money, and he immediately acted upon it. Here the person, from whom the money was obtained, never saw the box at all. The pretence alleged could not be inferred from what the prisoner did. Representing that there would be 11s. 9d. to pay did not necessarily involve the assertion that the box was of value; because the money might be payable on the box reaching its destination, although the box itself was of no value. If the prisoner meant the clerk to infer that 11s. 9d. would be paid at Brighton, this was a pretence of something future, and not within the Act. (n)

The prisoner, who was the agent of an insurance company, received a year's premium from the prosecutor, but appropriated it to his own use, and informed the company that the policy had lapsed. The following year he demanded and obtained from the prosecutor payment of the annual premium. It was held that this amounted to a representation that the policy had not lapsed, and that the prisoner was therefore rightly convicted. (nn)

*Where a Contract has intervened.*

There are many conflicting cases upon this subject. It may be as well, in the first instance, to refer to two or three of the most recent of them.

The prisoner was indicted under sec. 88 of 24 & 25 Vict. c. 96, for obtaining by false pretences a spring van. It was proved that the prisoner, by false pretences, induced the prosecutor to enter into a contract to build and deliver a van for a certain sum of money; that the prosecutor, on the faith of those pretences, built and delivered the van in pursuance of the original order, although the prisoner countermanded the order after the building and before the delivery. Held, that to bring the case within the statute it is not necessary that the chattel should be in existence when the false pretence is made, but that the 'obtaining' is within the statute, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; that the question whether the pretence is or is not such a continuing one, is one of fact for the jury; and that here there was evidence from which the jury might infer that it was such a continuing one; (o) *et per* Bovill, C. J.: 'The first point taken in the argument was, that, in order to convict of obtaining a chattel by false pretences under this statute, the chattel must exist at the time when

(n) *R. v. Partridge*, 6 Cox, C. C. 182. The Common Sergeant, after consulting Jervis, C. J., and Coleridge, J. All this case amounts to is that the proof did not shew that the money was obtained by the pretences alleged.

(nn) *R. v. Powell*, 15 Cox, C. C. 568, per Lord Coleridge, C. J., Grove and Mathew,

JJ. On the other hand Huddleston, B., and Manisty, J., thought that the first payment to the prisoner was a payment to the company, and therefore that the policy had not lapsed, and consequently that there was no false pretence in fact.

(o) *R. v. Martin*, 36 L. J. M. C. 20; L. R. 1 C. C. R. 56.

the pretence was made. That has been completely answered by my Brothers Blackburn and Willes during the argument. Take the case of a coat obtained by a false pretence, or of money, say £500. A man may not carry £500 about with him, and it may be that the bank notes obtained by the pretence are not printed when the pretence is made. Can anybody doubt that such a case would be an obtaining within the statute, the pretence and the delivery being connected together? So, as to obtaining a valuable security in the shape of a note or bill of exchange, which does not exist at the time when the prisoner asks for it, but is made afterwards. Again, take the case of minerals, of coal which is not dug at the time of making the pretence, and which, at common law, is not, till severed, the subject of larceny. A vast variety of similar cases might occur in which it would be an absurdity to say that the offence was not within the statute. In all cases, of course, the pretence must precede the delivery of the chattel. What, then, is the test as to the distance of time between them? the real test is, whether or not there is a direct connection between the making of the pretence and the delivery; or, in other words, whether the pretence is a continuing one, continuing during the interval between the time of making the pretence and the time of the delivery. It would be for the jury in all cases to say whether that was so in fact. In this case there is evidence from which the jury might draw the conclusion that the false pretence so continued. The decision in *R. v. Gardner (p)* was not quite as it is cited in the books. There the pretence was made in order to take the lodgings. (q) The prisoner occupied them for one week, and after he had become the lodger the false pretence was exhausted. The contract was for lodging only, and under that he became the lodger, having had no board at first, and no board being contemplated between one party and the other. There was no connection between the pretence and the obtaining of the board on that ground. In *R. v. Bryan (r)* the prisoner was indicted for obtaining board and lodging, and 6d. in money, but the point as to the board was not raised. The point was as to the loan of 6d. When the objection was taken that *R. v. Gardner* applied, the question was as to the money, and the only point was as to the 6d. (s) The obtaining of the 6d. in that case was quite as remote from the original contract for the board and lodging, as the obtaining the board was from the contract for the lodging in *R. v. Gardner*. Hill, J., there followed *R. v. Gardner*. Here, when the false pretences were made, the parties originally contemplated the making of the van and the delivery. The second point argued was, that what took place afterwards took the case out of the statute. It was for the jury to say whether the chattel was delivered in pursuance of the false pretence. The circumstance of the countermand might be of importance to the jury in deciding whether or not the chattel was delivered in pursuance of the pretence, but it was entirely for them.' *Et per Willes, J.*: 'It is quite clear that Hill, J., cannot have said, in *R. v. Bryan*, "You will return a verdict of not guilty, because, although the prisoner obtained money or goods from the prosecutor, he

(p) 25 L. J. M. C. 100.

(q) *Sed quære.*

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(r) 2 F. &amp; F. 567.

(s) *Sed quære.* See the report.

did it by means of a contract, and he obtained the contract only by means of the false pretences. He cannot have said that, after the cases of *R. v. Abbott*, and *R. v. Kenrick*, (*t*) and others, which decided that the intervention of a contract did not necessarily prevent a conviction for obtaining by false pretences.”

The prisoner was convicted upon an indictment which charged that he obtained money from one W. by falsely pretending to W. that a certain Albert chain, which the prisoner asked W. to buy of him, was of 15-carat gold, and that he was a draper, and that the chain was expressly made for him. The evidence as to the quality of the chain was that the prisoner said, ‘It is 15-carat fine gold, and you will see it stamped on every link.’ W. examined the chain, and gave £5 for it, but did so relying on the prisoner’s statement. The chain was in fact marked as 15-carat, which was a hall mark used to denote that quality of gold in some towns in England. The chain was of a quality little better than 6-carat gold. The jury found specifically that the prisoner knew that he was falsely representing the value of the chain. Held, that the conviction was right. (*u*) *Et per* Bovill, C. J.:— ‘The cases have drawn nice distinctions between what is a matter of fact and what of opinion, between allegations of fact and exaggerated praise. It is difficult for the Court to decide, sitting here, what is statement of fact, and what opinion or praise. These are things for the jury to decide, who can consider not only whether the statement is of fact, but also, at the same time, whether there was an intention to defraud. *R. v. Bryan* (*v*) has been most pressed upon us. The statement there was, that spoons were equal to Elkington’s A.; *prima facie*, that would be a matter of opinion. The Court there held that that was not sufficient. Many of the judges, however, expressed the opinion that a representation in some cases as to quality might be within the statute.’ Cockburn, C. J., says, ‘It seems to me to make all the difference whether the man who is selling merely represents, as in this instance he did, the articles to be better in point of quality than they really are, or whether he represents them to be entirely different from what they really are.’ Pollock, C. B., says, ‘If a tradesman or merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply.’ These expressions shew that, in the opinion of those judges, a misrepresentation of quality might be enough, if known to be false. Coleridge, J., expressly concurs with Pollock, C. B., and Erle, J., grounds his decision on the misrepresentation in that case being of what was more a matter of opinion than of fact; and he says: ‘No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that

(*t*) The cases of *R. v. Gardner* and *R. v. Bryan* cannot now be considered as authorities.<sup>1</sup>

(*u*) *R. v. Ardley*, 40 L. J. M. C. 85.  
(*v*) *Ante*, p. 497.

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<sup>1</sup> Nor are they so in America. See Bishop, ii. s. 431.

there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A.' So, again, Crompton, J., says, 'I think that the statute of false pretences ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the supposed misrepresentation consists in mere praise or exaggeration, or puffing of a specific article to be sold where the purchaser gets some value for his money; where the thing sold is of an entirely different description from what it is represented to be, and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the case is different. Then my Brother Willes pronounced an opinion carefully expressed, which went the whole length of saying that a misrepresentation of quality is enough, if known to be false, and made with intent to defraud; and my Brother Bramwell concurs with him. Now, applying the observations in that case, I think the statement in the present case is not in form a matter of opinion or praise, but a distinct statement of a matter of fact accompanied by circumstances, viz., that the chain was of 15-carat gold, and that not true, and known not to be true, and made with intent to defraud. How does this case differ from that of a man who states a chain to be made of one thing when in fact it is made of another? The case is distinguishable from *R. v. Bryan*, because here there is a statement of a specific fact within the prisoner's knowledge, viz., of the amount of the gold. Therefore, whether we look at the whole of the circumstances, or at the statement of the quality only, the conviction must be affirmed.' *Et per Willes, J.*: 'Erle, J., in *R. v. Bryan*, was of opinion that if the statement had been "is Elkington's A.," it would have supported the conviction; and so were several other of the judges.'

So where a jury found that the prisoner knew that what he had represented to be tea was not tea at all, but a mixture of articles unfit to drink, and that he designedly and falsely pretended that it was good tea with intent to defraud, it was held that the prisoner was rightly convicted. (*vv*)

Where upon an indictment containing counts for a conspiracy, and obtaining money by false pretences, 'the evidence was in effect that the prosecutor was told by both defendants that two horses had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable, all these statements being absolutely false, and the defendants knowing that nothing but a full belief in their truth would have induced the prosecutor to make the purchase, as he repeatedly informed them that he wanted the horses for his daughters' use. The evidence was that the defendants, in order to induce the prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses, and thereby induced him to buy them and part with the price.' (*w*) The conspiracy was made out to the entire satisfaction of the jury, who convicted; and upon a motion for a new trial, it was contended that nothing was proved but a warranty, which was indeed false, and must, after ver-

(*vv*) *R. v. Foster*, 2 Q. B. D. 301.

(*w*) The preceding statement is taken from the judgment of the Court.

dict, be assumed to have been wilfully so; but that was not the ground of an indictment. Lord Denman, C. J., 'A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be sustained. With some plausibility the thing obtained through the false pretence may be said to be the contract, and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay. This was the ground on which my Brother Littledale directed an acquittal in *R. v. Codrington*. (x) But that decision was lately much doubted by the judges with reference to a case reserved by the Recorder of London. (y) A person who falsely pretended that he was emigration commissioner thereby induced the prosecutor to enter into a contract with him, and to pay him under it a sum of money. An objection was taken that the verbal representation could not be received in evidence, as the bargain between them was reduced to writing. But the Recorder admitted the evidence, and the judges unanimously approved of his decision. Hence it follows that the execution of a contract between the same parties does not secure from punishment the obtaining money under false pretences in conformity with that contract. Generally speaking, indeed, there would be little satisfaction in suing parties guilty of such a proceeding. But in the greater number of such cases, it is more probable that a contract should intervene in the transaction than otherwise. Though many breaches of contract may be of such a nature as to be the subject of an action, and not of any criminal proceeding, it is clear that the liability to an action cannot of itself furnish any answer to an indictment for a fraud. We think that, in this case, the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false, and the money was obtained by their means.' (z)

The indictment alleged that the prisoner, having in his possession divers pounds weight of cheese, of little value and of inferior quality, and also divers pieces of cheese called 'tasters,' of good flavour, taste, and quality, falsely pretended to the prosecutor that the said pieces of cheese called 'tasters' were part of the cheese the prisoner then offered for sale, and that the said cheese was of good and excellent quality, flavour, and taste, and that every pound weight was of the

(x) 1 C. & P. 661, where the defendant purported to sell a reversionary interest which he had previously sold to another person, and entered into a covenant for title. See *R. v. Meakin*, 11 Cox, C. C. 270. So it was once said that an indictment would not lie for a false pretence by a deceitful representation and warranty of the soundness of a horse. *R. v. Pywell*, 1 Stark. N. P. R. 402.

(y) *R. v. Adamson*, 2 M. C. C. R. 286.<sup>1</sup>

(z) *R. v. Kenrick*, 5 Q. B. 49. The counts for false pretences were bad, and the judgment passed on the count for conspiracy; and the point taken was that, unless the obtaining the money was indictable, the conspiracy was to do an innocent act, so that it was necessary to determine the question whether the defendants were guilty of obtaining money by false pretences.

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<sup>1</sup> And in Maine it was held that where the defendant falsely pretended upon a sale of property that what he sold was unencumbered, and also warranted it against encum-

brances, he was liable for false pretences, provided the pretence and not the warranty was what operated upon the prosecutor's mind. *C. v. Lincoln*, 11 Allen, 233.

value of sixpence-halfpenny. The prisoner kept a cheese stall at Fareham Fair, and sold to the prosecutor a quantity of cheese, for the sum of £2 1s. 8d., being at the rate of sixpence-halfpenny a pound. At the time the prisoner offered the cheese for sale he bored two of them with an iron scoop, and produced a piece of cheese, which is called a 'taster,' at the end of the scoop for the prosecutor to taste, and the prosecutor did so. The cheese, however, which he so tasted had not been extracted from the cheese, but was a 'taster' of another superior kind of cheese, which the prisoner had privily and fraudulently inserted in the top of the scoop. The prosecutor would not have bought the cheese unless he had believed that the 'taster' had been extracted from it. The cheese, which had been so bought, was delivered to the prosecutor, and he continued in the possession of it. No precise evidence was given of its value, but it was of a kind very inferior in value to the 'taster.' In another case (a) the circumstances were precisely similar, except that it was proved that the cheese was sold for fivepence a pound, and was worth between threepence and fourpence; and in a third case (b) the cheese was sold for fifty shillings a hundredweight, and its value was about threepence a pound. It was objected that the prosecutor was not induced to part with his money merely by means of the false pretence, but principally because he got the cheese, the property in which vested in him by the sale: if this indictment could be sustained, an indictment would lie, in every case, of a fraudulent sale by sample, which did not correspond with the bulk; and if the principle were established, it would be impossible to stop short of holding that every man who induced another to buy by false representations of the quality of the thing sold, might be indicted for obtaining money by false pretences, even although property passed by the sale from the prisoner to the vendee nearly or quite equal to or even surpassing in value the price paid; but the jury having convicted, the judges, on cases reserved, were unanimously of opinion that the convictions were right. (c)

Upon an indictment for obtaining a sovereign by false pretences, it appeared that the defendant, an attorney, had appeared before the magistrates as attorney for the prosecutor, who kept a house for the sale of beer, and who was fined £2 by the magistrates. The defendant afterwards called on the wife of the prosecutor, and said he had been with a person from Frankwell to the magistrates, which person had been fined £2 for a similar offence, and he had prevailed on the magistrates to take £1 instead of £2; and if she could make it convenient to give him a sovereign, he would go and do the same for her. She gave him a sovereign. The defendant had never made any application to either of the magistrates respecting any person in Frankwell, or either of the fines, and both the persons residing in Frankwell and the prosecutor had been obliged to pay their full fines of £2 each. It was submitted that this was not a false pretence within the statute; but a matter of bargain between an attorney and his client. But

(a) *R. v. Dark*, 1 Den. C. C. 276.(b) *R. v. Garlick*, 1 Den. C. C. 276.(c) *R. v. Abbott*, 1 Den. C. C. 273. 2 C. & K. 630, A.D. 1847. These three caseswere decided at the same time on the authority of *R. v. Kenrick*, *supra*. *R. v. Goss*, Bell, C. C. 208; *R. v. Pratt*, 8 Cox, C. C. 334.

it was held to be a case clearly within the statute, as under the guise of an attorney the money was obtained. (*d*)

The indictment charged the prisoner with obtaining money by false pretences as to the weight of a quantity of coals sold and delivered by him. He was a coal dealer, and the prosecutrix asked him to sell her a load of coals which he then had; he declined, but said he would fetch and sell and deliver her one for sevenpence per hundredweight from a colliery, to which she assented, and he accordingly fetched and delivered to her a load actually to his knowledge weighing fourteen hundredweight, but he represented to her that the weight was eighteen hundredweight, and that it had been weighed at the colliery, and he produced a ticket, shewing such to be the weight, which ticket he stated he had made out himself when it was weighed. The prosecutrix thereupon paid him for eighteen hundredweight. The prisoner misrepresented the weight of the coals, wilfully and fraudulently, knowing them to be of the less weight, for the purpose of defrauding the buyer of the difference in price between the actual and represented weight; and he made the misrepresentation as to the weight of the coal, verbally and by the ticket, for the purpose of defrauding the buyer, and by such false pretences he intended to obtain, and did obtain, the excess: it was contended that this case was not within the statute, as it was a misrepresentation as to the quantity and value of goods agreed to be sold, and which were actually sold and delivered to the purchaser, and that the statute did not apply to misrepresentations made on sales; but, upon a case reserved, it was held that the case was within the Act. The misrepresentation was not a mere representation as to the quality of goods during a negotiation for the purchase of them, but the prisoner having sold and delivered the coals, when there came to be a question about the price, represented the quantity to be four hundredweight more than it really was. That representation as to the excess of four hundredweight was equivalent to a representation that he had sold four hundredweight of coals, when in fact there were no four hundredweight at all. And *R. v. Reed* (*e*) was expressly overruled. (*f*)

The first count stated that the prisoners did falsely pretend to one J. B. Thurman that two loads of soot, which the prisoners then delivered to him, did together weigh one ton and seventeen cwt., whereas

(*d*) *R. v. Asterly*, 7 C. & P. 191. J. A. Park, J.

(*e*) 7 C. & P. 848.

(*f*) *R. v. Sherwood*, D. & B. 251. A.D. 1857. Pollock, C. B., put the following case: 'If, the bargaining and selling being entirely over, goods were to be transferred from the seller to the buyer, upon payment of the price, and the seller were to go and demand payment, and fraudulently name an amount different from that agreed on, and that false representation was for the purpose of obtaining money which was not in fact due for the goods, and the seller did thereby obtain it, he would be guilty of obtaining money by false pretences.' And this case is said to have been put by Jervis, C. J.: 'Supposing a person employed a man on a contract to do ditching at one shilling a yard, and the man came at the end

of the week and said, "I have done 5000 yards," whereas he had only done 1000, and thereby gets the money, he is guilty of obtaining it by false pretences.' *R. v. Ragg*, Bell, C. C. 214. A.D. 1860. *R. v. Ridgway*, 3 F. & F. 838. A.D. 1862. Bramwell, B., is reported to have said, 'If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quantity, for the purpose of inducing the intended purchaser to complete the bargain, that is not a false pretence within the statute. But if he is selling it by quantity, and says there is a larger quantity than there really is, and thereby gets paid for a quantity of coal above the quantity delivered, I am quite satisfied he is indictable.' *Sed quare* whether the former dictum is not erroneous. C. S. G.



in fact the said two loads of soot did not weigh one ton and seventeen cwt., but only weighed one ton and thirteen cwt., the prisoners well knowing the said pretence to be false. The second count stated that the prisoners did falsely pretend to one J. B. Thurman that three loads of soot, one of which loads the prisoners delivered to him on the 17th August, and the remaining two loads on the 20th August, did together weigh two tons eleven cwt. and two quarters, whereas in fact the said three loads did not weigh together two tons eleven cwt. and two quarters, but only weighed one ton nine cwt., the prisoners well knowing, &c. On the 17th August, Lee delivered to Thurman, who had agreed to purchase soot at £1 18s. a ton, a cartload of soot, and at the same time presented to Thurman a ticket of the alleged weight (14 cwt. and two quarters). Thurman paid Lee £1 7s. 6d. for that soot, believing there were fourteen cwt. and two quarters, as stated on the ticket. On the 20th August both prisoners delivered to Thurman two loads of soot, and gave him two tickets for the alleged weight of the two loads. All three loads had been weighed, and the tickets obtained at a public machine some miles distant; and Lee stated that the weights mentioned in the tickets for the two last loads were the weights of those two loads. Thurman then paid the prisoners for those loads according to the weight stated in the tickets, believing them to be correct. In consequence of suspicion all the soot was weighed, and found to be one ton two cwt. and two quarters less than the weight represented by the prisoners. The loads had been weighed at the machine, and the tickets represented their weight at that time, and the prisoners had afterwards removed three bags full of broken bricks and wet coal slack, which were in the carts when they were weighed, and had ample opportunity to remove soot before the delivery to Thurman. It was objected that the indictment ought to have set forth that the soot was weighed and the tickets given, and the contents of the tickets, and then alleged that the false pretence was the production of the tickets; and also that it was not a false pretence within the statute falsely to represent the weight of the soot. But, on a case reserved, it was held that the indictment was good, and that it was supported by the evidence, which clearly shewed a false pretence within the Act. *R. v. Sherwood*, D. & B. 251, was precisely in point. (g)

The prisoner went with a cart containing a number of blacking bottles, labelled 'Everett's Premier.' Everett was a blacking maker in London, and that was a name given to a blacking of repute manufactured by him. The prisoner offered this blacking for sale to the prosecutor, taking out a bottle and brush and offering to prove its excellence; but the prosecutor was satisfied with his assertion, and after some bargaining, during which the prisoner offered to open any other bottle if the prosecutor doubted whether they contained as good blacking as that he had produced, the prosecutor bought six dozen bottles. The prisoner represented himself as the agent of Everett, of King-street, Holborn, and said they had sent him the blacking, and allowed him to bottle it. The bottles had a label upon them imitating Everett's labels, with the only difference that the residence was stated at 'Queen's-court' instead of 'King's-court,' and they were not

signed at the foot. The defence was that the blacking was sold on sale or return, and the prosecutor was not cheated, as he might have returned it, if not satisfied with it. That the labels were not similar, and the prosecutor might have protected himself by ordinary caution. Erle, J., told the jury that the 'prisoner's offer to sell on sale or return might be intended to put the prosecutor off his guard; but the actual bargain was for cash, which was paid, and the sale completed. As to the difference between the labels, the jury would consider whether it was a small and colourable difference only, and intended to deceive. It was of little consequence whether the man's name was Everett, as he had stated, or not; for even if it were, and he went about the country and offered blacking for sale as "Everett's Premier," representing it to be the well-known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent.' (*h*)

A false representation that a stamp on a watch was the hall mark of the Goldsmiths' Company, and that the number 18, part thereof, indicated that the watch case was made of eighteen-carat gold, is an indictable offence, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition. (*i*)

Where a count stated that the prisoner pretended that eleven thimbles which he produced were silver, and of the value of five shillings or more, with intent, &c., but did not allege that any money was obtained, and it appeared that the prisoner went to a pawnbroker's shop, and laid down eleven thimbles on the counter, and said he wanted five shillings on them, and being asked whether they were silver, he said they were; but they were tested, and, being found not to be silver, no money was advanced on them. *R. v. Tabram* (*j*) was cited, and it was urged that this was not a pretence within the Act; but Mirehouse, C. S., told the jury that the pretence must in fact be false, and so false that a man exercising reasonable discretion might still be deceived by it. The jury convicted, and the case having been mentioned to some of the judges, they agreed that, in point of law, the evidence was amply sufficient to justify the verdict, and that the verdict was in point of law good. (*k*)

Upon an indictment for obtaining ten shillings by falsely pretending that a chain was a silver chain, it appeared that the prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver; the prisoner replied that it was silver. The pawnbroker examined it, and tested it with an acid. The chain resembled in appearance greasy silver, and withstood the test as if it were silver. The pawnbroker then lent the prisoner ten shillings on the chain, which he took as a pledge. He paid this money relying on his own

(*h*) *R. v. Dundas*, 6 Cox, C. C. 380. A.D. 1853. *R. v. Smith*, D. & B. 566. See this case, *post*, *Forgery*.

(*i*) *R. v. Sutor*, 10 Cox, C. C. 577.

(*j*) Referred to by counsel *arguendo*, C. & M. 251.

(*k*) *R. v. Ball*, C. & M. 249. A.D. 1842.

This case overrules *R. v. Tabram*, and it was approved and acted upon in *R. v. Roebuck*, D. & B. 24, *post*. It seems that the fact that the false pretence might be detected by inspection will not prevent the case from being within the statute. See *R. v. Coulson*, *ante*, p. 480. *R. v. Jessop*, *ante*, p. 480.

examination and test of the chain, and without placing any reliance on the statement of the prisoner. Twenty-six similar chains were found on the person of the prisoner when he was apprehended. An assayer proved that these chains and the chain pledged were not silver; they were all made of a composition worth about a farthing an ounce, and each chain was of much less value than ten shillings. The jury acquitted the prisoner of the offence charged, as the money had not been obtained by the prisoner's statement, but convicted him of an attempt to obtain it; and, upon a case reserved, the conviction was held right. Lord Campbell, C. J., '*R. v. Ball* (l) appears to be an authority expressly in point, and I entirely approve of the principle on which that decision may rest. Under such circumstances the party who has succeeded in defrauding the pawnbroker, the money being advanced upon the faith of the false representation, comes clearly within the 7. & 8 Geo. 4, c. 29, s. 53; for, by fraudulently representing as an existing fact that which he knew to be not an existing fact, he obtained the money from the pawnbroker "with intent to defraud him of the same." Having the *animus furandi*, he actually steals the money under pretence of a contract of borrowing on pledge; and the statute deprives him of the technical defence that there was not (m) a larcenious asportation. I think it makes no difference that the chain, which has in it no silver, is of "a composition worth about a farthing an ounce." It was in no respect the thing bargained for, and it was of no value to the prosecutor. This case cannot properly be distinguished from the cases on "flash notes," for the paper on which those notes are written or printed is of some value, although infinitesimally small.' (n)

An indictment alleged that the prisoner pretended that certain spoons produced by him were of the best quality, that they were equal to Elkington's A. (meaning spoons made by Messrs. Elkington and stamped by them with the letter A), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretences were made by the prisoner for the purpose of procuring advances of money on the spoons, offered by the prisoner by way of pledge, and he thereby obtained the money by way of such advances. The spoons were of inferior quality to that represented by the prisoner, and the prosecutor said that, had they known the real quality, they would not have advanced money on the goods at any price. It was the declaration of the prisoner as to the quality of the spoons, and nothing else, which induced them to make the advances. The money advanced exceeded the value of the spoons. (o) The jury found the prisoner guilty of fraudulently representing that the goods had

(l) *Supra*.

(m) 'Not' seems introduced in error.

(n) *R. v. Roebuck*, D. & B. 24. A.D. 1855. Some of the judges thought that this conviction could only be sustained, because they were bound by the authorities. In *R. v. Matthews*, tried before Parke, B., in 1841, and cited D. & B. 39, the prisoner was convicted of obtaining a watch by falsely pretending that certain articles were made of gold, and were of the value of £25, whereas

they were not made of gold. See *R. v. Stevens*, 1 Cox, C. C. 83.

(o) It is difficult to conceive a more unsatisfactory statement of a case than this. It neither states whether the spoons were of the same materials as represented, nor the difference in value; so that it is perfectly consistent with this statement that the spoons were of the same materials as represented, and very nearly equal in value. C. S. G.

as much silver on them as Elkington's A., and that the foundations were of the best material, knowing that to be untrue, and that in consequence of that he obtained the money; and, upon a case reserved, it was urged that this was a mere representation as to quality, and was not within the statute, and that it was the mere puffing of the spoons, for they were plated spoons, although of an inferior quality to that they were represented to be. It was answered, that by representing the spoons to be equal to Elkington's A., the prisoner represented that they were covered with the same quantity of silver as Elkington's spoons were covered with, and that this was a representation of a fact, and that, even if it were merely a representation of quality, it was within the Act. Lord Campbell, C. J., 'I am of opinion that this conviction cannot be supported. It seems to me to proceed upon a mere misrepresentation, during the bargaining for the purchase of a commodity, of the quality of that commodity.' . . . 'And bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them, although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, though the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the Legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were.' Cockburn, C. J., 'It seems to me to make all the difference whether the man who is selling merely represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether he represents them to be entirely different from what they really are.' . . . 'Here, if the prisoner had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be a different thing; but the representation here made was only a vaunting or exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture.' (p) Willes, J., who differed in opinion from the other

(p) Pollock, C. B., Coleridge, Cresswell, Erle, Crompton, Crowder, J.J., Watson and Channell, B.B., agreed that the case was not within the statute; but Pollock, C. B., said, that there might be many cases of buying and selling to which the statute would apply. 'If a tradesman or a merchant were to concoct an article of merchandize expressly for the purpose of deceit, and were to sell it as and for something very different, even in quality, from what it was, the statute would apply. So, if a mart were opened, or a shop in a public street, with a view of defrauding the public, and puffing away articles calculated to catch the eye, but which really possessed no value, there the statute would apply.' Coleridge, J., also thought that the statute might apply to cases of buying and selling. He said, 'It would be a dangerous thing to

say that there could be no fraudulent misrepresentation within the statute, in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of a real transaction of buying and selling as in any other way; but in order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look, among other things, to the extent to which it goes, and the subject matter to which it is applied. It seems to me to be a safe rule to say, when it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other, which too frequently takes place, even in tolerably honest transactions, this is not the subject of a criminal proceeding.' Erle, J., said, 'It seems to me not only are contracts for sale not intended to be excluded from the

judges, said his opinion was 'the considered opinion of Jervis, C. J.' and 'I am of opinion the conviction was right. It appears to me that a great number of observations have been brought to bear upon the construction of the statute, which would not have been attended to if the words of the statute had been looked at, and I cannot help thinking that in many of the cases upon this subject the judgments would have commanded more attention in after times, if the words of the statute had been attended to, and those who delivered those judgments had not permitted themselves to consider instead, whether a particular view would or would not be convenient to trade, either in its present state, or in the state to which it might be reduced by a proper administration of the law. I think that the words of the statute should be implicitly followed, and the Legislature obeyed according to the terms in which it has expressed its will in the 7 & 8 Geo. 4, c. 29, s. 53. I am looking to the words of that section, and I am unable to bring myself to think that the Legislature was at all dealing with anything in the nature of a distinction between a case of property fraudulently obtained by a fraudulently obtained contract, and goods obtained without any contract, but fraudulently obtained. I cannot help thinking that if the attention of the framers of the statute had been directed to any such possible operation of it, they would, in the spirit in which the section is framed, have enacted, in terms even more clear than those of sec. 53, that that which is obtained by fraud shall not benefit the fraudulent person, and that the interposition of a contract, also obtained by fraud, ought not to make any difference in favour of the cheat.' (After referring to the preamble and enactment.) 'It appears to me that the only proper test to apply to any case is, whether it was a false pretence by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained. Now, in this case it should seem that there was a false pretence; there was a pretence that the goods had as much silver upon them as Elkington's A., and there was also the pretence that the foundations were of the best material.' 'On the face of the case it should seem that Elkington's A. must have been, for practical purposes, a fixed quantity: the quantity of silver on it must have been fixed, and the

statute, but, on the contrary, the statute was precisely intended to make falsehoods, in respect of contracts of sale, indictable. The statute recites that there had been a failure of justice by reason of cheats not amounting to larceny, and it therefore makes the obtaining of goods by false pretences an indictable misdemeanor. Now what were the cheats which were not amounting to larceny, in respect of the prosecution of which there had been a failure of justice? I think that these cheats were the cases either where a person, intending to defraud another of his goods by a false pretence in purchase, obtained from him a transfer of the property in the goods, he intending not to give the value of them, or where by a false pretence in a sale, a man put off on another a counterfeit article, which he knew was not truly the article intended, and so got money paid

for the specific thing shewn, that being apparently what the buyer intended, but being in reality a totally different thing; the property was, under these circumstances, held to have passed, and the matter was held to amount to a cheat; at the same time, where a party intended to part with the possession only, and a fraudulent person obtained the article *animo furandi*, and took it off, although the possession was so passed to him, still it was held to be no transfer of the property in law, but the property remained in the owner notwithstanding.' Crompton, J., thought that 'where the thing sold is of an entirely different description from what it is represented to be, and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money,' the statute applied.

proper material. The best material for the foundation of such plated articles must have been a well-known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of silver and the quality of the foundation, with intent to defraud.' 'It appears that the persons who made the advances were thereby defrauded, and thereby induced to make the advances, and the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of these statements he obtained the money mentioned in the indictment. It appears to me that for all practical purposes that ought to be taken to be a sufficient fact, coming within the region of assertion and calculation, and not mere opinion, and that it should be considered as a false pretence.' 'If the matter was a simple commendation of the goods, without any specific falsehood as to what they were; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would have been easily disposed of by the jury, who were to pass an opinion on the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any such conclusion as that praise of that kind should have the effect of making the party resorting to it guilty of obtaining money on a false pretence. I say nothing on the effect of simple exaggeration, except that it appears to me it would be a question for the jury in each case whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract, and intended to defraud, and did defraud, and by which the money was obtained.' 'But it is said that the effect of establishing such a rule as that for which I contend, would be to interfere with trade. No doubt it would, and I think ought, to prevent trade being carried on in the way in which it is said to be carried on. I cannot help expressing my regret if trade is carried on, and I do not believe that it is generally carried on, by persons making false pretences, with the intention to defraud persons of their money. I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening on the other; those are things persons may expect to meet with in the ordinary course of trade; but I cannot help thinking that people ought to be protected from such acts as those I have referred to being resorted to for the purpose, and with intent to defraud purchasers of their money or goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a great extent, and, amongst others, in this form. I agree in what the late C. J. Jervis said, as peculiarly applicable to such a supposed state, though I hope not to ordinary trade: that if there be such a commerce as requires to be protected by the statute being limited in the mode suggested, it ought to be made honest, and conform to the law, and not the law bent for the purpose of allowing fraudulent commerce to go on.' Bramwell, B., 'The inclination of my opinion is that this conviction ought to be sustained. I can understand the statute in two ways. One, that it only applies to those cases where there is no contract, and the

chattel or money is got by false pretences, either without or independently of any contract, as in *R. v. Sherwood*, (q) where, though there had been no fraud in making the contract, there was in the assertion that the things delivered were of a certain amount. The other that the statute was intended never to apply to cases where the fraud was not the immediate cause, or sole cause, of obtaining the money; but the contract was obtained by fraud, and the money or the article handed over to the person in pursuance of that, or of that and something given by the fraudulent person. The first case is clearly within the statute, and the inclination of my opinion is that the statute does extend to cases such as last mentioned.' . . . 'I can understand the statute being limited to the first class of cases, or extended to both; but I cannot understand the medium course suggested to-day, namely, that the statute does apply to some of the cases in the second class, but does not apply when the person defrauded gets in specie the thing contracted for, though with a difference of quality.' . . . 'As at present advised, I incline to think the true meaning of the statute is that it shall extend to people who make these bargains by fraud, and so by the fraud get possession of the chattels or property of others.' (qq)

(q) *Ante*, p. 502.

(qq) *R. v. Bryan*, D. & R. 265. See *ante*, p. 497. See *R. v. Levine*, 10 Cox, C. C. 374. As it seems to me that the clause in question has never been sufficiently considered, it may be well to devote some remarks to it. It recites that 'a failure of justice frequently arises from the subtle distinction between larceny and fraud.' Now a reference to the numerous cases, *ante*, p. 148, *et seq.*, will plainly shew that the subtle distinction alluded to is this: that if the owner of property, or his servant, is induced by fraudulent pretences to part with the possession only of his property, still retaining the right of property, the case is larceny; but if he is induced by such means to part with the right of property as well as the possession, the case is not larceny; and it is plain that the primary object of the clause was to provide for those cases which would have been larceny if the property as well as the possession had not been parted with; and that this is the true construction of the clause is put beyond a doubt by the proviso that if the prisoner 'obtained the property in any such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor.' To put a single instance of this class: A man goes to a shop, and fraudulently goes through the purchase of an article, and gets it from the shopman by some false pretence or other, with intent to defraud the owner; if the shopman had no authority to part with the property without payment of the price, the offence is larceny; but if he had such authority, it is only a fraud. Well may this be termed a 'subtle distinction,' especially as the distinction turns on a fact — the authority — of which, in most cases, the prisoner must be ignorant. Now such

being the object of the clause, one simple test for determining whether a case is within it immediately presents itself. Assume that the pretences are proved as laid, and that the party from whom the chattel or money was obtained did not part with the property in it; then if the prisoner would be guilty of larceny, the case is clearly within the clause; for, under that supposition not only may he be convicted, but he must be convicted; for the words are, 'he shall not by reason thereof be entitled to be acquitted of such misdemeanor.' It is therefore, very confidently submitted that wherever on an indictment for false pretences the pretences are proved, and the offence would have been larceny if the property in the chattel or money had not been parted with, the case is within the statute. And this clearly shews that the decision in the principal case is wrong; for no one can doubt that, if the money had been obtained from a shopman, who had no authority to make advances, except on real and valuable pledges, the offence would have been larceny. See *R. v. Jackson*, *ante*, p. 147.

The words of the clause are, 'If any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud,' &c. Now these words are perfectly general and unqualified, and it is obvious that they are amply wide enough to include every case where property is obtained by means of a fraudulent contract; and a reference to the first Act on the subject, from which they are taken, seems not only to shew that it does include such contracts, but that its principal object was to punish those who by such contracts defrauded tradesmen. Sec. 1 of the 30 Geo. 2, c. 24, recites that 'evil-disposed persons

The prisoner was charged with obtaining by false pretences a prize in a swimming race. He obtained his entry ticket by representing himself to be a member of a certain club, and on the faith of this he was allowed a considerable start and won the prize. It was held

have, by various subtle stratagems, threats, and devices, fraudulently obtained divers sums of money, goods, wares, and merchandizes, to the great injury of industrious families, and to the manifest prejudice of trade and credit,' and then contains the first enactment against obtaining 'money, goods, wares, or merchandizes' by false pretences; and there can be no doubt that the similar enacting part of the 7 & 8 Geo. 4, c. 29, s. 53, and the new clause, ought to receive an equally comprehensive meaning. It must also be observed that it would seem to be erroneous to speak of a fraudulent contract as a contract; fraud vitiates everything; and, though the ceremony of a contract may have been gone through, there is really no contract at all, where the prisoner has done everything with intent to defraud. And where a prosecution is instituted by the injured person, there is no ground for asserting that the prosecutor has affirmed the contract. Whether there be fraud or not is a question for the jury; and where they have expressly found that the contract was made with intent to cheat the owner of his property, as they have in every case which has been reserved, it appears to be quite a mistake to speak of a contract in the manner in which it has sometimes been spoken of in these cases.

In order to bring a case within the statute, the following things are alone requisite: 1. A false pretence. 2. An obtaining of property by it. 3. An intent to defraud. And the correct way to determine whether any particular case falls within it is, not to consider each of these things separately, but to look at them all together; for no case is within the statute unless all of them co-exist in it. And one error in some cases seems to have been to consider the pretence apart from the finding of the jury that it was made with intent to defraud. One man may extol an article innocently, and another fraudulently, in similar terms, but the latter is alone within the statute, which does not apply to every false pretence, but only to such false pretences as are made with intent to defraud.

As to the distinction between a representation that articles are better in point of quality, and a representation that they are entirely different from what they really are, there is nothing in the statute which warrants any such distinction; what the statute

requires is that there shall be a false pretence. Then is a representation as to quality a pretence? Possibly where such a representation is made on the mere inspection of an article it may be rather a matter of opinion than a pretence; but where it is made with a full knowledge of the quality of the article, it is not opinion (for opinion must cease when knowledge exists), but an affirmation of a known fact; in other words, a pretence. If a man who knew the precise composition of Elkington's A. swore that a spoon, which he himself had manufactured, was of the same quality as Elkington's A., he would clearly be guilty of perjury, if it was made of the materials of which the spoons in this case were composed. If then a man possessing such knowledge made such a representation as to a spoon made by himself, can it be doubted that he made a false pretence? The judges, indeed, do not seem to say that such a representation is not a false pretence, but only that it is not a false pretence within the meaning of the Act. But as the words '*any person*' include every person who comes within the other requisites of the clause; so the words '*any false pretence*' include every false pretence which is made with intent to defraud. The Legislature has declared the false pretences to be such as are made with intent to defraud; and to hold that any false pretence made with that intent is not within the Act, is to assume the office of legislation rather than that of judge.

As to the remark that, if extolling goods be within the statute, so must deprecating them be so also: the answer is that if a person were to induce an owner to part with his property by falsely representing it as of inferior value, the case would clearly be within the statute, if the representation was made with intent to defraud. Suppose a veterinary surgeon represented that a valuable race-horse had a fatal disease, when he well knew that it had not, and by that means obtained it at the price of a useless horse, with intent to defraud the owner; the case would clearly be within the statute.

As to the danger to the honest tradesman, there is no fear that a jury, generally containing several tradesmen, will be too ready to find an intent to defraud in cases of this kind, unless there be plain and palpable evidence of fraud, and where that exists it is the interest of every one that the offender should be convicted. C. S. G.<sup>1</sup>

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<sup>1</sup> See the remarks of Mr. Bishop, vol. ii. s. 454, *et seq.* There is no doubt the chief question in *R. v. Bryan* was whether the statement that the spoons had as much silver

upon them as Elkington's A. was a representation of a fact or of an opinion. It is very near the line, and that is all that can be said.



by Charley, Common Sergeant, after consulting Stephen, J., that the false pretences were too remote. (r) But in a case tried at the summer assizes at Nottingham, in 1879, before Lindley, J., a professional runner, by representing himself as an amateur, and assuming a false name, competed in a race exclusively for amateurs, was allowed a start, and won the race. He was convicted of attempting to obtain the prize by false pretences. (rr) It would seem that in all such cases the question of remoteness is for the jury. (s)

*A Pretence that a Party will do an Act is not within the Statute.*

A promissory pretence to do an act is not within the statute.

A pretence that the party would do an act which he did not mean to do (as a pretence that he would pay for goods on delivery) is not a false pretence within the Act. (ss)

The indictment stated that a mare and gelding of one E. Young had strayed to a place unknown to E. Young, and that the prisoner unlawfully did falsely pretend to the said E. Young that he would tell him where the said mare and gelding were, if he would give him a sovereign; whereas in fact the prisoner would not tell the said E. Young where the said mare and gelding were, if he would give him a sovereign. It appeared that the prosecutor having lost a mare and gelding, went in search of them to Lincoln; where the prisoner, on being introduced to the prosecutor, said he knew where they were, and would tell him if he would give him a sovereign; the prosecutor hesitated to give the sovereign, but the prisoner refusing to give the information unless the sovereign was delivered into his hands, the prosecutor reluctantly put two half sovereigns into his right hand, which the prisoner immediately put into his pocket. The prosecutor then required the prisoner to give him the information he had promised, which he refused to do or to return the money, saying he had no information to give him. The jury having found the prisoner guilty, upon a case reserved upon the question whether this was a false pretence within the 7 & 8 Geo. 4, c. 29, s. 53, the judges held that the indictment should have stated that the prisoner pretended he knew where the horses were, and that the conviction was wrong. (t)

An indictment alleged that Fisher had deserted his wife, and that the prisoner falsely pretended to the wife that she, the prisoner, then had the power to bring back Fisher to his wife, and that the prisoner then had power to bring back Fisher to his wife over hedges and ditches, and that a certain stuff which the prisoner then had in her possession was sufficient for the purpose of bringing back Fisher to his wife; by means whereof the prisoner unlawfully obtained from the wife a dress and two sixpences. The wife proved that her husband had left her, and that she had had a conversation with a woman,

(r) *R. v. Iarner*, 14 Cox, C. C. 497.

(rr) *R. v. Dickenson*, Roscoe's Crim. Ev. 11th Ed. p. 474.

(s) See *R. v. Marten*, *supra*.

(ss) See *R. v. Goodhall*, MS. Bayley, J.,

and *R. & R.* 461, decided under the repealed statute, 30 Geo. 2, c. 24.

(t) *R. v. Douglas*, R. & M. C. C. R. 462.

See also *R. v. Lee*, L. & C. 309. *R. v. Giles*, L. & C. 502. *R. v. Henshaw*, L. & C. 444.

in consequence of which she went with her to the prisoner's house, and 'I asked the prisoner to tell me a few words by the cards to fetch my husband back. She asked me how much money I had. I told her sixpence. She said that would not be of any use at all. Then I gave her another sixpence. She said her price was high; it was five shillings. She asked me if I had anything on that I could leave. I said I had a petticoat on, but that was old, and she said that would be of no use. I had two frocks on. She told me to leave the under one. I left it with her. She said her price was so high, she could not do anything without the money; the stuff she had to work upon would cost her five shillings, or nearly that. She said she could bring my husband back over hedges and ditches. She said that about bringing my husband back after she got the frock. She said that she would bring my husband back before I gave her the money. She went up stairs, and came down again, and said I was not to be offended at what she was going to tell me; she said my husband was gone off with another woman. I told her I did not think so. She said the woman came from the same place as I did, but that did not matter; she would bring my husband back; she could do it and would do it. She said she was what they called the cunning woman, and there was not another woman such as her about handy. She said she would bring my husband back with the stuff she had to work upon. She would bring him back on the Wednesday if she could, and if she did not bring him back on the Wednesday she would on the Thursday. She said if I brought her four shillings I should have the frock again. I went to the prisoner's house again on the following Monday. She asked me if I had heard anything of my husband. I replied I had not. She asked me if I had any more money. I said I had not. She said she had worked very hard for me all the time during the week. I parted with the money and the dress on the faith of what passed between us on the first occasion.' Upon a case reserved, it was urged that the false pretence charged amounted merely to a promise that the prisoner would do the act. It might mean by moral influence, physical strength, or supernatural power. Secondly, there was no sufficient evidence to go to the jury. The false pretence was made after the property had been obtained. Lastly, there was no evidence that the prisoner knew that she had not the power to do what she promised. Erle, C. J., 'The first question is whether the indictment is good. I take it that the pretence that the prisoner had the power to bring back her husband to the prosecutrix is the material part of the indictment. Now, the pretence of power, whether moral, physical, or supernatural, made with intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the language of the statute. The second point is, whether there was any evidence to support the indictment. I take the law to be that there must be a false pretence of a present or past fact, and that a promissory pretence to do some act is not within the statute. Then the question is, was there evidence of a false pretence of an existing fact that the prisoner had the power to bring the husband back when the money was obtained? It was contended that the prosecution ought not to succeed, because the evidence was that the prisoner said that she *would* bring the prosecutrix's husband back,

and that thereupon the money was parted with by the prosecutrix, and that after the prisoner had got the property she said she *could* bring the husband back, and that there was therefore a promissory pretence only. It is clear that an indictable pretence must precede the obtaining of the money, so that it can be alleged that the money was obtained by means of the pretence. The exact words of that part of the evidence favour the argument of the prisoner's counsel; but I have come to the conclusion that we ought not to sustain the objection, because the whole tenor of the evidence is to be regarded, and it may be upon the evidence that the prisoner intended to convey to the mind of the prosecutrix that she had not only the will but the power to bring her husband back. The whole of the evidence was to be regarded by the jury, and they were to consider whether the prisoner intended to pretend to the prosecutrix, and to induce her to believe, that she, at that time, had the power to bring her husband back, and that she did actually so pretend. Upon the whole evidence, I think there was enough for the jury from which they had a right to infer that she intended to induce the prosecutrix to believe that she had power, at the time when the money was parted with, to bring her husband back. It was next contended that the prisoner might have believed that she did possess such power; but upon the facts, I think there was evidence to go to the jury that the prisoner was a fraudulent impostor. I think, therefore, that the conviction ought to be affirmed. (u)

A count alleged that the prisoner pretended to one Scholey, the shopman of one Archer, that he was then intending to open a shop for the sale of cheese and bacon, and that he was then a provision dealer, and that he was possessed of the sum of £1 7s. 1½d., and that he was desirous of purchasing a cheese of the said Archer, in good faith, and for the purpose of selling it again in the trade of a provision dealer, and that he had the means of paying the said Archer the price of the said cheese, and that if Scholey would sell and deliver the cheese to him, he was ready to purchase the said cheese, and pay Scholey the said sum of £1 7s. 1½d. It was urged, in arrest of judgment, that the pretences were so mixed up together that, if one was bad, the count was also bad, and that some of the pretences merely related to the future, and were therefore insufficient; but it was held that the pretences that the prisoner was a provision dealer, and had the means of paying, were pretences of existing facts, and whether a false pretence were as to the status of the prisoner at the time, or as to any collateral fact supposed to be then existing, it would equally support an indictment under the statute. (v)

So where upon an indictment for false pretences it appeared that the prisoner told the prosecutrix that he had been to Paddock Wood to a Mr. Bennett; and bought thirty sheep skins, two bullocks' hides, and two horses' hides, and had paid ten shillings upon them to make them safe. He said Mr. Bennett was a gentleman farmer, kept a pack of hounds, and lived half a mile from Paddock Wood station,

(u) *R. v. Giles*, L. & C. 502. The indictment was clearly bad on the face of it, as it laid the property in the wife, and alleged the

intent to be to defraud her. It ought in both instances to have been the husband.

(v) *R. v. Bates*, 3 Cox, C. C. 201. *R. v. Fry*, D. & B. 449.

and he said he was to give seven pounds for the skins, and would bring them and sell them to the prosecutrix, and asked her for four pounds ten shillings in part payment of them; the prosecutrix believed his story, and let him have the money; the representation that he had bought the skins induced her to let him have the money; but she added, 'I expected to make a profit by the skins, and I lent the prisoner the money, because I thought he would bring me the skins, and I would not have lent him the money if I had not believed that he was going to Paddock Wood to bring me the skins. If he had only told me that he had bought the skins at Paddock Wood, unless I had thought that he would sell them to me, I would not have let him have the money; nor should I have lent him the money, if I had not thought that he had already bought the skins of Mr. Bennett.' The jury found the prisoner guilty of obtaining the money 'upon the false pretences that he had bought the skins from Mr. Bennett and would bring them to the prosecutrix, and sell them to her;' and, upon a case reserved, it was held that this case was governed by *R. v. Fry*, (*w*) in which it was decided that when a misrepresentation of a matter of fact is accompanied by a promise, the promise does not prevent the case from coming within the statute; (*x*) and here there was a pretence of an existing fact combined with a promise for future conduct; the pretence here being that the prisoner *had bought* the skins, and *would bring* them to the prosecutrix. (*y*)

An indictment charged that William Cooper did falsely pretend that he was a dealer of potatoes in a large way of business, and in a position to do a good trade, and able to pay for goods supplied to him, by means of which, &c. The evidence was that the prisoner had written the following letter:—

'Sir, — Please send me one truck of Regents and one truck of Rocks as samples, at your prices named in your letter. Let them be good quality, and then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice.

'Yours truly,

'WILLIAM COOPER.

'P. S. I may say if you use me well, I shall be a good customer. An answer will oblige, saying when they are put on.'

It was held that there was evidence on which the jury were justified in convicting. (*yy*)

On an indictment for obtaining money by false pretences it appeared that the prisoner, who had a wife living, had represented himself to the prosecutrix as a single man, and, pretending that he was

(*w*) *Supra*.

(*x*) Per Pollock, C. B.

(*y*) *R. v. West*, D. & B. 575. A.D. 1858.

(*yy*) *R. v. Cooper*, 2 Q. B. D. 510; 46 L. J. M. C. 219. It is a question for the jury whether the words used fairly conveyed a representation of an existing fact. So where the defendant inserted the following advertisement in a newspaper, 'Barnardo, £2, £1, 10s., for most words from Barnardo.

Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists with 1s. 3d. to Rev. A. Brient, Trowbridge Wilts, by March 5. Result 8th,' it was held that the jury could rightly find that this amounted to a representation that a minister of religion of the name of Brient had instituted a *bond fide* competition. *R. v. Randell*, 16 Cox, C. C. 335.

about to marry her, induced her to hand over to him £8 out of her wages, representing that he would go to Liverpool, and with the money furnish a house for them to live in, and that, having done so, he would return and marry her. Having obtained the money he went away, and never returned. The prosecutrix stated that she had been induced to part with her money on the representations of the prisoner that he was a single man, that he would furnish the house with the money, and would then marry her. There was no doubt that these representations were false; but it was contended that as the prosecutrix had parted with her money on the joint operation of the three representations, and as only the first had reference to a present existing fact, while the others related to things to be done in future, the indictment could not be maintained. But, on a case reserved, it was held that though a false promise cannot be the subject of an indictment for obtaining money by false pretences, yet here there was the pretence that the prisoner was a single man, which was false, and was essential, for without it he would not have obtained the money. Then this false fact, by which the money was obtained, would support the indictment, although it was united with two false promises, which alone would not have supported the conviction. (2)

A count stated that the prisoner unlawfully pretended to H. G. H. that he intended to marry her on the 8th of February and that he had purchased a suit of clothes for the wedding, for which he wanted the sum of £4 to pay for the same; whereas the prisoner did not intend to marry H. G. H., nor did he ever purchase a suit of clothes for the said wedding. The prisoner had paid his addresses to H. G. H., and the banns had been published with his sanction. After the first publication the prisoner met H. G. H. at a draper's shop, by appointment, in order that he might there buy a suit of clothes for the wedding. He accordingly bought a suit of clothes for £4, and asked her for £4 to enable him to pay for them, and she gave him £4 for that purpose. The jury found the prisoner guilty; but Rolfe, B., doubted whether the pretence stated was one on which a conviction could take place; and, upon a case reserved, the judges held the conviction wrong. (a)

The prisoner owed his landlord £180 for rent, and promised his bailiff to pay it in February, but only paid part in that month, and promised to pay the remainder in the first week in March. The prosecutor owed the prisoner £16 10s., and they met on Friday to settle the debt. The prosecutor put down two £10 notes; but the prisoner could not give change, and it was then arranged that the prisoner should take one of the notes, and that the balance should be paid the next day. The prisoner then said, 'I am going to pay (or I have got to pay) my rent to the squire on the 1st of March, but as that is Sunday, I am going to pay it the next day. Will you advance £10 for your father-in-law on the rent of the flax field?' (about which they were in treaty.) The prosecutor said, 'I don't wish to be mixed up with my father-in-law's affairs.' The prisoner then said, 'Will you lend me £10 till Tuesday or Wednesday, and I will give you a note of hand for it to make it all business-like?' The prosecutor then

(2) R. v. Jennison, L. & C. 157. A.D. (a) R. v. Johnson, 2 M. C. C. R. 254. 1862.

lent him £10, and the prisoner gave him a formal promissory note for that sum. The prisoner did not say he required the sum of £10 to make up his rent; but the prosecutor believed that was what he wanted it for. The prisoner at the time he obtained the money meant to leave the next day for New Zealand, and did leave accordingly, and without paying his rent. The jury found that the prisoner's statement that he was going to pay his rent on the Monday was a false pretence, and that the money was advanced on the credit of that pretence. But, on a case reserved, it was held that there was no false pretence of any existing fact. The pretence alleged was that he had got to pay his rent, while in fact he had no intention of paying it, but meant to appropriate the money to his own purposes. That was not a false pretence of an existing fact. (b)

The prisoner was convicted on an indictment charging that:—by the false pretence to the prosecutors that 'he was prepared to pay' them £100, he did then unlawfully and fraudulently induce them to make a certain valuable security, to wit, a promissory note for £100, with intent thereby to defraud them. It was held that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner of an existing fact: viz., that he was prepared to pay the prosecutors £100, and had the money ready for them on their signing the promissory note, and, secondly, that the indictment shewed an offence within 24 & 25 Vict. c. 96, s. 90, of fraudulently causing a person to make a valuable security, although the promissory note in question might not be of value until it had been delivered into the hands of the prisoner. (bb)

The prisoner represented that he was collecting information for a directory which Warriner & Co. were getting up, and by means of this pretence he obtained 1s. from the prosecutor. It was held that he was rightly convicted, since there was a misrepresentation of an existing fact, namely, that Warriner & Co. were getting up a new directory. (c)

• *Money, &c., Must be obtained by Means of the False Pretence.*

It is for the jury to determine whether the false pretence used was the means of obtaining the money, &c.

It must be remembered that in some cases where the goods have not been thus obtained the prisoner may be convicted of an attempt to commit the offence charged: see 14 & 15 Vict. c. 100, s. 9, Vol. I. p. 62.

It must be shewn that the prisoner obtained the goods by means of some of the false pretences laid in the indictment. (cc) The indictment stated that the prisoner did falsely pretend that he was a gentleman's servant, that he had lived in Brecon, and that he had bought twenty horses in Brecon fair, and that he thereby obtained a filly

(b) *R. v. Lee*, L. & C. 309. A.D. 1863. The indictment ought to have alleged that the prisoner pretended that the rent was due, as well as that he had to pay it on the Monday following.

(bb) *R. v. Gordon*, 23 Q. B. D. 354.

(c) *R. v. Speed*, 15 Cox, C. C. 24.

(cc) *R. v. Jones*, 15 Cox, C. C. 475.

from the prosecutor. The pretences were proved to have been made by the prisoner as stated in the indictment, but it was also proved that the prosecutor sold the filly to the prisoner for £11, and that the prisoner said he had twenty other horses at the Cross Keys at Brecon, and that if the prosecutor would take the horse that the prisoner had got to the Cross Keys, he would come down there in about half an hour, and pay the prosecutor for the filly. The prosecutor thereupon delivered the filly to the prisoner, and took the prisoner's horse to the Cross Keys, where he ascertained the prisoner's statement to be false. In his cross-examination the prosecutor said that he delivered the filly to the prisoner because he believed that the prisoner would call at the Cross Keys and pay him, and not because he believed him to be a gentleman's servant, or that he lived at Brecon, or had purchased twenty horses. Coleridge, J., told the jury, 'The question for you to consider is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner. It is sufficient for the prosecutor to prove that any one of the false pretences charged in the indictment was false, and that he parted with his filly by reason of such false pretence, the prisoner intending to defraud him thereby. However, in this case, the prosecutor himself says that he parted with his filly because the prisoner promised to pay him, and not on account of any of the false pretences charged. If you think that was so, you will acquit the prisoner.' (*d*)

On an indictment against the registrar of the court of record for the borough of Northampton for obtaining money by a false return of the amount of fees received by him, it appeared that he sent the return from Northampton, and swore an affidavit there of its truth, and upon these was obtained the treasury minute, which authorised the payment to the prisoner of the sum he had obtained. This minute was the most formal act that was done in the matter, and it was an authority and direction to the paymaster to pay the amount awarded. It was objected that the return and affidavit did not amount to a false pretence, on which money was obtained. The 6 & 7 Vict. c. 96, placed the commissioners in a quasi judicial position, and their minute, which was the authority on which the money was obtained, was a judicial act; that minute was obtained by false testimony, but the money was not obtained by a false pretence. Coleridge, J., 'The return and minute are mere procedure and matter of regulation — the means by which the prisoner obtained the money. It will be for the jury to say whether the minute was not obtained by a belief in the truth of the return. If so, then the money was so obtained.' (*dd*)

In *R. v. Lince*, 12 Cox, C. C. 451, Bovill, C. J., said, 'The second point reserved was, whether a charge of obtaining goods by false pretences can be sustained when the prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence. It has been long settled that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged. If that were not so, an indictment for false pretences could scarcely ever be maintained, as a tradesman is gener-

(*d*) *R. v. Dale*, 7 C. & P. 352. See *R. v.* (*dd*) *R. v. Cooke*, 1 F. & F. 64.  
Hunt, 8 Cox, C. C. 495.

ally more or less influenced by the profit he expects to make upon the transaction. The case of *R. v. Hewgill*, Dears. C. C. 315, is an authority in support of this view. I therefore think this conviction ought to be affirmed.' (e)

The prisoner was a carrier, and dealt with a brewer. He went to the brewer and said, 'I want a cask of XX ale. I will call on my way back.' He came again and said, 'Is my beer ready?' The brewer said, 'Yes.' The prisoner took it up saying, 'It is for W.,' which it was not. It was objected that the prisoner did not obtain the ale by means of the false pretence, as the order was originally given for himself, and he did not say anything of W. until he had got possession of the ale; Wightman, J., held that the objection was fatal. (f)

Where upon an indictment for false pretences it appeared that the prisoner was employed to cut chaff for the prosecutor, and was to be paid 2d. per fan for as much as he cut. He demanded 10s. 6d., and stated he had cut sixty-three fans, but the prosecutor had seen him remove eighteen fans of cut chaff, and add them to the heap which he pretended he had cut, thus making the sixty-three fans for which he charged. Upon the representation that he had cut sixty-three fans, and notwithstanding his knowledge of the prisoner having added eighteen fans, the prosecutor paid him the 10s. 6d.; and it was held, on a case reserved, that the prisoner had not obtained the money by means of the false pretence; for the prosecutor knew it was false, and therefore it was not the false pretence that induced him to part with his money. (g)

Upon an indictment for obtaining a sovereign, it appeared that the prosecutor and a magistrate went and saw the defendant in consequence of a letter, which had been previously received, stating that the writer was able to give information of something to the prosecutor's advantage, and that the prisoner said J. Laurie was his partner, and was the brother of Sir P. Laurie, neither of which was the fact. The prosecutor paid him a sovereign, upon which he gave him a paper containing some information, which turned out to be useless. The defendant refused to return the money. For the defence an endeavour was made to shew that the prosecutor and the magistrate went together to the defendant, well knowing who he was, for the purpose of making evidence to support a case against him. Patteson, J., 'If I understand the defence set up, it is nothing more nor less than this, that a conspiracy existed between the prosecutor and the

(e) See *R. v. English*, 12 Cox, C. C. 171.

(f) *R. v. Brooks*, 1 F. & F. 502. *R. v. Steels*, 11 Cox, C. C. 5.

(g) *R. v. Mills*, D. & B. 205. *R. v. Ady*, *supra*, was cited, and Coleridge, J., observed, 'In *R. v. Ady* it is said that the

prosecutor believed the false statement.' The prisoner might, in a case like this, be convicted of attempting to obtain the money by false pretences.<sup>1</sup> See *R. v. Roebuck*, D. & B. 24, *ante*, p. 505. *R. v. Hensler*, 11 Cox, C. C. 570.

#### AMERICAN NOTE.

<sup>1</sup> It has been held in Massachusetts that where the prosecutor has like means of knowing whether the statement is true or false, the statement is not a false pretence. *C. v. Norton*, 11 Allen, 266, 267, 268. The defendant falsely pretended to a trader that the

trader had previously given him wrong change, and he demanded money. It seems doubtful whether the prosecutor yielded to the demand in consequence of the false pretence, or because he was afraid of being accused by the defendant of illegally selling liquor.



magistrate to entrap the defendant into the commission of the offence. You will judge for yourselves whether it be so or not. But still, if the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not.' (h)

It should seem that a pretence, to come within the meaning of the statute, need not be such an artful device as will impose upon a man of ordinary caution.<sup>2</sup> In a case where it was said in argument that an opinion had always prevailed that the fraud, to constitute an indictable offence, must be such an artful device as would impose upon a man of ordinary caution; Lord Denman, C. J., said, 'I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him; how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?' It was answered that the law prescribed it. *R. v. Jones* (i) was then cited; in that case the defendant was indicted for having obtained money by pretending to be sent for £20 for the use of J. S., and Holt, C. J., said, 'It is no crime unless he came with false tokens. Shall we indict a man for making a fool of another? Let him bring his action.' Upon which Lord Denman, C. J., added, 'Why is it the prosecutor's folly more than the defendant's fraud? This point is sometimes put as if a lie were something laudable. There are indeed cases, where the pretence is so very foolish that it is difficult to say that an imposition is practised; but still who is to give the measure?' (j)

(h) *R. v. Ady*, 7 C. & P. 140.<sup>1</sup>

(i) 2 Ld. Raym. 1018.

(j) *R. v. Wickham*, 10 Ad. & E. 34. It is submitted that the jury are the proper persons to give the measure, and that it is for them to say whether or not the pretences used were the means of obtaining the property. Any rule founded upon the pretence being such as would impose upon persons of ordinary caution, would leave all such as were unfortunately gifted with a less degree of caution at the mercy of the fraudulent

and designing. And as in robbery it would be absurd to lay down any rule which defined the force necessary to constitute a robbery with reference to the ordinary strength of mankind; so in false pretences it would be equally absurd to establish a rule with reference to the ordinary capacity of mankind. On the other hand, as in robbery, the correct rule clearly is that any force sufficient to overcome the bodily resistance of the party robbed constitutes the offence, whether that party be a powerful man or a feeble woman;

#### AMERICAN NOTES.

<sup>1</sup> Mr. Bishop on this case says (vol. ii. s. 463), that "the mind of the person defrauded must have been influenced by the pretence;" but it is difficult to see how that could possibly be so under the circumstance, although it was assumed by Coleridge, J., in *R. v. Mills*, cited *supra*. It seems to have been held in New York that where the prosecutor commits a crime in parting with the goods the defendant cannot be found guilty. *P. v. Stetson*, 4 Barb. 151. *McCord v. P.*, 46 N. Y. 470. But the contrary was held in Massachusetts, *C. v. Morrill*, 8 Cush. 571; and Mr. Bishop, vol. ii. s. 469, agrees in the latter view.

<sup>2</sup> The prisoner represented to the prosecutor that a third party owed him some money, but he did not say how much, nor did he say anything as to the ability of his

debtor to pay. It was held that this representation could not, whether true or false, induce any man of ordinary prudence to part with his money. *S. v. Magre*, 11 Ind. 154. Some of the older cases in the States appear to favour the notion that the false pretence must be such as to be calculated to mislead persons of ordinary intelligence; but the later and better opinion is that the weak must be protected. *Cown v. P.*, 14 Ill. 348. *Johnson v. S.*, 36 Ark. 242. *S. v. Montgomery*, 56 Iowa, 195. *Bowen v. S.*, 9 Bax. 45; 40 Am. R. 71. *Watson v. S.*, 16 Lea, 604. *S. v. Williams*, 12 Mo. Ap. 415. *S. v. Mills*, 17 Me. 211. *Smith v. P.*, 47 N. Y. 305. *Colbert v. S.*, 1 Tex. Ap. 314. Nor need it be shewn that the prosecutor acted with ordinary care and prudence. *In re Goodenough*, 31 Vt. 279, 290.

The prisoner was indicted for obtaining a £10 note by false pretences from James Barnett, and it appeared that the prisoner had gone to Barnett, and said his (the prisoner's) master wanted £2 or £3 to pay for some wheat; Barnett said he had no small money, but he had a £10 note, and he would let him have that, which he did, and he said the reason he did so was, that he had no small change, and in consequence of what the prisoner said. Taunton, J., expressing doubts whether the £10 was obtained by the false pretence, it was submitted that if the pretence had not been used the prisoner would not have obtained the note; the note therefore was obtained by means of the pretence, which was all the indictment alleged. Taunton, J., 'The prisoner asks for one thing and obtains another; he did not obtain the £10 note by means of the pretence, but through the imprudence of the prosecutor. I think that that is not sufficient.' (k)

An indictment charged the prisoner with obtaining from Williams and Wadkin certain money by pretending that he had obtained an order from the Wynn Hall Colliery Company for the sale to them of one hundred 'miners' lamps.' The prisoner, having invented an improved miners' lamp, entered into partnership with Williams and Wadkin by a deed, for the purposes of manufacturing and selling such lamps. By the deed the capital of the partnership was to consist of £300, to be advanced by Williams and Wadkin in equal shares. After the execution of the deed Williams and Wadkin advanced the prisoner money to pay the expenses of exhibiting the lamp, and obtaining the patent for it; at length they refused to advance any more money unless he agreed to go out as an agent to sell the lamps on commission; and a verbal agreement was made between the three that the prisoner should travel about the country to obtain orders for the lamps, on the terms that Williams and Wadkin should pay him a commission of 15 per cent. on all orders received by him, besides his travelling expenses, such commission to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits. On the occasion in question the prisoner stated to Williams and Wadkin that he had got an order from the Wynn Hall Colliery Company for one hundred lamps, to be made in a month, and paid for in a month after delivery. In the faith that this statement was true, Williams and Wadkin gave the prisoner £12 10s., the commission which would be due to him under the said agreement on the sale of one hundred lamps. No such order had, in fact, been given. It was objected that the money obtained was money in which he was interested under the deed of partnership; and that the intent to defraud was negatived by the fact that the money came out of the partnership funds. And, upon a case reserved on these questions, it was held that this was not an obtaining of money by false pretences within the statute. The prisoner was charged with obtaining money by making charges against the part-

so it is submitted that any pretence sufficient to overcome and impose upon the mind of the party to whom it is made, ought to be considered to constitute an offence within this statute; and that whether it were of such a character or not, ought to be left to the determination of the jury with reference

to all the facts of the particular case. C. S. G. See *R. v. Woolley*, *ante*, p. 485. *R. v. Young*, 3 T. R. 98. 2 East, P. C. c. 18, s. 8, p. 828.

(k) *R. v. George Smith*, Hereford Spr. Ass. 1832. MSS. C. S. G.

nership funds, for which there was no foundation. But as, before there could be any division of profits, those expenses would have to be paid out of the capital fund, those charges would be matter of account between the parties. If there was a real foundation for these charges, they would come into the account, and be deducted from the profits of the partnership. The act of the prisoner was no more than a misrepresentation, which would be overhauled when the accounts were gone into. (b)

Obtaining *credit* in account from a banker by drawing a bill on a person, on whom the party has no right to draw, and which has no chance of being paid, was not within the repealed Act, 7 & 8 Geo. 4, c. 29, s. 53, though the banker pays money in consequence thereof to an extent that he would not otherwise have done. The prisoner had kept an account with certain bankers for more than 3 years. They had told him that they could not allow him to overdraw beyond £200, but on the 29th November, 1828, his account was £400 in debt, of which he had had notice, and was told he must get them some money. On that day he met Mr. Roe, one of the partners, and told him he had been obliged to give a cheque to Mr. Jacob for £70; Mr. Roe said, 'We certainly shall not pay it, unless you give us some money first.' He said, 'Sir, I can give you a good bill on Mr. Foster.' Mr. Roe said, 'Very well.' About two hours afterwards the prisoner sent a letter to the bank containing a bill of exchange in his own handwriting, of which the following is a copy:—

Newport, S. W., November 29th, 1838.

'Two months after date pay to my order £200 value received in flour.

'THOMAS B. WAVELL.

'Mr. John Foster, Mark Lane,

'London.

(Indorsed)

'Thomas B. Wavell.'

After this, cheques drawn by the prisoner were brought in and paid there on that day, and amongst others that in favour of Jacob for £70. Mr. Jacob banked with the prosecutors, and they placed the amount to his credit, which Roe swore he should not have done unless he had met the prisoner and received the bill. Several other cheques were afterwards paid, or placed to the credit of parties, on whose behalf they were sent in. The bill was not accepted, and searches were made in vain for a person of the description of John Foster, and the bill was not paid. The prisoner endeavoured to prove that at the time he drew the bill he had reason to expect that it would have

(7) *R. v. Evans, L. & C. 252. A.D. 1862.* This decision may be supported on the ground that the prisoner obtained money in which he had a joint interest. But the grounds on which the decision was rested are open to the gravest doubt. It might just as well be said that a clerk, who obtains money by presenting a false account, was not guilty of the offence, because there might be an accounting afterwards. Pollock, C. B., delivered the judgment, and added, 'I may add, that, in my opinion, the statute against

obtaining money by false pretences was never intended to meddle with the real business of commerce. It was not to control commercial proceedings, unless where there was really and truly a piece of swindling; nor to apply to frauds committed in the course of a commercial transaction. In my opinion—and I am giving this as my opinion only, and not that of the Court—it would be very mischievous to make every knavish transaction the subject of an indictment.' C. S. G.

been accepted, but the jury disbelieved the defence, and, upon a case reserved, it was objected that no chattel, money, or valuable security was obtained by the prisoner by means of the false pretences; he only obtained such credit with the bankers as to induce them to honour his cheques; and the judges held that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained by him was credit in account; somebody else received the money: and therefore the conviction was wrong. (*m*)

The prisoner agreed with Bowers and Co. in writing 'to go captain and take charge of the vessel Richard, and to work her by the thirds, as is customary.' The meaning of 'working by the thirds' was that the prisoner was to have two-thirds of the net profits of the vessel. The prisoner had repairs done to the vessel to the amount of £1 2s. 2d.; but presented a receipt for £1 19s. 10d.; and that amount was allowed to the prisoner in the settlement of the vessel's accounts. Maule, J., 'How can it be said that the prisoner obtained any *money* by this false pretence? I have no doubt about the pretence or the falsity of it; but my difficulty is that he obtained no *money* by it, but only *credit* on account. It is only a non-payment of the 17s. 8d. It is like *Wavell's case*, (*n*) and there must be an acquittal.' (*o*)

Where the prosecutor, by certain false representations made to him by the prisoner as to his business, customers, and profits, was induced to enter into partnership with the prisoner, and to advance £500 as part of the capital of the concern, and the sessions directed the jury that, if they believed the account given by the prosecutor, they would find the prisoner guilty, and the question was reserved whether the conviction could be supported, the Court held that the only point of law reserved was whether, in every possible and conceivable view of the evidence by the jury, they were bound to return a verdict of guilty; (*p*) and the Court held that they were not; for many other questions ought to have been submitted to the jury. (*q*)

A begging letter containing false representations for the purpose of inducing the party to whom it is addressed to send the writer money, is a false pretence within the statute; and if money be obtained by such a letter, it is obtaining money by false pretences within the

(*m*) *R. v. Wavell*, R. & M. C. C. R. 224. See sec. 89, *ante*, p. 468.

(*n*) *Supra*.

(*o*) *R. v. Crosby*, 1 Cox, C. C. 10.

(*p*) Per Williams, J.

(*q*) *R. v. Watson*, D. & B. 348. A.D. 1857. As the only question turned on the direction to the jury, it is quite useless to set out the facts. The marginal note is altogether wrong. Cockburn, C. J., said, 'I am far from saying that where a party is induced by false pretences to enter into a partnership, and to advance money, the allegations being altogether fraudulent and false, or colourable merely, he might not have ground for maintaining an indictment for obtaining money by false pretences, or from saying that he might not rescind a contract obtained by fraud. But I am clearly of opinion that if he does enter into the contract of partnership, and does not rescind it, and ad-

vances money as part of the capital of the concern, he has not parted with his money within the meaning of the statute; because, being a partner, he is still interested in that money.' Erle, J., thought on the evidence there had been a real partnership assented to by the prosecutor for some time, and was not aware of any case in which it was held that money advanced to a concern by a partner can be treated as money obtained by another partner by false pretences: but he agreed that there might be a case of partnership obtained by fraud, and money advanced, where the whole thing was a pretence, and the party always intended to obtain and appropriate the money, where an indictment for false pretences might lie. See *R. v. Williamson*, 11 Cox, C. C. 328, as to an indictment being maintained for false representations on sale of a business.

statute, although the money be given as a voluntary charitable gift.<sup>1</sup> The prisoner wrote a letter to the prosecutor in the fictitious name of Dr. Scott, falsely stating that he wrote at the request of James Brewer, a young man, to whom the prosecutor had been kind on several occasions, and falsely stating that Brewer was advised to endeavour to obtain admission into the Consumption Hospital, Brompton, near London; that he was in very distressed circumstances, and had no means of paying the fees of that institution; and asking for some little assistance. The prosecutor believing the statements in the letter to be true sent a post-office order for £3 to the address mentioned in the letter, and this was received by an accomplice of the prisoner, and the proceeds divided between them. The prisoner knew that each of the statements in the letter was false, and wrote the letter with intent to cheat the prosecutor of his money, and used the name of Scott for that purpose. It was objected that the post-office order was a mere voluntary gift, and that the statute did not apply to voluntary charitable gifts; but the objection was overruled, and the prisoner convicted, and, upon a case reserved, the judges were unanimously of opinion that the conviction was right; that a begging letter containing a false tale was a false pretence within the statute; and that the offence created by the Vagrant Act, 5 Geo. 4, c. 83, s. 4, was a different offence, viz., 'going about as a collector of alms, &c.' But that statute would not prevent the party from being proceeded against under the then existing statutes, which had already made the offence a misdemeanor. (r)

*As to the Intent to Defraud.*

By 24 & 25 Vict. c. 96, s. 88, it is not necessary to prove an intent to defraud any particular person. It is sufficient to prove that the party accused did the act charged with an intent to defraud (see *ante*, p. 468).

Upon an indictment for obtaining two sacks full of malt, by pretending that the master of the prisoner had bought them, it appeared that the prosecutor owed the prisoner's master a sum of money, of which he could not procure payment, and that the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in his absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, and thereupon she delivered the two sacks of malt to the prisoner, who carried them to his master. The pretence was false,

(r) *R. v. Jones*, 1 Den. C. C. R. 551. The prisoner was also convicted of obtaining money by another begging letter, which was written in the name of J. H. Collingridge,

and addressed to the same prosecutor, and contained a false story about the misfortunes and health of the supposed writer.

AMERICAN NOTE.

<sup>1</sup> In New York, the contrary doctrine was at one time maintained, but it is said that the decision cannot be upheld, *Bishop*, ii. s. 467, and that in North Carolina, Indiana, and Massachusetts, the English law

is followed, and further, that in New York it is enacted that the statutes shall apply where the thing obtained is "for any charitable or benevolent purpose whatever."

and the prisoner knew it to be so at the time he used it. It was submitted that the prisoner must be acquitted, as he had no intent to defraud; it was replied, that every one must be taken to intend the natural consequence of his own act, and the natural consequence of the prisoner's act was to defraud the prosecutor. Coleridge, J., told the jury, 'Although *prima facie* every one must be taken to have intended the natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud the prosecutor.' (s)

An indictment charged that the prisoner, being a member of a building society, obtained from the society £30 by falsely pretending that he had completed two houses, which he had to erect before he was entitled to the money. The prisoner, by the rules, would have forfeited the houses, if they were not completed by the time he made the pretence, and the certificate of a surveyor was necessary to be, and was in fact, obtained before the money could be received. Willes, J., on the suggestion of the prosecution, allowed the prosecution to be abandoned, on the ground that the pretence might have been made in order to avoid the forfeiture. (t)

On an indictment charging the prisoner with obtaining goods by certain false pretences, the jury found that the prisoner did obtain the goods by means of the false pretences, but that he intended to pay for them when it should be in his power to do so, and a verdict of guilty was entered. Held, that the prisoner was properly convicted. (u)

But where a jury appended to their verdict a recommendation to mercy on the ground that they were unable to say whether there was an intent to defraud or not, it was held that this amounted to a verdict of not guilty. (uu)

On an indictment for obtaining money on the pretence of being a captain in the guards, it appeared that the money was obtained on the representation by the defendant that he could embark it in the manufacture of bricks, and that the profit would be very great, and that the prosecutor should receive a large share of the profit, and the money was invested in the purchase of the brick-field, and the making of the bricks, but the prosecution was commenced before the speculation was fully carried out. It was urged that the pretence might have been made for a perfectly honest purpose; the speculation might have succeeded, and the prosecutor might have received the return on his capital. *R. v. Williams* (v) was cited. Pollock, C. B., 'I do not fully admit the doctrine that the obtaining money under false pretences is not a crime, if the prisoner does not intend ultimately to cheat the person advancing it. It is forgery on the part of one who accepts a bill in the name of another, even although he may

(s) *R. v. Williams*, 7 C. & P. 354.

(t) *R. v. Stone*, 1 F. & F. 311.

(u) *R. v. Naylor*, 35 I. J. M. C. 61.  
10 Cox, C. C. 149.

(uu) *R. v. Gray*, 17 Cox, C. C. 299.

(v) *Supra*.

intend to provide funds to meet it when it becomes due. In *R. v. Williams* the prisoner believed, however, erroneously, that he had some sort of right to do as he did, and this was probably the ground on which the jury acquitted him.' (w)

The prisoner was convicted of obtaining by false pretences from a servant of the Lancashire and Yorkshire Railway Company a railway ticket of the company, for a journey from Bradford to Huddersfield by one of their trains; the ticket was in the following form:—

|           |                |       |
|-----------|----------------|-------|
| April 11, | Express Train. | 1836. |
|           | BRADFORD       |       |
|           | to             |       |
|           | HUDDERSFIELD.  |       |
|           | 1st Class.     | 23    |

And was a voucher for the journey without further payment, but was to be given up to the company at the journey's end. Wightman, J., reserved the question whether the obtaining such a ticket was obtaining a chattel of the company, with intent to cheat and defraud the company of the same, within the meaning of the 7 & 8 Geo. 4, c. 29, s. 53; and after consideration, Pollock, C. B., said that the judges were unanimously of opinion that it came within the statute, which makes it criminal to obtain a chattel by a false pretence. The ticket while in the hands of the party using it was an article of value entitling him to travel without further payment, and the fact that it was to be returned at the end of the journey did not affect the question. (x)

To constitute an obtaining of a chattel, &c., within 24 & 25 Vict. c. 96, s. 88, there must, as in larceny, be an intention to deprive the owner wholly of his property, and merely to obtain the loan of a chattel by false pretences, with intent, &c., is not within the section. The prisoner, by false pretences, obtained from a livery stable keeper a horse on hire for a third person, rode it himself during the time of hiring, and returned it to the stable afterwards. Held, that a conviction for obtaining the horse by false pretences, with intent, &c., was bad, and must be quashed. (y)

(w) *R. v. Hamilton*, 1 Cox, C. C. 244. Maule, J., was present.

(x) *R. v. Boulton*, 1 Den. C. C. 508. See *R. v. Beecham*, 5 Cox, C. C. 181, *ante*, p. 215. This case was not argued. As the ticket was to be returned to the company at the end of the journey, it is clear the property in the ticket did not pass from the company. Now, in false pretences the essence of the offence is that the property has passed from the owner. This decision, therefore, seems very questionable. Suppose a person wanting to ride from A. to B. were falsely to pretend that C. sent him to borrow a horse, and by means of that pretence he obtained the horse, and rode it from A. to B., but returned it to the owner, it could hardly be contended that he obtained the horse by false pretences. He obtained the ride by false pretences. So in this case what the prisoner obtained was the ride by the train

— not the railway ticket, and it is plain that the real intent was to obtain the ride without paying for it. C. S. G. See *R. v. Kilham*, *infra*.

(y) *R. v. Kilham*, 39 L. J. M. C. 109, *et per Cur*. But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction the case of *R. v. Boulton*, 1 Den. C. C. 508, 19 L. J. M. C. 67, was referred to. There the prisoner was indicted for obtaining by false pretences a railway ticket, with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this re-

Upon an indictment under a repealed Act for stealing a cheque for £50, it appeared that the prisoner was clerk to the Rugby Savings' Bank; the course of business for drawing out money was this: the depositor gave a notice to the clerk of the amount required, and, if present on the next night of business, received a cheque for that amount from the manager in attendance, or, if absent, he allowed the clerk to receive the cheque and to get cash for it, to be kept by him till called for, and the depositor and clerk signed the books of account usual in a savings' bank. The prisoner, as clerk, falsely pretended to T. Haylock, the manager in attendance, that E. Glaby, a depositor, had given notice for £50, and produced the usual entries, signed by himself, and, as E. Glaby was not in attendance, received from Haylock a cheque for £50, for which he obtained cash at the bank. E. Glaby had not given any notice or authority to draw out £50, or any sum, and the prisoner made the false pretence with the intention from the beginning of obtaining the cheque, and appropriating it to his own use. According to the course of business the cheque was handed to the prisoner as agent of the depositor. And, upon a case reserved, it was held that the offence was not larceny; for it must be taken that the prisoner received the cheque as the agent of the depositor, and not as the agent of his employers, the managers of the savings' bank, and therefore he could not be charged with stealing the money of the bank. (z)

#### *Venue.*

Where the indictment was in Herefordshire, and the false pretence in that county; but the money received in Monmouthshire; the judges held that the indictment was laid in the wrong county; because the language of the 30 Geo. 3, c. 24, made the offence to consist in obtaining the money, and not in using any false pretence whereby money is obtained. (a) But this difficulty was entirely removed by the 7 Geo. 4, c. 64, s. 12, which in such cases makes it lawful to indict the party in either county.

The prisoner was indicted at the Middlesex Sessions for obtaining by false pretences a post-office order of J. Collingridge, and in other counts for obtaining a five-pound bank note, and two pieces of paper, to wit, two halves of a five-pound note, of the said J. Collingridge. The prosecutor resided at Sunbury, in Middlesex, having a house also at Bath, and the prisoner lived at Vauxhall-road in Middlesex, and the prisoner wrote the first letter at his residence in the assumed

spect, that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to its own use, for the only use for which it was capable of being applied. The conviction must therefore be quashed.

(z) *R. v. Essex*, D. & B. 371. A.D. 1857. The offence was clearly obtaining the cheque by false pretences from the manager as he parted with the property in it. See 24 & 25 Vict. c. 96, s. 88, *ante*, p. 484.

(a) *R. v. Buttery*, as stated by Lord Tenterlen in 3 B. & C. 703. But the same very learned Chief Justice, after stating the decision in this case in 4 B. & Ald. 179, added, the judges did not think the party not indictable at all, because the pretence which was necessary to constitute the crime was in one county and the receipt in another; and so there was no entire crime in either.



name of Dr. Scott, to which he had no right, and directed it to 'John Collingridge, Esq., Bath.' This letter falsely represented that James Brewer was advised to gain admission into a consumption hospital; that he had no means of paying the fees of the institution, and requested assistance, and desired an answer to be addressed, 'James Brewer, Post-office, Gravesend.' This letter was posted at Gravesend by an accomplice of the prisoner, and reached the prosecutor at Sunbury, having been forwarded to him from Bath, and he, believing the story told in the letter to be true, obtained the post-office order in question, and having enclosed it in a sealed envelope directed to 'James Brewer, Post-office, Gravesend, Kent,' put it in the Sunbury post-office, whence it was transmitted in due course to Gravesend in Kent, and there received by the accomplice of the prisoner under his directions, who got the money for the order, and gave half of it to the prisoner, at his residence in the Vauxhall-road. The prisoner wrote and posted the second letter from Bath. This letter was written in the fictitious name of John Henry Collingridge, and directed to 'John Collingridge, Esq., Sunbury Villa, Sunbury, Middlesex.' This letter represented the writer to have been engaged in mercantile pursuits, and to have lost a large sum of money by the upsetting of a small-decked vessel, and to have injured his health, and to have been recommended to try the benefit of the Bath waters, and asked for pecuniary assistance, not as a loan, but as a gift; and some letters enclosed in it were requested to be returned to the writer at Chippenham. 'Address Mr. J. H. Collingridge (to be called for), late from Africa, the Post-office, Chippenham.' This letter was received at Sunbury by the prosecutor, who, believing its contents to be true, enclosed one half of a five-pound note in a letter addressed as desired, and forwarded it by post from Sunbury to Chippenham, in the county of Wilts, where it was received by the prisoner, who thereupon requested the prosecutor by letter to forward the second half of the note by post to his residence in Middlesex, and which the prosecutor, who was still at Sunbury, accordingly did, and the prisoner received it there. It was objected, 1st, that the prisoner was only triable for obtaining the post-office order in Kent, where it was received. 2nd, that one half of the note having been received in Wiltshire, and the other half in Middlesex, the bank note was not received in Middlesex; and that with respect to the charge of obtaining two pieces of paper, to wit, two halves of a Bank of England note, the same constituted no offence, because the halves were of themselves and as distinct from each other valueless. The objections were overruled, and the prisoner convicted; and, upon a case reserved, the judges were unanimously of opinion that the conviction was right, even independently of the 7 Geo. 4, c. 64, s. 12; and Alderson, B., observed that when the prosecutor put the letter containing the post-office order into the post-office at Sunbury in Middlesex, the postmaster became the agent of the prisoner, and the latter must thus be taken to have received it in Middlesex. (*d*)

(*d*) *R. v. Jones*, 1 Den. C. C. 551. No notice was taken of the objection as to the half notes being valueless, but *R. v. Mead*, 4 C. & P. 535, *ante*, p. 238, shews that there was nothing in this objection.

Upon an indictment tried at the sessions for the county of the borough of Carmarthen, which is a separate jurisdiction from the county of Carmarthen, it appeared that the false pretence, with which the prisoner was charged, was contained in a letter written by him at N. E., in the county of Carmarthen, and received by the prosecutor in the borough of Carmarthen. The money obtained by such false pretence was posted in a registered letter in the borough of Carmarthen, and received by the prisoner at N. E., in the county of Carmarthen; and, upon a case reserved, it was held that the sessions for the borough had jurisdiction to try the prisoner. The offence consisted of making the false pretence, and obtaining the money by means of the false pretence, and that offence was committed by the prisoner partly in one county and partly in another. (*e*)

The prisoner was indicted in Northamptonshire for pretending to the commissioners of the treasury that the fees received by him as the registrar of the court of record for the borough of Northampton amounted to a certain sum only, by means whereof he did then and there obtain a certain sum of money. The prisoner's return of the amount of fees was received in a letter, dated in Northampton, and he had sworn an affidavit there of its truth. The treasury minute upon it, which authorised the payment to the prisoner of the sum he had obtained, was proved; it directed the paymaster to pay the amount, which was paid in Westminster. It was objected that no part of the offence had taken place in Northamptonshire; but Coleridge, J., held that as the letter was written and the affidavit sworn in Northamptonshire, the jury might infer that they were posted there, and that was sufficient. (*f*)

Where the prisoner was indicted in Nottinghamshire for false pretences, and it appeared that he had written and posted a letter at Nottingham, addressed to a Frenchman at a place in France, containing a false pretence by means of which he induced the Frenchman to transmit to him in Nottingham a draft which he received and cashed in Nottingham, it was held that he could rightly be convicted there; and Lord Coleridge, C. J., said, 'Of the two necessary ingredients of the offence both take place in Nottingham. It may be that one important part of the offence taking place in Nottingham would be sufficient, but here both ingredients take place in Nottingham.' (*ff*)

So where an undischarged bankrupt living at Newcastle, directed a farmer in Ireland by letter to send him a horse, which he accordingly did, it was held that an indictment against the bankrupt under 46 & 47 Vict. c. 52, s. 31, for obtaining credit while an undischarged bankrupt, could properly be tried at Newcastle, and that the offence was committed there. (*g*)

The prisoner was indicted, and the venue laid in Essex, for obtaining sheep by false pretences. The sheep were obtained in Middlesex and remained in his possession till he conveyed them into Essex, and it was held, on a case reserved, that he had been indicted and tried in the wrong county. (*gg*)

(*e*) *R. v. Leech*, 1 Dears. C. C. 642.

(*f*) *R. v. Cooke*, 1 F. & F. 64.

(*ff*) *R. v. Holmes*, 12 Q. B. D. 23.

(*g*) *R. v. Peters*, 16 Q. B. D. 636. See

*R. v. Dawson*, 16 Cox, C. C. 557.

(*gg*) *R. v. Stanbury*, L. & C. 128. 31  
L. J. M. C. 83.

*Form of Indictment. Trial. Evidence.*

No indictment for obtaining money or other property by false pretences can be preferred without previous authorisation, &c., as mentioned in Vol. I. p. 2.

The indictment, whether it is for obtaining or attempting to obtain money, &c., by false pretences, must state the person to whom the false pretence was made, and the person from whom the money, &c., was obtained or attempted to be obtained. (*h*)

The indictment should state what the false pretences are. (*hh*) They should be set out, in order that the Court may see what they are, and whether they come within the statute. (*i*) But it does not appear to be necessary to describe them more particularly than they were shewn or described to the party at the time; and in consequence of which he was imposed upon; and it does not seem to be necessary to make any express allegation that the facts set forth shew a false pretence. (*j*) In a case upon the repealed Act, 30 Geo. 2, c. 24, where it was assigned for error that it was nowhere alleged in the indictment that the defendant 'did *falsely* pretend,' the judgment was nevertheless affirmed. The indictment alleged, in substance, that the defendant unlawfully, knowingly, and designedly pretended certain things, 'by means of which said *false pretences*' he obtained the money; and, in the subsequent part of the indictment, all the pretences were averred to be false; and the Court held this to be sufficient. And it seems also to have been their opinion, that the indictment would have been good if it had only alleged that the defendant obtained the money by such and such pretences (stating them); and then averred that those pretences were false. (*k*) But a special averment, that the pretences, or some of them, are false, cannot be dispensed with; and, in a case upon the repealed statute, where it was omitted, and an exception taken on a writ of error, the judgment was

(*h*) *R. v. Sowerby* (1894), 2 Q. B. 173. But an indictment setting out that the defendant by means of an advertisement 'did falsely pretend to the subjects of Her Majesty the Queen that he, &c.,' by means of which false pretence he did unlawfully obtain from one A. B. certain moneys, is good. *R. v. Silverlock* (1894), 2 Q. B. 766, where *R. v. Sowerby* is distinguished.

(*hh*) *R. v. Mason*, 2 T. R. 581. See *R. v. Goldsmith*, *ante*, p. 437.

(*i*) Fuller's case, 2 East, P. C. c. 18, s. 13, p. 837. A count alleged that Henshaw and Clark did falsely pretend to H. Pond, who lived at one Madame Temple's, and acted as her representative, that Clark had come down from London to the residence of Henshaw, and that H. Pond was to give him 10s., and that the said Madame Temple was going to allow Clark 10s. a week for the benefit of his health. By means, &c., the prisoners did attempt, &c. Madame Temple had a shop in London and another at Brighton, and the prisoners went to the shop

at Brighton, and saw H. Pond, who kept the accounts of Madame Temple there, and who proved that Henshaw in the hearing of Clark said that Clark had come down from London, and had been in Brompton Hospital with a bad leg, and had seen Madame Temple in London, who had said that she (Pond) was to give Clark 10s. a week while he was in Brighton for the benefit of his health. She refused to do so. And, upon a case reserved, it was held that the indictment did not sufficiently allege any pretence of an existing fact. *R. v. Henshaw*, L. & C. 444. The Court seem to have thought that, if the indictment had alleged that Pond was to give the money on account of Madame Temple, it would have been good. In these sort of cases there ought to be an averment that the prisoner was authorised by the party to ask for and to receive the money. C.S. G.

(*j*) 2 East, P. C. c. 18, s. 13, p. 837, 838. Terrey's case, Cro. Car. 564.

(*k*) *R. v. Airey*, 2 East, R. 80, *ante*, p. 474.

reversed. The Court considered the case by analogy to the necessary averments in an indictment for perjury framed under the 23 Geo. 2, c. 11, and were decidedly of opinion, that where a party was charged with obtaining money, &c., by false pretences, and the matter charged as the pretence contained more than one proposition, the indictment ought to announce the precise charge by distinct averments, and state in what particular such pretences are false. Lord Ellenborough, C. J., said, 'To state merely the whole of the false pretence, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied with some truth. Suppose the offence, instead of being comprised within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as the vehicle of the falsity; are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and, in furtherance of that convenience, it is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party of what he is come prepared to defend; and, to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood. The Legislature have expounded their understanding of the matter in the case of perjury; and I am at a loss to discover, why, in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury.' (*m*) It appears from this case that it is not necessary that the whole of what is stated in order to obtain the property should be false; it is sufficient if part is false; provided that part has a material effect in inducing the party defrauded to give up his property. (*n*)

One count alleged that the prisoner falsely pretended that he, having executed for Spencer and Roberts a certain quantity of work, there was then due and payable to him from Spencer and Roberts for and on account of the said quantity of work a certain sum of money, (to wit) the sum of six shillings, being parcel of a larger sum, (to wit) the sum of 16s. 7d. claimed by him for the said quantity of work. In other counts it was alleged that the prisoner falsely pretended that there was due and owing to him from Spencer and Roberts the whole amount of a certain sum of money, (to wit) the sum of nineteen shillings (different sums were inserted in the several counts), for and on account of a certain quantity of work executed by him for Spencer and Roberts; whereas the whole amount was not due and owing; and, upon a case reserved after a verdict of guilty, it was held that the indictment was bad. Considering each of these allegations as an allegation merely that so much was 'due and owing,' it might

(*m*) *R. v. Perrott*, 2 M. & S. 379, 386.  
*R. v. Kelleher*, 14 Cox, C. C. 48.

(*n*) And see *R. v. Hill*, *post*, p. 548.

involve many questions both of law and fact. It might involve the price to be paid, the value of the work, the credit to be given, and the terms of payment. An indictment for false pretences must disclose a false pretence of an existing fact. Here there was merely a fraudulent claim in respect of a *quantum meruit* of the prisoner's work and labour, and the indictment would be supported by evidence that the prisoner made a false estimate of the value of his work. The false pretence consisted of nothing more than what might be matter of opinion, and this indictment might be supported by evidence of a mere wrongful overcharge, or a misrepresentation of a matter of law. The false statement that money is due and owing does not necessarily involve a false pretence of an existing fact. (o)

In a case which has been previously mentioned, on another point, (p) an objection was taken that the pretence was not stated with sufficient *certainty*, inasmuch as a wager therein mentioned was stated only to have been made 'with a colonel in the army, then at Bath,' without setting forth the colonel's name. (q) But the objection was overruled; and Lord Kenyon, C. J., said, that the charge was sufficiently certain to enable the defendants to know what they were called upon to answer for; and that perhaps the colonel's name with whom the wager was stated to have been made was not mentioned; in which case he could not have been described with greater accuracy. And further, that if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence.

It is sufficient to state the effect of the pretence correctly, and the very words used need not be stated. The indictment alleged that the prisoner did falsely pretend that he was the servant of one T. Groves, of Gloucester, butcher, and that he was sent by the said Groves to look at two heifers, the property of the prosecutor, for the said

(o) *R. v. Oates*, Dears. C. C. 459. This decision seems to be wrong. In an indictment for this offence the pretence may either be laid in the terms actually used, or in what are substantially the same; and consequently it is uncertain, on the face of the indictment, which course is adopted. The first fallacy that runs through the judgment is the assumption that the indictment does not state the pretence that was actually used; no one can doubt that if a person, having done a certain quantity of work, writes a letter, and says that a pound is due and owing for that work, knowing that 5s. alone is due, with intent to defraud his employer, that is an offence within the Act, and an indictment using the very terms of the letter would clearly be good: and that was substantially this case; for the prisoner obtained the money by altering the sum in an account into a larger one, and presenting the account so altered to his employers. Another fallacy was the considering the pretence apart from its being false and made with intent to defraud. The case was clearly put on its right ground by Maule, J. (who seems to have left the Court before judgment was given): 'The

allegation in the indictment being in effect that the prisoner made a statement that a debt was due and owing to him, knowing that statement to be false, and for the purpose of effecting a fraud, it excludes the idea of a disputed account, or that what is due and owing is a conclusion of law, and amounts to a false statement that a debt was existing.' Lastly, another fallacy was that the allegation was treated like an allegation in a count for work and labour, instead of being the statement of a false pretence. If a man alters an account which shews 5s. to be due to him, and makes it £1 5s., and then presents it, and obtains the money, is not this a pretence that the latter sum is due and owing to him? and how can an indictment more correctly state the pretence than that he pretended the sum was due and owing to him? The Court then doubted the validity of the indictment in *R. v. Woolley*, 1 Den. C. C. 559, *ante*, p. 485, on the same grounds as they decided this case. C. S. G.

(p) *R. v. Young*, *ante*, p. 470.

(q) See the abstract of the indictment, *ntc*, p. 471.

Groves, and that he was sent by the said Groves to buy the said heifers of the prosecutor for the said Groves, and that the said Groves would buy the said heifers for the sum of £23 10s., and that the said Groves would pay the prosecutor the said sum of £23 10s. for the said heifers, and that the said Groves would be over on the next Thursday, and would pay the prosecutor for the said heifers on that day. The evidence was, that the prisoner said he came from Groves, &c., and that either Groves or himself would be over the following Thursday; and it was submitted that the indictment was supported; first, it was sufficient to state the effect of the pretence correctly, and that the allegation that the prisoner was sent by Groves was supported by proving that he said 'he came from Groves.' Secondly, that the alternative that the prisoner would himself come was a mere naked lie, on which no indictment could be supported, and, therefore, it was unnecessary to state it in the indictment; and Little-dale, J., held that the evidence was sufficient to support the indictment; and the prisoner was convicted. (r)

The second count of an indictment alleged that the defendant, intending to cheat J. Wood, on, &c., at, &c., unlawfully, knowingly, and designedly did falsely pretend to the said J. Wood that he, the defendant, then was a captain in Her Majesty's fifth regiment of Dragoon Guards; by means of which said false pretence the defendant did then obtain from the said J. Wood a certain valuable security, to wit, an order for the payment of the sum of £500 of lawful money, of the value of £500, the property of the said J. Wood, with intent to cheat and defraud him of the same; whereas in truth and in fact the defendant was not at the time of making such false pretence a captain in Her said Majesty's said regiment; (s) and it was objected upon error after judgment, 1st, that the count was bad for not shewing that the alleged false pretence was made with intent to obtain the security; but the Court of Queen's Bench held that the count was not bad for omitting such allegation. 2ndly, that the count ought to have shewn how the false pretence was calculated to effect the obtaining of the order; but the Court held that this was matter to be shewn by the evidence, and need not be shewn by the indictment. 3rdly, that it ought to have been shewn that in fact the particular pretence did induce the party defrauded to part with the order; but the Court held that it could not be necessary to state that there was no pretence besides that charged. Had the defendant shewn that there was any other which caused the giving of the order, he must have been acquitted. 4thly, that the falsehood of the pretence was not properly made to appear. The pretence was that the defendant 'then,' that is to say, on the day and year aforesaid, was a captain; the subsequent allegation is that he was not so 'at the time of making the false pretence.' Now he might have been a captain at the early part of the day, and ceased to be so before he made the supposed false pretence; but the Court held that the averment was sufficient. And, lastly, that the count ought to have alleged that the security

(r) *R. v. John Scott*, Hereford Spr. Ass. 1832, MSS. O. S. G., cited in *R. v. Parker*, 2 M. C. C. R. 1.

(s) The indictment added that the prisoner knew he was not a captain.

was unsatisfied; but the Court held that after verdict the indictment was sufficient, under the 7 Geo. 4, c. 64, s. 21, as it followed the words of the 7 & 8 Geo. 4, c. 29, s. 53. (t)

Where an indictment alleged that the prisoner pretended that a certain paper produced by him was a good and valid promissory note for the payment of five pounds; but did not set out the instrument, which was a Bank of Elegance note; upon a case reserved it was contended that the instrument should have been set out in the indictment. There was no averment even of the purport of the paper. Wilde, C. J., 'We are of opinion that the objections are insufficient. With regard to the record, it can only be necessary to set out the instrument where the Court could derive assistance from seeing a copy of it on the record; as where the case turns on the nature and character of the instrument as distinguished from its quality of good or bad. The cases seem to shew that this is the true criterion.' Alderson, B., 'It is not necessary to set out instruments of any kind in an indictment, except where it is material for the Court to see that the thing described is described rightly. But here the charge is a false pretence. It is needless to set out instruments which are not in any way affected by the terms applied to them in the indictment.' (u)

A count stated that A. Brown agreed with G. Wilson and J. Benson, in consideration that A. Brown would receive divers iron rails, chairs, &c., from S. Atkins, the agent of a railway company, and convey them from St. Mary's to K., that G. Wilson and J. Benson would pay A. Brown a certain sum for the carriage of the said rails, &c. That it was the duty of S. Atkins whenever he delivered any such rails, &c., to A. Brown, to give to A. Brown certain tickets signed by S. Atkins, and containing the amount of rails, &c., delivered, and the place to which they were to be conveyed. That when A. Brown received such tickets he, after the carriage of the said rails, &c., gave such tickets to J. Brunt, as the agent of G. Wilson and J. Benson in that behalf; and that it then became the duty of G. Wilson and J. Benson to pay A. Brown for the said carriage of the said goods in the said tickets mentioned. That the prisoners A. Brown and J. Brown, well knowing the premises, falsely pretended to J. Brunt, as such agent as aforesaid, that A. Brown had received certain iron rails and chairs from S. Atkins, and that S. Atkins had given to A. Brown certain tickets as aforesaid signed by S. Atkins, containing the amount of the said goods so delivered by S. Atkins to A. Brown, and the place to which the said goods were to be conveyed, and that A. Brown had conveyed *the same* from St. Mary's to K. By means of which said false pretences the prisoners obtained from G. Wilson and J. Benson 'a certain large sum of money, to wit, the sum of £90.' It was urged in arrest of judgment that the count made the agreement material, and that only A. Brown was entitled to receive the money; but it was held that two persons might receive the money. Secondly, that the words 'the same' referred to tickets; but it was held that the fair construction was that 'the same' referred to goods. Thirdly, that the pretence must be made to the same person from whom the money was obtained, and that that must appear by the indictment;

(t) *Hamilton v. R.*, 9 Q. B. 271. See (u) *R. v. Coulson*, 1 Den. C. C. 592. *R. v. Goldsmith*, *ante*, p. 437.

but it was held that there was nothing in the Act which made it necessary that the pretence should be made to the same person as the money was obtained from; and when it was said that 'by means of the said false pretences' the money was obtained, that was a question of evidence: and if there were any means to shew that the pretence to A. operated on the mind of B., it might be shewn in evidence. Fourthly, that the tickets, being written documents, ought to have been set out; but it was held that the tickets need not be set out *in hæc verba*. (v)

The prisoner was indicted for an attempt to obtain money by false pretences. He had insured his house and furniture, and a fire had happened, and a person from the insurance office called on the prisoner, who delivered to him an inventory of the goods, which he said had been burnt by the fire. Some of the goods mentioned in the inventory were afterwards discovered. The indictment did not allege any contract, under which the prisoner could make any claim. The indictment charged the prisoner with having delivered a false inventory; but did not state wherein it was untrue. The indictment alleged that the prisoner made a claim, but no claim was proved beyond the delivery of the inventory. It was contended that the indictment ought to have alleged a contract, which entitled the prisoner to make the claim. Secondly, it was not alleged that any claim was made for the loss sustained: a mere false pretence, unaccompanied by any claim, was no offence. Thirdly, the indictment ought to have specified the particulars in the inventory which were false. Platt, B., having considered the points, said there was so much in them that he should not give judgment, but would consult the judges. (w)

The first count alleged that the prisoner did unlawfully pretend to F. E. that the wife of the said prisoner was then dead; by means whereof he obtained from F. E. £3 15s. of the moneys of the said F. E. with intent to defraud F. E. The second count was similar, except that it added the words 'and others' after the name of F. E. The third count stated that there was a friendly society, and that the prisoner was a free member of it, and that when the wife of a free member died he was by the rules of the society entitled to receive £5 from the society's stock; and that F. E. was one of the stewards of the society, and that the prisoner produced to F. E. a paper, which purported to be a certificate of the funeral of the prisoner's wife, and falsely pretended to F. E. that the paper contained a true account of the death and burial 'of the said wife of' the prisoner; and that the prisoner *further* falsely pretended to F. E. that 'the said wife of the said' prisoner was then dead, and that he as such free member was entitled to receive from the steward of the said society the sum of £5 by virtue of their rules in consequence of the death 'of his said wife.' By means of which *said last-mentioned* false pretence the prisoner

(v) *R. v. Brown*, 2 Cox, C. C. 348, Patteson, J., after consulting Coleridge, J. It was also objected that the money was not sufficiently described; but it was held that it was. See now the 14 & 15 Vict. c. 100,

s. 18, vol. i. p. 25. The third ruling in this case was recognised by Williams, J., in *R. v. Butcher*, Bell, C. C. 6.

(w) *R. v. Wakley*, 2 Cox, C. C. 484. It does not appear what became of the case, and the report is very unsatisfactory.



obtained from F. E. £3 15s. of the moneys of F. E. and others, with intent to cheat the said F. E. and others of the same. It appeared that F. E. was one of the stewards of the society, and that the moneys of the society were kept in a box, of which F. E., another steward, and the landlord of the inn where the box was kept, had each keys. The prisoner was a free member of the society, the rules of which had not been enrolled. A printed book containing the rules was produced; and it was proved that a printed book of the same kind had been delivered to the prisoner, who had been a member of the society for more than a year, and had paid his subscriptions. Upon this evidence Rolfe, B., held that the book produced was admissible in evidence against the prisoner. (x) By one of the rules every free member was entitled to be paid £5 out of the funds of the society on the death of his wife; and the prisoner had stated to the clerk of the society that his wife was dead, and had been told by the clerk that he must produce a certificate of her burial. Afterwards at a meeting of the stewards he produced the document mentioned in the third count, and said to the clerk, in the presence of F. E. and the other steward, that his wife was dead; the document was read by the clerk, and thereon F. E. took £5 out of the box and gave it to the prisoner. F. E. stated that he was induced to part with the money by the certificate, and that he should not have given it to the prisoner without the certificate. It was proved that the prisoner's wife was alive, and that the certificate was fabricated by the prisoner. It was submitted that neither the first or second count was proved, as it was not the statement of the wife's death that induced F. E. to part with the money, but the certificate; but Rolfe, B., held that the pretence was that the wife was dead, and that the certificate was only evidence of it. It was then urged that there was a variance, as the pretence was laid to have been made to F. E., and the evidence was that it was made to the clerk. Rolfe, B., 'The pretence is made in F. E.'s presence to all there; that is sufficient. I am inclined to think, however, that it would have been good if it had been stated to have been made to all.' It was next urged that the money was not obtained from F. E. Rolfe, B., 'It is paid by the hands of F. E., and he is for this purpose the agent of the others.' It was next urged that the property was not properly laid. Rolfe, B., 'The money is in the possession of F. E. and the two others, who had keys; that is sufficient to support the count laying the money as the money of F. E. and others.' It was next urged that the first count was not proved; it was answered that the money was actually in F. E.'s hand, and that as against a wrongdoer was sufficient to support that count: and Rolfe, B., held that was so. A general verdict of guilty having been found, it was moved, in arrest of judgment, that the last count mentioned 'the said wife' of the prisoner, and that that count did not state that the prisoner had a wife; but Rolfe, B., thought the last count as to this was sufficient, as it referred to the wife mentioned in the other counts. It was then urged that there were several pretences charged in the last count, and then the count alleged that by means of the said last-mentioned false pretence the money was obtained. The last pretence is that the prisoner was entitled to receive £5 in consequence of the death of his

(x) See *Brown v. Langley*, 4 M. & G. 466.

wife. Rolfe, B., 'That is perfectly correct. The count states several things; and then concludes with a statement of that pretence, which is in truth the pretence whereby the money was obtained. That count is clearly good.' (y)

An indictment charged that the defendant having in his custody and possession a certain parcel, to be by him delivered to Maria, Countess Dowager of Ilchester, upon the delivery of which he was authorised and directed to receive and take the sum of six shillings and sixpence and no more, for the carriage and portorage of the same; yet that defendant produced and delivered to T. Harris, then being servant to the said Countess of Ilchester, the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of nine shillings and tenpence was charged for the carriage and portorage of the said parcel, and unlawfully, knowingly, and designedly, did falsely pretend to the said T. Harris, that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged, and was due and payable, for the carriage and portorage of the said parcel; and that defendant was authorised and directed to receive and take the said sum of nine shillings and tenpence for the carriage and portorage of the said parcel; by means of which said false pretences, defendant did unlawfully, knowingly, and designedly obtain of and from the said T. Harris the sum of three shillings and fourpence in moneys, of the moneys of the said Countess, with intent to cheat and defraud her of the same; whereas in truth and in fact, &c. The delivering the parcel mentioned in the indictment, and receiving nine shillings and tenpence, instead of that which he ought to have received, namely, six shillings and sixpence, was sufficiently brought home to the defendant. But it appeared that the parcel was a *basket* of fish: upon which it was contended on behalf of the prisoner, in the first place, that the indictment was not upon the 30 Geo. 2, c. 24, but upon a public local Act, the 39 Geo. 3, c. 58, (z) by which it is enacted, that if any porter, or other person employed in the portorage or delivery of the 'boxes, *baskets*, packages, *parcels*, trusses, game, or other things,' mentioned in the Act, shall demand or receive, in respect of such portorage or delivery, any greater sum or sums than the rates or prices thereinbefore fixed, such persons shall for every such offence forfeit not exceeding twenty nor less than five shillings: and that, being upon such Act, the *basket* in question was not properly described as a *parcel*; that parcel was not a generic name, and that the indictment should have described the thing according to the fact. (a) Lord Ellenborough, C. J., was of opinion, that if the indictment had been upon the 30 Geo. 3, this would have been a fatal variance; but that, as the indictment was upon the 30 Geo. 2, c. 24, a basket answered the general description of a parcel well enough. In the next place, it was objected that as the nine shillings and tenpence were

(y) *R. v. Dent*, 1 C. & K. 249. See *R. v. Hamilton*, 9 Q. B. 271, that the first and second counts were good, although they did not shew how the pretence could operate to obtain the money, upon which ground they were objected to, but no opinion pronounced by Rolfe, B.

(z) Entitled 'An Act for regulating the rates of portorage to be taken by innkeepers, and other persons within the cities of London and Westminster, the borough of Southwark, and places adjacent.'

(a) See as to this objection, *Cook's case*, 1 Leach, 105. 2 East, P. C. 616.

paid to the defendant by the servant of the Countess of Ilchester, the indictment had improperly averred that the moneys obtained by the defendant, namely, the three shillings and fourpence, were 'the moneys of the Countess,' though she had afterwards repaid the servant the whole sum of nine shillings and tenpence; that in fact the three shillings and fourpence never had been hers, and whether or not she was bound to reimburse her servant, this particular sum of three shillings and fourpence was at the instant the sole property of the servant. And upon this point Lord Ellenborough held, that the subsequent allowance by the Countess of Ilchester did not make the money paid to the defendant her property at the time, that she was not chargeable for more than was actually due for the carriage of the basket, and that it depended on herself whether she should pay the overplus. But the servant afterwards stated, that at the time of this transaction he had in his hands upwards of nine shillings and tenpence, the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment. In the last place, it was objected, that as the offence certainly came within the 39 Geo. 3, c. 58, the defendant ought to have been prosecuted on that statute; but Lord Ellenborough said, that the remedy given by that statute was cumulative, and did not take away the remedies which before existed either at common law, or by other Acts of Parliament. (b)

The indictment alleged that the prisoner 'unlawfully, knowingly, and designedly did feloniously pretend;' and Law, R., thought that the indictment was bad, and after consulting Bosanquet and Taunton, JJ., stated they were of the same opinion, and the prisoner was therefore acquitted. (c)

By 24 & 25 Vict. c. 96, s. 88, noticed *ante*, p. 467, an indictment for obtaining goods by false pretences need not allege any ownership of the chattel, money, or valuable security, but formerly this was otherwise. (d)

Where the first count of an indictment charged that the prisoner did falsely pretend to J. Lovelock that he was sent by W. P. for an order to go to Bracey's (meaning J. Bracey, a shoe factor) for a pair of high shoes; by means of which false pretence he unlawfully obtained from the said J. Bracey one pair of shoes of the goods and chattels of the said J. Bracey, with intent to cheat the said J. Lovelock of the price and value of the said shoes, to wit, of the sum of nine shillings of the moneys of the said J. Lovelock; and the second count charged that the prisoner did falsely pretend to the said J. Lovelock that W. P. had said that the said J. Lovelock was to give him an order to go to Bracey's for a pair of high shoes; by means of which false pretence he unlawfully obtained from the said J. Bracey, in the name of the said J. Lovelock, one pair of shoes, of the goods and chattels of the said J. Bracey, with intent to cheat the said J. Lovelock of the same; the prisoner having pleaded guilty, judgment was arrested,

(b) *R. v. Douglas*, 1 Campb. 212.

(c) *R. v. Walker*, 6 C. & P. 657. (This case was decided under the repealed Act.) But see *R. v. Carradice*, R. & R. 205, *ante*, p. 314, where an indictment for taking fish alleged them to have been 'feloniously'

taken, and the judges thought that did not vitiate the indictment. C. S. G.

(d) *R. v. Norton*, 8 C. & P. 196. Alderson, B., Williams and Coltman, JJ. *R. v. Martin*, 8 A. & E. 481. *Sill v. R.*, 1 E. & B. 553. *R. v. Bullock*, Dears. C. C. 653. See *R. v. Godfrey*, D. & B. 426.

on the ground that neither count charged an offence within the 7 & 8 Geo. 4, c. 29, s. 53. (e)

Where an indictment alleged that Pawson was possessed of a mare, and Henderson of a horse, and that Henderson and Barlow 'unlawfully and fraudulently did falsely pretend to Pawson that Barlow was then and there possessed of a certain sum of money, to wit, the sum of £12,' and that if Pawson would exchange the said mare for the said horse, Barlow was willing to purchase the said horse of Pawson, and then and there to pay Pawson the sum of £12; whereas Barlow was not then possessed of the said sum of £12: the prisoners pleaded *autrefois acquit*, to which there was a demurrer; and, on a case reserved, it was held that the indictment was bad, because it did not allege that the prisoners knew that Barlow had not got the money. (f)

The indictment alleged that the prisoner 'unlawfully did falsely pretend to C. S. that a paper writing, which was as follows:—

|  |                             |
|--|-----------------------------|
| 'Folio   | 'London Friendly Union,     |
| '15,610  | '71, Leadenhall Street.     |
| 'Established for the encouragement of trade, and to give employment to industrious artisans. |                             |
| 'Received of   | Two Shillings and Sixpence, |
| the December Quarter's subscription to this Institution.                                     |                             |
| '1842.   | 'Treasurer, W. J. THURNELL. |
| <hr/>  |                             |
| '£0 2s. 6d.'   |                             |
| <hr/>  |                             |

was a good £5 Ledbury bank note. There were other similar counts, but it was not alleged in any of them that the prisoner *knew* that the paper writing was not a £5 note. It was objected, on the authority of *R. v. Henderson* (g), that this indictment was bad, as it did not allege that the prisoner knew that the paper was not what he alleged it to be; and Wightman, J., after taking time to consider, held that the indictment was bad. The jury might find the prisoner guilty on this indictment, although it was not proved that he knew that the instrument was not such as he stated it to be; and as the prosecutor was deceived by the instrument, so might the prisoner have been; and the defect was not aided by the statement of the intent. (h)

But where an indictment alleged that the defendant 'unlawfully did falsely pretend to H. H., that he the defendant had caused a writ of right to be issued at the suit of M. W., &c.,' 'By means of which false pretences the defendant did unlawfully obtain from H. H. £1' with intent, &c., and the defendant was found guilty, the Court of Queen's Bench held that, as the indictment used the words of the statute, it was sufficient, after verdict, under the 7 Geo. 4, c. 64, s. 21. (hh)

(e) *R. v. Tully*, 9 C. & P. 227, Gurney, B., after consulting Patteson, J. In *R. v. Brown*, 2 Cox, C. C. 348, Patteson, J., said, 'Tully's case was a peculiar one, and I am not quite sure that that case could be supported if carried into a court of error.'

(f) *R. v. Henderson*, 2 M. C. C. 192. C. & M. 328. This case was only argued for

the prisoners. As to the plea of *autrefois acquit* in this case, see vol. i. p. 38.

(g) *Supra*.

(h) *R. v. Phillpotts*, 1 C. & K. 112.

(hh) *R. v. Bowen*, 13 Q. B. 790. Lord Denman, C. J., observed that *R. v. Henderson*, *supra*, note (f), was not fully

By 24 & 25 Vict. c. 96, s. 88, *ante*, p. 467, it is sufficient in the indictment to allege that the party accused did the act with intent to defraud without alleging an intent to defraud any particular person.

Where in an indictment for false pretences the words 'with intent to defraud,' are omitted, the indictment is bad, and cannot be amended under the 14 & 15 Vict. c. 100, s. 1. (*i*)

It has been held that several defendants might be charged jointly in the same indictment, if they were all acting in concert together, and taking part in the same transaction. (*j*) And it was held also to be no objection in arrest of judgment, that the indictment contained several charges of the same nature in the different counts. Lord Kenyon, C. J., said, 'This objection would be well founded if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But, in this case, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they may be joined in the same indictment.' (*k*)

An indictment alleged that the prisoner 'did unlawfully attempt and endeavour, fraudulently, falsely, and unlawfully to obtain from the "Agriculturist Cattle Insurance Company" a large sum of money, to wit, the sum of £22 10s., with intent thereby then and there to cheat and defraud the said "Agriculturist Cattle Insurance Company;" after a verdict of guilty, upon a case reserved, it was objected that the nature of the attempt was not sufficiently specified, and the money was not laid to be the property of any one; and the judges were unanimously of opinion that both objections were well founded, and the judgment was arrested. (*l*)

Upon an indictment for obtaining money by false pretences, the pretences which, as we have seen, must be distinctly set out, (*m*) must at the trial be proved as laid: so that, where the indictment stated that the defendant pretended that he had paid a sum of money into the Bank of England, and it appeared upon the evidence that he did not say that he paid the money, but that he said generally that the money had been paid into the bank, Lord Ellenborough, C. J.,

argued, and that no reference was made to the 30 Geo. 2, c. 24, s. 1, which contained the words 'knowingly and designedly.' In *R. v. Gruby*, 1 Cox, C. C. 249, it was held that an indictment alleging that the prisoner 'unlawfully did falsely pretend' that a document was a lease for nine years, was sufficient (after plea), without any allegation of knowledge that the pretence was false. *R. v. Henderson* was there distinguished as not having the word 'unlawfully' in the indictment; but this was a mistake, as that word is in 2 M. C. C. 192.

(*i*) *R. v. James*, 12 Cox, C. C. 127.

(*j*) *R. v. Martin*, 8 A. & E. 481. *R. v. Molland*, 2 M. C. C. R. 276, *ante*, p. 490.

(*k*) *R. v. Young*, *ante*, p. 472. In one case it is reported that Maule, J., stated that several counts, charging separate offences by obtaining money under distinct

false pretences from different persons, could not be included in the same indictment. *R. v. Bassett*, 1 Cox, C. C. 51. But as the prosecutor was put to his election, and the previous case was not cited, and as that very learned judge well knew that the general rule in misdemeanors is that any number of misdemeanors may be included in the same indictment, probably the case is incorrectly reported. See also *ante*, p. 67, *R. v. Hempstead*, MS. Bayley, J., and *R. & R.* 344.

(*l*) *R. v. Marsh*, 1 Den. C. C. 505. The proper course is to allege the false pretences, and to deny their truth in the same manner as in an indictment for obtaining property by false pretences, and then to allege that by means of the false pretences the prisoner attempted to obtain the property. C. S. G.

(*m*) *Ante*, p. 529.

held this to be a fatal variance; and said, that an assertion that money had been paid into the bank was very different from an assertion that it had been paid into the bank by a particular individual. (*n*)

One count alleged that the prisoner pretended to J. Holden, the treasurer of the company of Free Fishers and Dredgers of Whitstable, that he was the agent of two persons commonly called the 'Jim Butchers,' and that he was sent by them to the pay-table of the said company to receive certain moneys payable to them, and that he was authorised to receive such moneys for them. Another count alleged that the prisoner pretended to W. Butler that he was authorised to send him to the pay-table of the said company to get the money of the 'Jim Butchers.' A third count alleged that the prisoner pretended to W. Butler that he was the agent of the 'Jim Butchers,' and that he was sent by them to receive moneys payable to them, and was authorised to receive such moneys. Each count alleged that by means of the pretences the prisoner obtained £2 3s., and the two first counts stated the money to belong to the company, and the third to W. Butler. The members of the said company were employed in working on the oyster grounds of the company, and were paid for their work by the treasurer; amongst the freemen of the company were two persons who went by the name of the 'Two Jim Butchers,' and the money due to them was commonly called the 'Two Jim Butchers' money.' One Friday evening W. Butler, a little boy, went to the pay-table of the company, and said, 'I want the "Two Jim Butchers' money;"' whereon J. Holden, the treasurer, paid the boy £2 3s., the sum that was due to them. W. Butler proved that the prisoner came to him and another boy, and said, 'Which of you wants to earn a penny?' and on his saying, 'I do,' the prisoner said, 'Go to the pay-table and fetch the "Two Jim Butchers' money;"' the boy accordingly went, and asked for the 'Two Jim Butchers' money;' received £2 3s., and took it to the prisoner, and received from him a penny. The boy said he went and received the money because the prisoner had promised him a penny. The treasurer said that he parted with the money because the boy said he wanted the 'Two Jim Butchers' money,' and that he should not have parted with it without that. And, upon a case reserved, it was held that the false pretence was not correctly stated in any of the counts. The prisoner was, no doubt, guilty of obtaining money by false pretences; but it was also clear that the pretence by which the money was obtained was that the boy had authority to receive it, and that is not one of the pretences laid in the indictment. The prisoner, no doubt, was as much responsible for what the boy said as if he, the prisoner, had gone to the pay-table, and made the false representation himself; but the representation of the boy was that he, the boy, had authority to receive money; there was no such representation alleged in the indictment, and that was the representation on which the treasurer parted with the money. (*o*)

(*n*) *R. v. Plestow*, 1 Campb. 494.

(*o*) *R. v. Butcher*, Bell, C. C. 6. During the argument, Cockburn, C. J., said, 'I am

inclined to agree in thinking the conduct of the defendant amounted to a false representation; but it was a false representation to

An indictment alleged that the prisoner pretended that 'he had served a certain order of affiliation on one J. Bell:' the evidence was that he had said 'he had been with the order to Bretby to serve Bell, and left it with the landlady at the Chesterfield Arms there, where Bell lodged;' and it was held that the allegation in the indictment meant a personal service of the order, and consequently that there was a variance in the proof. (*p*)

A count stated that the prosecutrix had written and sent divers letters to the prisoner, and that he pretended that a parcel contained the said letters, and each and every of them, whereas the parcel did not contain the said letters, but only one of them. On cross-examination it appeared that the prosecutrix had destroyed some of the letters; it was objected that the pretence that the parcel contained all the letters was not proved; but the Court held the allegation distributive. (*q*)

The prisoner was indicted for obtaining from George Birtles 5s. 6d. by falsely pretending that he was an agent for a loan society. He went to Birtles, and told him that he was an agent for a loan society, and could get £10 for him, and that the charge would be 5s. 6d.; Birtles told him to go to his wife for it, which he did, and said he came for 5s. 6d., as the man from the loan-office was waiting for the money; and she gave him 5s. 6d. of her husband's money; it was objected that the proof was that the money was not obtained from the prosecutor as alleged, but from his wife; but, on a case reserved, the conviction was affirmed. (*r*)

A count alleged that the prisoners pretended that some houses had belonged to a family of the name of Lloyd; that Mr. Lloyd was deceased, and that the family lived at Stratford. The proof was that the prisoners pretended that the family lived two miles from Stratford, and that the elder member of the family was dead; and it was held that these were fatal variances. (*s*)

Where a count alleged that the prisoners promised H. G. H. to marry her, and that he and H. G. H. had taken a messuage for their residence after their marriage, and that the prisoner pretended that he intended to go to Newcastle to purchase furniture for the said house, &c.; and it appeared that the house was not hired until after the prisoner got the money, and that the pretences were made whilst they were in treaty for the house; it was held, on a case reserved, that the prisoner ought not to have been convicted on this count. (*t*)

this effect; it was as if he had gone to the pay-table himself, taking the boy with him, and said, "This boy is authorised to receive the Jim Butchers' money." See *R. v. Boyd*, 5 Cox, C. C. 502, as to a representation made by an agent of a prisoner.

(*p*) *R. v. Bailey*, 6 Cox, C. C. 29. Greaves, Q. C., after consulting Platt, B. It was also held that this variance was not amendable under the 14 & 15 Vict. c. 100, s. 1.

(*q*) *R. v. Colucci*, 3 F. & F. 104. Martin, B., and Keating, J. It is not stated when the letters were destroyed, or in what

way that fact had any bearing on the indictment, which, as reported, only stated that the prosecutrix had sent 'divers letters,' which allegation did not include every letter, and then the pretence referred to 'the said letters.'

(*r*) *R. v. Moseley*, L. & C. 92. Any variance of this kind might be amended under the 14 & 15 Vict. c. 100, s. 1.

(*s*) *R. v. Ward*, 1 Cox, C. C. 101. The Recorder. There were other pretences, but no proof that they alone induced the prosecutor to part with his money.

(*t*) *R. v. Johnston*, 2 M. C. C. R. 254.

The prisoner was indicted for obtaining hop-poles from Cloke by pretending that he was authorised by F. The prisoner hearing that F. wanted hop-poles, went to him, and agreed to sell him a number at so much per hundred to be delivered at a station. He then went to Cloke, who had hop-poles, and said he was commissioned by F. to buy them, and promised that F. would send a cheque for the price. A cheque was sent; but it did not appear by whom. Cloke sent the poles to the station and F. got them. Then the prisoner got the money from him. It was urged that the prisoner never got the poles. He pretended to sell goods he had not. Cloke ratified the contract between F. and the prisoner, and if the prisoner was indictable at all, it was for obtaining money from F., not goods from Cloke; and Wightman, J., so held, and directed an acquittal. (u)

The indictment alleged that the prisoner falsely pretended that he was the servant of W. Hardman of Stickley (the said W. Hardman being well known to the prosecutor), and that he was sent by the said W. Hardman to buy a horse for him; by means, &c. The prisoner had gone up to Henderson, the prosecutor, who had a mare for sale, and asked him if she was for sale; he said, 'Yes.' 'What price?' — '£12.' 'Where do you come from?' — 'Denton Burn.' 'The same place,' said the prisoner, 'that my governor is from.' 'Who is he?' — 'Mr. Hardman.' Henderson knew no person of the name of Hardman, but he had known very well one Harding of Benwell Lodge. Henderson and the prisoner then went to an inn, where Henderson's father joined them. Henderson said to his father, 'I am going to sell a horse to Mr. Harding of Benwell Lodge;' upon which the father said, 'He does not live there now.' 'No,' said the prisoner, 'he lives now at Stickley farm.' And the prisoner ultimately got the mare. Upon a case reserved it was held that the indictment was not supported by the evidence; for the indictment alleged that the prisoner pretended he was the servant of Hardman, while the evidence shewed that the prosecutor considered him the servant of Harding. But if the indictment had alleged that the prisoner pretended that he was the servant of Harding, it would have been supported. The prosecutor confounded Hardman with Harding, and then the prisoner availed himself of what was passing in the prosecutor's mind, and linked Hardman into Harding. It was further held that the proviso in the 24 & 25 Vict. c. 96, s. 88, did not prevent the prisoner from being acquitted; for that proviso does not authorise the proof of a larceny under any state of facts that may be alleged in the indictment; but provides that the prisoner shall not be acquitted of the misdemeanor by reason of its being merged in the felony, shewing that the pretences alleged must still be proved. (uu)

But it is not necessary to prove the whole of the pretence charged: proof of part of such pretence, and that the money was obtained by such part, is sufficient. An indictment on the repealed statute 30 Geo. 2, charged the prisoner with obtaining money under colour of obtaining a pension for a discharged seaman, by falsely pretending that the prisoner had received an answer by letter, in reply to an

(u) R. v. Martin, 1 F. & F. 501.

(uu) R. v. Bulmer, L. & C. 476. *Quære*, whether the indictment might not have been

amended by substituting the name of Harding for Hardman under the 14 & 15 Vict. c. 100, s. 1.



application he had made on the seaman's behalf, that two guineas must be sent to the under clerks as fees, *which they always expected, and that nothing could be done without it.* There was no evidence that the prisoner used that part of the pretence in italics, but there was evidence that he used the residue, and by means thereof obtained the money; and on point saved, the Court held it not necessary that the whole of the pretence charged should have been proved, and that the conviction was right. (v)

But the rule that it is sufficient to prove any part of the pretences laid, if the property were obtained thereby, must be confined to those cases where such part is a separate and independent pretence; for if false pretences are so connected together upon the record that one cannot be separated from the other, and the statement of one of those pretences is insufficient in point of law, no judgment can be given upon the other pretence. The indictment stated that the prisoner 'did falsely pretend to W. Walker that he was a captain in the service of the East India Company, and that a certain promissory note, which he then and there produced and delivered to the said W. Walker, purporting to be made for the payment of the sum of £21, was a good and valuable security for the sum of £21;' whereas the defendant was not a captain in the service of the East India Company, and whereas the said promissory note was not a good and valuable security for the sum of £21, or for any other sum of money whatsoever.' Upon error it was objected, amongst other things, that the allegations respecting the note were too loose. No description of the note was given. The record did not shew who was the maker, nor when the note was payable. Something ought to have been stated to identify it, and that indictment ought to have shewn how the note proved not to be a valuable security. It might have been a forgery, or invalid for want of a stamp. The record ought to shew that the defendant knew the instrument to be worthless. It might have been a note drawn by himself, and then so far as it was a token, it was a true one. On the part of the Crown it was admitted that the defendant's knowledge was not alleged, except by the words 'falsely' and 'fraudulently,' which were not sufficient, and the note was not set out so as to identify it. But the false pretence of being a captain in the East India Company's service was properly alleged, and bore out the conviction. The crime as charged being made up of two false pretences it must be presumed that the judge would tell the jury that one of them was so laid as not to call for an answer. (w) Lord Denman, C. J., 'The indictment here omits to say in what respect the note was not valuable. It may have been for want of a stamp, or from other causes. We do not mean to throw any doubt on the late decisions, and there is much of the argument for the defendant below in which we do not concur. But the pretences stated in

(v) *R. v. Hill*, MS. Bayley, J., and R. & R. 190. In *R. v. Ady*, 7 C. & P. 140, Patteson, J., said, 'It is not necessary that all the pretences should be false. If you believe that any one of them was false, and that the mind of the prosecutor was operated upon by it, then you will find the defendant guilty.' See per Coleridge, J.,

in *R. v. Dale*, *ante*, p. 517. *R. v. Lince*, 12 Cox, C. C. 451.

(w) Lord Denman, C. J., observed, 'Can we presume on a writ of error? On a special verdict it might have been stated that the jury convicted as to one pretence, but negatived the other.'

this indictment must be taken together, and the falsification as to that part which relates to the note, is not sufficient. The judgment must therefore be reversed.' Patteson, J., 'I do not know that I should have gone the whole length of reversing this judgment if the note had appeared to be that of another person; but consistently with this indictment, the note may have been the defendant's own, and then the pretences are so connected together that we cannot separate them.' (x)

On an indictment for false pretences it appeared that the prisoner had obtained the goods by a false letter, which had been lost before the trial; and Tindal, C. J., allowed parol evidence of its contents to be given. (y)

The indictment charged the prisoner with falsely pretending that he had obtained from Lord Stanley the appointment of emigration agent at Port Philip, which was a situation worth £600 a year, and that for £200 he would give J. Heron one-third of the emigration agentship. According to the evidence of the prosecutor and his witnesses the prisoner obtained the money by means of the pretences stated in the indictment, which were false. The prisoner had also urged the prosecutor to become his partner, and engaged that if the prosecutor accepted his proposal of a partnership, and advanced him the £200 as a bonus, the prosecutor should have a third share of the emigration agentship, and of the other business, which the prisoner would have in the colony. After the pretences stated in the indictment had been made, and before the prosecutor parted with his money, a partnership deed was, at the prisoner's instance, prepared by the prisoner's solicitor, and executed by the prosecutor and prisoner. The prisoner had, however, previously promised that on drawing up the deed of partnership between them he would shew the prosecutor the letters from Lord Stanley appointing the prisoner emigration agent. The consideration of the partnership was stated in the deed to be £200, and no mention was made of the emigration agency in respect thereof. It was objected that as the deed did not contain the pretences stated in the indictment, but on the contrary represented the £200 to be given in consideration of a general partnership, and as the prosecutor had made use of the deed as part of his case, the parol evidence of the false pretences ought to be rejected. The Recorder overruled the objection, and told the jury that if they believed the evidence of the prosecutor, and were satisfied that the prosecutor in fact parted with his money on the pretences laid in the indictment, and that the preparation of the partnership deed, and the execution of it, were a part of the prisoner's scheme to effect the fraud, the prisoner might properly be convicted; and, upon a case reserved after conviction, upon the question whether, under the circumstances, upon the production of the deed as part of the prosecutor's case, the parol evidence ought to have been excluded, the judges held the conviction right. (z)

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which, in fact, was

(x) *R. v. Wickham*, 10 Ad. & E. 34.  
 Littledale and Coleridge, JJ., concurred.

(z) *R. v. Adamson*, 2 M. C. C. R. 286.  
 1 C. & K. 192.

(y) *R. v. Chadwick*, 6 C. & P. 181.

composed of crystals, evidence is admissible of a false pretence on a prior occasion to another person that a chain was gold, whereas it was plated, and on another distinct occasion that a ring was of diamonds, which it was not. And further, that it was no objection that the diamond ring spoken of on the prior occasion was not produced in court. (a)

As to evidence of other similar false pretences being admissible, see Vol. III., Evidence.

An indictment alleged that the prisoner pretended that he was a captain in the 5th Regiment of Dragoon Guards, and it was held that evidence was admissible that he had represented to the prosecutor that he had been in India and in active service in Cabul; for the falsehood of the pretence alleged, and the intent to defraud, must be proved; and his having told other falsehoods was evidence of an attempt to deceive. A number of statements might have been made, all contributing to create a general impression that he was what he assumed to be, but there might be one particular representation which was more influential than all the rest, and which eventually enabled the prisoner to obtain his object; and this pretence of his having been in India was essentially connected with the pretence alleged, since it was probably used as a means of confirming the impression that he was in the Dragoon Guards. It was also held, that it might be proved that the prisoner had, after he had obtained the money, represented himself to be in the Dragoon Guards to another person, for this evidence tended to confirm the prosecutor's evidence. It was also held, that it might be proved that, for three years previously to the offence, the prisoner had gone by another name, and followed a different profession, for that was one mode of proving that the prisoner was not in the Dragoon Guards; but it was merely presumption, and might be rebutted. The prisoner had assumed the name of Captain Hamilton, and represented himself to be in the Dragoon Guards before he was acquainted with the prosecutor, and had repeatedly appeared in the undress uniform of a cavalry regiment, and it was some time after his introduction to the prosecutor that he obtained the money; it was urged that the false pretence must be immediately connected with the object of obtaining the money, and here the pretence was made before the prisoner knew the prosecutor. It clearly, therefore, was not made for the purpose alleged in the indictment. But it was held that every time a man reiterates a false pretence he makes one within the Act. He does not exhaust his liability by the commission of a single fraud. If he assumes a false character for one object, his maintaining it for the accomplishment of another does not divest the second of its criminality. But it is for the jury to determine whether the character was maintained for the purpose of defrauding the prosecutor. (b)

Where an indictment alleged a pretence to have been made to J. Baggally and others, and the pretence was made to J. Baggally in the absence of his partners, but with intent to defraud the firm, we have seen that it was held that the evidence supported the indictment. (c)

(a) *R. v. Frances*, 43 L. J. M. C. 97.  
See vol. iii. *Evidence*.

(b) *R. v. Hamilton*, 1 Cox, C. C. 244.  
Pollock, C. B., and Maule, J.

(c) *R. v. Kealey*, 2 Den. C. C. 68, *ante*.

Where the prisoners were charged with pretending that a certain vessel was in Penarth Roads, and that one of them was the master and the other of them was the mate of the said vessel, and that they wanted the sum of £3 to pay for the pilotage of the vessel, and it was proved that no vessel answering the description of the prisoners' supposed ship had arrived or had been heard of down to the trial, and after the prisoners were in custody one of them said that the vessel was expected at Swansea, and subsequently that there was no vessel at all; Wightman, J., seems to have held that the fact that there was no vessel at all, or with which they were connected, negatived the pretence that they were the master and mate of the supposed vessel. (*d*)

One count alleged a pretence to have been made to R. Mills, and the money obtained from him; another count alleged the pretence to have been made to H. Insoll, and the money obtained from him. The prisoners had been members of 'The Conqueror' lodge of Odd Fellows, by the rules of which, on the death of a member, his family became entitled to a sum of money. 'The Conqueror' lodge was a branch lodge of the Odd Fellows at Wordesley, and on the death of any one of its members a certificate in a printed form was presented to the secretary at Wordesley. The prisoners went to Insoll, the secretary at Wordesley, and presented a certificate in the printed form and filled up in writing, purporting to certify the death of a member of 'The Conqueror' lodge. At this time 'The Conqueror' lodge had been dissolved, and a new lodge formed; but Insoll was not aware of this fact, and did not doubt the genuineness of the cheque; and the prisoners told him they were members of 'The Conqueror' lodge, and that the man named in the certificate had died of fever, and the money was wanted to provide for his funeral immediately, and in consequence of this representation the secretary accompanied the prisoners to Mills, the treasurer, who, upon the facts stated, being equally ignorant of the dissolution, paid the prisoners £16, the amount to which the family of a member was entitled under the circumstances mentioned in the certificate. The certificate was altogether false. It was objected that neither count was proved, for the pretence was to Insoll, and the money obtained from Mills; Erle, J., 'Mills is the treasurer, who disposes of the money of the society on receiving certificates from Insoll, who is the responsible party. The prisoners go to Insoll, and Insoll goes to the mechanical instrument, the treasurer, and the latter produces the money. I think that it is correctly stated that Insoll paid the money, and that it was obtained from him. The second count, therefore, is correct.' (*e*)

The prisoner was charged with obtaining money by falsely pretending that he was of age, and it was held that a plea of infancy to an action brought against him was not admissible, as the plea might have been pleaded without his knowledge; but that evidence that, when he was applied to for the payment of a debt, he had said he was a minor and should plead his infancy, ought to be left to the jury. (*f*)

(*d*) *R. v. Baroisse*, 5 Cox, C. C. 559.

(*e*) *R. v. Rouse*, 4 Cox, C. C. 7. As the certificate was produced, and the pretences told to Mills in the presence of the pris-

oners, it should seem that the first count was proved.

(*f*) *R. v. Walker*, 1 Cox, C. C. 99. The Common Sergeant, after consulting Rolfe, B. See *R. v. Simmonds*, 4 Cox, C. C. 277.

By 24 & 25 Vict. c. 96, s. 88, *ante*, p. 467, on the trial it is not necessary to prove an intent to defraud any particular person, but it is sufficient to prove that the party accused did the act charged with an intent to defraud.

In cases where goods had been obtained from another by mere fraud, the Court had formerly no power of awarding restitution on conviction of the offender, as in cases of felony; (*g*) but restitution may now be awarded under the 24 & 25 Vict. c. 96, s. 100. (*h*)

Where the goods were obtained by a forged instrument, which fell within the class of instruments, the forging of which was made felony by statute, the indictment must formerly have been for forging the instrument, as the misdemeanor was merged in the felony. (*i*) But if the offence were now to turn out to be felony, the prisoner might be convicted, unless the Court were to discharge the jury, and direct the prisoner to be indicted for felony, under the 14 & 15 Vict. c. 100, s. 12. (*j*)

Where the prisoner, a servant of Mr. Warman, applied to Bendon's wife for payment of a debt of seventeen shillings due to Warman: she refused, unless she had Warman's receipt, and the prisoner went away and returned with the following document, upon which she paid the money: —

Received from  
Mr. Bendon, due to  
Mr. Warman, 17s. 0d.  
Settled.

Six judges thought the document was a forged receipt; but five judges thought it did not purport to be the receipt of Warman, and therefore was no forgery, as if it was to be taken as the receipt of the prisoner, it was no forgery; and that the offence of the prisoner was the obtaining money under false pretences. (*k*) Wherever an instrument is of such an ambiguous character, it is prudent, since the 14 & 15 Vict. c. 100, s. 12, to indict for obtaining money by false pretences, because then the prisoner may either be convicted on that indictment, or an indictment for felony may be preferred by the direction of the Court.

Upon an indictment for any offence mentioned in this chapter, the jury, under the 14 & 15 Vict. c. 100, s. 9, may convict of an attempt to commit that offence, and thereupon the prisoner may be punished in the same manner as if he had been convicted on an indictment for such attempt. (*l*)

The eighth count of an indictment alleged that the prisoner falsely pretended to the relieving officer of a parish that he had delivered to a pauper of the parish two loaves of bread, and that each of them weighed 3½ lbs.; by means of which false pretences he unlawfully attempted to obtain the sum of one shilling from the guardians of the

(*g*) *Parker v. Patrick*, 5 T. R. 175. R. v. De Veaux, 2 Leach, 585. See *Noble v. Adams*, 7 Taunt. 59. *Stephenson v. Hart*, 4 Bing. 476.

(*h*) Vol. i. p. 86.

(*i*) *Foster*, 373. R. v. Evans, 5 C. & P.

553. R. v. Anderson, 2 M. & Rob. 469. See other similar cases in the chapter on *Forgery, post*.

(*j*) See the section, *ante*, vol. i. p. 62.

(*k*) R. v. Inder, 1 Den. C. C. 325.

(*l*) See the section, vol. i. p. 62.

parish; the ninth and tenth counts were similar. (m) The prisoner had entered into a contract with the guardians of Great Yarmouth to supply the out-door poor with loaves of bread of  $3\frac{1}{2}$  lbs. each, at sevenpence per loaf, until the 25th day of March, 1854, and the guardians agreed to pay the prisoner at the price aforesaid for the loaves so supplied within two calendar months from the said 25th day of March. The contract also provided for the guardians retaining money due to meet deficiencies in its performance by the prisoner. On paupers applying for out-door relief, the relieving-officer gave the applicant a ticket in this form —

|  |
|--|
| <p>31<br/>Bread<br/>One Loaf.<br/>Wm. Harbert.</p> |
|--|

The pauper, on presenting the ticket to the prisoner, was entitled to receive a loaf. By the course of dealing the prisoner would return the tickets the following week after they were delivered to him, with a statement in writing of the number of loaves he had supplied, but no other particular would be delivered, and the relieving-officer would credit the prisoner in his books for the amount, and the money would then be paid to him at the time stipulated in the contract. A number of tickets had been delivered to paupers, who had obtained loaves from the prisoner in the usual course, and many of these loaves were deficient in weight. The prisoner had, in the usual course, returned the tickets to the relieving-officer, with a note in writing of the number of tickets returned, and they were entered to the credit of the prisoner's account in the books of the guardians; but the prisoner was apprehended before any money was paid to him. Upon a case reserved, after a verdict of guilty, and after argument, Parke, B., delivered the following judgment: 'It was contended that the counts for attempting to obtain money by false pretences could not be supported, because the offence of obtaining money under false pretences was committed only when the money was obtained wholly without consideration, and that the offence was analogous to larceny, of which the prisoner might be convicted if the offence should appear on the trial to be larceny. There are many cases, no doubt, in which the distinction is very subtle between the misdemeanor of obtaining money by false pretences and larceny; but it does not follow that all the cases of obtaining money by false pretences are of that description. But it was strongly contended that the statute applied to no cases where there was some bargain or consideration for giving the money, and so some cause for the giving other than the false pretence, as where goods were sold under a false representation of the quality or value, and the purchaser had the commodity; otherwise the range of indictable offences would be greatly extended, and breaches of contract made the ground of criminal proceedings.' (n) 'But this is not

(m) They are set out at length, 1 Dears. C. C. 384.

(n) R. v. Kenrick, *ante*, p. 500, and R.

v. Abbott, *ante*, p. 501, were then mentioned, but no opinion intimated as to them.

the case of the sale of goods by a false pretence of their weight; it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, viz., that a greater number of pounds of bread had been delivered than had actually been delivered, and that representation made with a view of obtaining as many sums of two-pence as the number of loaves falsely pretended to have been furnished amount to. In this respect the case exactly resembles that of *R. v. Witchell*,<sup>(o)</sup> where the prisoner obtained money by the false pretence that certain workmen, whom it was his duty to pay, had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done, according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been obtained. A second objection was, that the prisoner was not to obtain the price of the number of pounds falsely stated to have been delivered in cash, but only to have *credit in account*. The statement in the case is that the prisoner was to return the tickets, and upon such return, with a written statement of the amount of loaves in the following week, would be credited in the relieving-officer's book for the amount, and the money would be paid at the time stipulated in the contract, that is, in two calendar months from the 25th March following. No further step would be necessary for the prisoner to receive payment. The prisoner did obtain credit in account from the relieving-officer in effect for the number of pounds falsely represented to have been delivered. Further, the contract stipulates that if the prisoner should fail in his performance of it, the guardians might deduct the damages and costs sustained thereby from the sum payable to him for loaves supplied. On the part of the prisoner it was contended, first, that the attempt to obtain credit in account for a sum of money by delivering up the tickets as vouchers, was not in itself an attempt to obtain money within the meaning of the statute; for that credit in account was not equivalent to money, and no doubt the credit in the relieving-officer's book was not equivalent to money, and the prisoner could not have been convicted of the offence of actually obtaining money by false pretences; secondly, it was contended that the credit in account would not necessarily lead to an ultimate payment, for there might be deductions for breaches of contract, which would prevent any payments in cash by the guardians. We have had great doubt on this part of the case, but do not think that this objection should prevail. We think that the contingency of the whole sum due to him being subject to deductions in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an *attempt* to do so. The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if, in this case, after the credit with the relieving-officer for the fraudulent over-

(o) *Ante*, p. 436.

charge, any further step on the part of the prisoner had been necessary to obtain payment, as the making out a further account or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving-officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in the case, no other act on the part of the prisoner would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered an attempt. The receipt of the money appears to have been prevented by the discovery of the fraud by the relieving-officer; and it is very much the same case as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the prisoner had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused.' (p)

On an indictment for attempting to obtain money by false pretences, it appeared that the prisoner was a collier, and in order to ascertain the amount of wages to which each collier was entitled, each collier, on going to work, was supplied with a certain number of tallies marked with a number corresponding with that marked against his name in his employer's books. In each tub of coal got by a collier he placed one of his tallies, and the tubs with the tallies in them were sent by rail to a canal, and there emptied, and the tallies put in one tub, and sent back to the pit's mouth, where they were hung on the tally board over the number on that board corresponding with the number on the tally, and so shewing the amount of work for which each man was entitled to be paid. These tallies were counted, and the number booked to the credit of the collier. The prisoner placed three tallies in the tub, containing other tallies, which was just about to be sent back to the pit; by which means the tallies would in due course have been placed on the tally board; but they were immediately removed from the tub by a person who saw them put in it. It was urged that there was no proof of any false pretence actually made; and at all events the false pretence was not complete. But it was held that the facts constituted the offence charged; the placing of the tally in the tub by the prisoner being an act done for the purpose of obtaining money which was not due to him, and with intent that the person whose duty it was to do so should place the tallies on the board, whereby he would have obtained credit for work which he had not done. (q)

Upon an indictment for attempting to obtain money by false pretences, tried at the Central Criminal Court, it appeared that Messrs. Duncan of New York, the correspondents of the Union Bank in Lon-

(p) *R. v. Eagleton*, Dears. C. C. 376 and 515. The act of the relieving-officer in making the entries was the act of an innocent agent, and precisely the same as if it had been done by the prisoner, and that gets rid of all the doubt, for which there really was no ground whatever. If the prisoner had put one innocent agent in motion, and any number of other innocent agents had been thereby put in motion, every act done would have been just the

same as if done by the prisoner. As to the point upon the deductions the simple answer was, the prisoner made the attempt, and, whether he succeeded or not, he was guilty of that attempt. C. S. G.

(q) *R. v. Rigby*, 7 Cox, C. C. 507. Martin, B., and Byles, J. This decision quite accords with *R. v. Eagleton*, Dears. C. C. 376, *supra*, and *R. v. Holloway*, 1 Den. C. C. 370, *ante*.



don, were in the habit of issuing circular letters of credit for certain sums, with a list of correspondents in different parts of the world, authorising the person to whom the letter of credit was given to draw in favour of one of those correspondents for such part as he might require of the stipulated sum for which the letter was given. The Union Bank correspondent, on giving cash on such draft, was to endorse the amount on the circular, and when the whole was advanced, the last person making an advance retained the circular. Each circular was numbered with a distinctive number. The prisoner obtained a circular from Messrs. Duncan for £210, No. 41, and having obtained different sums not amounting to £210 in England, went to St. Petersburg, and, having altered the circular by adding the figure 5 to 210, and so converted the circular into one for £5210, exhibited it to Messrs. Wilson of that place, one of the firms mentioned in the circular, and obtained from that house several sums, and finally a sum of £1200, and another of £2500, on drafts for those amounts on the Union Bank, drawn by the prisoner in favour of their firm in London, all of which were endorsed on the back of the circular. Messrs. Wilson forwarded the drafts to their house in London, and they duly presented the draft for £1200 on the Union Bank, and required payment of it. The Union Bank having been advised of the circular No. 41 by Messrs. Duncan as a circular for £210 only, and so discovering the fraud, refused to pay the £1200, and the prisoner, being afterwards found in England, was apprehended, and the indictment in question preferred. Parke, B., thought that a person, though personally abroad, might commit an offence in England, and that it was a question for the jury whether, although the prisoner's immediate object was to cheat Messrs. Wilson, he did not also mean that they or their correspondents or the indorsee from them should present the draft, and obtain payment of it from the Union Bank by presenting it as a true one: and he left the question to the jury whether he did so intend, and they found that he did; but, upon a case reserved, it was held that the conviction could not be supported. The question was whether, supposing the Union Bank had honoured the prisoner's draft upon them, he could have been convicted of obtaining any chattel, money, or valuable security. This would not have been an obtaining within the meaning of the statute, which contemplates the money being obtained according to the wish and for the advantage, or at all events to gain some object of the party who makes the false pretence. Here it was not to gain any object, and it was not according to his wish. He would derive no benefit from the draft being honoured. He had obtained his full object at St. Petersburg, and had the money in his pocket. As to the finding of the jury, they merely meant to say that the prisoner foresaw that the draft would be presented to the Union Bank, not that he wished it. (r)

(r) *R. v. Garrett*, Dears. C. C. 232. Maule, J., "The word "obtain" means the same as the word "get" in its sense of "acquire." Parke, B., "The word "obtain" seems to mean, not so much a defrauding or depriving another of his property, as the obtaining some benefit to

the party." None of the Court doubted that 'if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction.' Per Lord Campbell, C. J. See as to this point, *R. v. Brisac*, 4 East, R.

## SEC. III.

*Of Cheats and Frauds Punishable by Other Statutes.*

The few statutes by which, in addition to those which have been already mentioned, cheats and frauds are subjected to punishment, will now be mentioned.

**Voluntary conveyances** — The 13 Eliz. c. 5, intituled, 'An Act against Fraudulent Deeds, Gifts, Grants, Alienations, &c.' recites, 'that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, had been and were devised and contrived of malice, fraud, covin, collusion, or guile; to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs;' and then enacts, in the first place, that 'all and every feoffment, gift, grant, alienation, bargain, and conveyances of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution shall be deemed and taken;' (only as against that person, his heirs, executors, assigns, &c., whose actions, suits, &c., by such fraudulent devices and practices, as aforesaid, shall or might be in any ways disturbed, delayed, or defrauded,) 'to be clearly and utterly void.' The third section then enacts, 'that all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, or being privy and knowing of the same, or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made *bonâ fide* and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same, and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;' one moiety to the Crown, the other to the party grieved, to be recovered

163.<sup>1</sup> It is not a little singular that it seems never to have occurred to any one that, supposing all the facts in this case to have happened in England, the prisoner would clearly have been guilty of obtaining by false pretences the money he received from Messrs. Wilson, and that makes an end of this case. Suppose a person drew a

cheque on a bank in which he had no funds, and by it obtained from A. a sum of money, and the cheque afterwards passed through several persons' hands, each of whom gave the amount for it, nothing can be clearer than that the offence would be obtaining the money from A. only. C. S. G.

## AMERICAN NOTE.

<sup>1</sup> See as to this the American cases cited in Bishop, i. s. 110 and see s. 111.

in any of the Queen's courts of record, by action, &c.: 'and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise.' (s)

The 27 Eliz. c. 4, recites, that subjects and corporations, 'after conveyances and purchases of lands, tenements, leases, estates, and hereditaments, for money, or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made of, in or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances were, or hereafter shall be meant, or intended by the parties that so make the same, to be fraudulent and covinous of purpose and intent to deceive such as have purchased, or shall purchase, the same; or else by the secret intent of the parties, the same be to their own proper use, and at their free disposition, coloured nevertheless by a feigned countenance and shew of words and sentences, as though the same were made *bonâ fide* for good causes and upon just and lawful considerations.' The second section then enacts, 'that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken (only as against that person, body politic, &c., their heirs, successors, executors, &c., and persons lawfully claiming under them, which so purchase for money or other good consideration, the same lands, &c.) 'to be utterly void.' (ss) And the third section enacts, 'that all and every the parties to such feigned, covinous, and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them as true, simple, and done, had or made *bonâ fide* or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim any thing by, from, or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, so purchased or charged;' (the one moiety to the Crown, and the other moiety to the party grieved, to be recovered in any of the Queen's courts of record,

(s) See 1 Chitty's Statutes, 385, for the cases decided on this statute, to which may be added *Shears v. Rogers*, 3 B. & Ad. 362. *Gale v. Williamson*, 8 M. & W. 405. *Martindale v. Booth*, 3 B. & Ad. 498. *Bowen*

*v. Bramidge*, 6 C. & P. 140. *Butcher v. Harrison*, 4 B. & Ad. 129.

(ss) Voluntary conveyances if made *bonâ fide* and without any fraudulent intent are not to be void. See 56 & 57 Vict. c. 21, s. 2.

by action, &c.) 'and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise.' (t)

An indictment on the 13 Eliz. c. 5, s. 3,<sup>1</sup> alleged that the prisoners devised and prepared a certain feigned, covinous, and fraudulent conveyance of certain lands, and unlawfully, fraudulently, &c., did execute the said conveyance. It was urged in arrest of judgment that the section did not create an indictable offence; and that, if it did, an indictment could not be preferred until after a recovery of damages in a civil action; and that this indictment was bad for not stating in what respect the conveyance was fraudulent; but Maule, J., held that the Act created an indictable offence, and that an indictment might be preferred before an action was brought, and that it was not necessary to shew in what respect the conveyance was fraudulent. (u)

The offences relating to those cheats which are effected by means of cards, dice, and other kinds of *gaming* have been mentioned in a former part of this treatise. (v)

**Fortune telling.** — The 9 Geo. 2, c. 5, (vv) repeals certain Acts relating to conjuration, witchcraft, &c., and then, for the more effectual preventing and punishing of *any pretences* to any acts or powers of witchcraft, sorcery, enchantment, or conjuration, whereby ignorant persons are frequently deluded and defrauded, enacts, 'that if any person shall pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted (on indictment or information in England, or on indictment or libel in Scotland), shall, for every such offence, suffer imprisonment by the space of one whole year without bail or mainprise, and once in every quarter of the said year, in some market town of the proper county, upon the market day, there stand openly on the pillory by the space of one hour, (w) and also shall (if the Court by which such judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, in such sum and for such time as the said Court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties be given.'

**The Merchandise Marks Act, 1887.** — By the Merchandise Marks Act, 1887, (50 & 51 Vict. c. 28) sec. 2, (1) 'Every person (x) who (a) forges any trade mark, (y) (b) falsely applies to any

(t) See 1 Chitty's Statutes, 387, for the cases decided on this statute: to which may be added *Doe dem Tunstil v. Bottrill*, 6 B. & Ad. 131. S. C. 2 N. & M. 64, and *Kerrison v. Dorrien*, 9 Bing. 76.

(u) *R. v. Smith*, 6 Cox, C. C. 31.

(v) Vol. i. p. 929.

(vv) The 5 Geo. 4, c. 83, s. 4, makes punishable as a rogue and vagabond every person professing to tell fortunes 'to deceive or impose upon' any persons. It was held that in order to support a conviction there

must be an intent to deceive. *Penny v. Hanson*, 18 Q. B. D. 478. As to palmistry, see *Monck v. Hilton*, 2 Ex. D. 268.

(w) The punishment of the pillory is abolished by the 1 Vict. c. 23.

(x) Including a body of persons corporate or unincorporate, sec. 3.

(y) By sec. 4, 'A person shall be deemed to forge a trade mark who either (a) without the assent of the proprietor of the trade mark makes that trade mark, or a mark so nearly resembling that trade mark as to be calcu-

#### AMERICAN NOTE.

<sup>1</sup> It is said that an indictment would lie in America under this statute, but no case is

given, and there are special statutes in most of the States. *Bishop*, i. s. 572 (a).

goods, (z) any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive, (a) or (c) makes any die, block, machine, or other instrument for the purpose of forging or of being used for forging a trade mark, or (d) applies (b) any false description to goods, (z) or (e) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark, or (f) causes any of the things above in this section mentioned to be done, shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act. (c)

‘(2) Every person (d) who sells, or exposes for, or has in his possession for, sale or any purpose of trade, or manufacture, any goods or things to which any forged trade mark or false trade description (e) is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case

lated to deceive, or (b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise, and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark. Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.’

By sec. 3, the expression ‘trade mark’ means a trade mark registered in the register of trade marks kept under 46 & 47 Vict. c. 57, and includes any trade mark which either with or without registration is protected by law in any British possession or foreign state to which the provisions of sec. 103 of that Act are under order in council applicable.

(2) Goods means anything which is the subject of trade, manufacture, or merchandise, sec. 3.

(a) By sec. 5, ‘A person shall be deemed to apply a trade mark or mark or trade description to goods who applies it to the goods themselves or applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, or places, endorses, or annexes any goods which are sold or exposed, or had in possession for any purpose of sale, trade, or manufacture in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied, or uses a trade mark, or mark, or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark, or mark, or trade description.’ ‘Covering’ includes stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper. ‘Label’ includes band or ticket. A trade mark, or mark, or trade description is applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods or to any covering, label, or reel.

A person shall be deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of a trade mark, applies such trade mark, or a mark so nearly

resembling it as to be calculated to deceive; but in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant (sec. 5).

(b) See *Budd v. Lucas*, 1891, 1 Q. B. 408.

(c) It is not necessary that there should be any fraud in the sense of an intention to supply a worthless or inferior article, but it is sufficient that an article is intended to be supplied of a different description from that which the customer intends to purchase, and believes that he is purchasing. *Starey v. Chilworth*, 24 Q. B. D. 90.

(d) Including a body of persons corporate or unincorporate, sec. 8.

(e) By sec. 3, trade description means ‘any description, statement, or other indication, direct or indirect, as to the number, quantity, measure, gauge, or weight of any goods, or as to the place or country in which any goods were made or produced, or as to the mode of manufacturing or producing any goods, or as to the material of which any goods are composed, or as to any goods being the subject of an existing patent, privilege, or copyright, and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act. The expression “false trade description” means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, when that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act.’ By 54 Vict. c. 15, s. 1, the customs entry relating to imported goods shall be deemed to be a trade description applied to the goods.

may be, shall, unless he proves that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description, and that on demand made by, or on behalf of, the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or that otherwise he had acted innocently, (f) shall be guilty of an offence against this Act.

‘(3) Every person (g) guilty of an offence against this Act shall be liable (I) on conviction on indictment to imprisonment with or without hard labour for a term not exceeding two years, or to fine, or to both imprisonment and fine, and (II) on summary conviction to imprisonment with or without hard labour for a term not exceeding four months, or to a fine not exceeding £20, and in the case of a second or subsequent conviction to imprisonment with or without hard labour for a term not exceeding six months, or to a fine not exceeding £50, (h) and (III) in any case to forfeit to Her Majesty every chattel, article, instrument, or thing, by means of or in relation to which the offence has been committed.’ (i)

‘(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted in manner provided by the summary jurisdiction Acts “Provided that a person charged with an offence under this section before a Court of summary jurisdiction shall on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and, if he requires, be so tried accordingly.”’

By sec. 3, (2) ‘The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words or marks or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandize of some person other than the person whose manufacture or merchandize they really are.’

(3) ‘The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person, applied in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression “false name or initials” means, as applied to any goods, any name or initials of a person which are not a trade mark or part of a trade mark, and are identical with or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and are either those of a fictitious person, or of some person not *bona fide* carrying on business in connection with such goods.’

(f) The mere absence of an intent to defraud does not necessarily shew that the prisoner ‘acted innocently.’ *Wood v. Burgess*, 24 Q. B. D. 162.

(g) Including a body of persons corporate or unincorporate, sec. 3.

(h) Sec. 2, (5), gives an appeal to Quarter Sessions.

(i) The Court can order such articles to be forfeited or disposed of as it may think fit (sec. 2, (4)).

By sec. 6, 'Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging or being used for forging a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves, (a) that in the ordinary course of his business he is employed on behalf of other persons to make dies, blocks, machines, or other instruments for making or being used in making trade marks, or as the case may be to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and, (b) that he took reasonable precautions against committing the offence charged; and, (c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and, (d) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied, — he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor unless he has given due notice to him that he will rely on the above defence.' (j)

By sec. 7, 'Where a watch case has thereon any words or marks which constitute or are by common repute considered as constituting a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *prima facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale or any purpose of trade or manufacture goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case.'

By sec. 9, 'In any indictment, pleading, proceeding, or document in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.'

By sec. 10, 'In any prosecution for an offence against this Act, a defendant and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and if called shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness. In the case of imported goods, evidence of the port of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced.'

By sec. 11, 'Any person who, being within the United Kingdom,

(j) By sec. 19, (3), 'Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United

Kingdom who *bonâ fide* acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor has given full information as to his master.'

procures, counsels, aids, abets, or is accessory to the commission without the United Kingdom of any Act which, if committed within the United Kingdom, would under this Act be a misdemeanor, shall be guilty of that misdemeanor as a principal and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanor had been there committed.'

Sec. 12 gives a power of search and provides for the forfeiture of goods discovered; and sec. 13 extends the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17) to offences under this Act.

By sec. 14, 'On any prosecution under this Act the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.'

By sec. 15, 'No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.' (k)

By sec. 18, 'Where at the passing of this Act a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade descriptions when so applied: Provided that where such trade description includes the name of a place or country and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.'

By sec. 19, (1), 'This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

'(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action; but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.'

**The Trades Marks Registration Act, 1883.** — By the 46 & 47 Vict. c. 57 (The Trades Marks Registration Act, 1883), a register of trade marks is established.

By sec. 76, the registration of a person as proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act.

(k) By 54 Vict. c. 15, the Board of Trade may, in certain cases, make regulations as to prosecutions.



By sec. 96, the certificate of the registrar as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be evidence of such entry having been made, and of the contents thereof, and of such matters and things having been done or left undone.

**Vendors of land.** — By the 22 & 23 Vict. c. 35, s. 24, ‘Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the Court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty’s Attorney-General, or, in case that office be vacant, of Her Majesty’s Solicitor-General; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the Attorney-General or the Solicitor-General (as the case may be) shall direct.’ And by the 23 & 24 Vict. c. 38, s. 8, the preceding section ‘shall be read and construed as if the words “or mortgagee” had followed the word “purchaser” in every place where the latter word is introduced in the said section.’

**Land Transfer Act, 1875.** — By 38 & 39 Vict. c. 87 (The Land Transfer Act, 1875), s. 99, ‘If in the course of any proceedings before the registrar, or the Court, in pursuance of this Act, any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award.’

By sec. 100, ‘If any person fraudulently procures, attempts to fraudulently procure, or is privy to the fraudulent procurement of any

entry on the register, or of any erasure from the register, or alteration of the register, such person shall be guilty of a misdemeanor, and upon conviction on indictment be liable to imprisonment for any term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award, and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.'

**Coal Mines Regulation Act, 1887.** — By the Coal Mines Regulation Act, 1887, (50 & 51 Vict. c. 58) sec. 32, 'Every person who commits any of the following offences, that is to say:—

(1) Forges or counterfeits, or knowingly makes any false statement in any certificate of competency under this Act, or in any certificate of service granted under this Act or any Act repealed by this Act, or any official copy of any such certificate, or (2) Knowingly utters or uses any such certificate or copy which has been forged or counterfeited or contains any false statement, or (3) For the purpose of obtaining for himself or any other person employment as a certificated manager or under-manager, or the grant, renewal, or restoration of any certificate under this Act, or a copy thereof, either (a) makes or gives any declaration, representation, statement, or evidence which is false in any particular, or (b) Knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same, shall be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding two years with or without hard labour.'

**Admiralty Powers Act.** — By 28 & 29 Vict. c. 124 (The Admiralty Powers, &c., Act, 1865), s. 6, 'If any person, in order to sustain any claim to any pay, wages, allotment, prize-money, bounty-money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the Navy, or other money payable by the Admiralty, or to any effects or money in charge of the Admiralty, or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy, does any of the following things, namely, offers or utters to any person in the service of the Crown or of the Admiralty any false affidavit, knowing the same to be false, or makes or subscribes or offers or utters as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false,—every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.'

Sec. 7. 'The following sections of the Act of the session of the 24 & 25 years of Her Majesty's reign (c. 98), 'to consolidate and amend the Statute Law of England and Ireland relating to indictable offences by forgery,' shall be incorporated with this Act, and shall be read as if they were here re-enacted, namely, sections 40 to 42, and 50 to 53

(all inclusive) and for this purpose the expression 'this Act,' used in the said incorporated sections, shall be construed to include the present Act, and expressions therein used relating to forgery or forged writings shall be construed to apply to any act being a misdemeanor under the last foregoing provision of this Act, and to writings made, subscribed, offered, or uttered in contravention of that provision.'

Sec. 9. 'Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act or at common law in respect of an offence (if any) punishable as well under this Act as under any other Act or at common law.'

Sec. 11. 'Every order in council under this Act shall be published in the 'London Gazette,' and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.'

**Government Annuities.**—By the Government Annuities Act, 1882,<sup>(m)</sup> sec. 11, any person who knowing the same to be false in any material particular makes a false declaration in relation to any matter or thing required by the Government Annuities Acts, 1853 and 1864, or by this Act, or by the regulations made in pursuance of such Acts or any of them, shall be liable on conviction to twelve months' imprisonment, with or without hard labour, in addition to the forfeiture of the annuity.

By sec. 12, 'If any person receives any payment in respect of any savings bank annuity after the death of the person at whose death such annuity is to cease, or receives the amount of any insurance payable at the death of a person, before the death of that person, with intent to defraud, he shall be liable to twelve months' imprisonment with hard labour in addition to the forfeiture of the money.'

**Petition for Declaration of Lunacy.**—By the Lunacy Act, 1890, (53 Vict. c. 5,) sec. 7 (4), 'If after a petition has been dismissed another petition is presented as to the same alleged lunatic, the person presenting such other petition, so far as he has any knowledge or information with regard to the previous petition and its dismissal, shall state the facts relating thereto in this petition, and shall obtain from the Commissioners at his own expense and present with his petition a copy of the statement sent to them of the reasons for dismissing the previous petition, and if he wilfully omits to comply with this subsection he shall be guilty of a misdemeanor.'

**Statements for Board of Agriculture.**—By the 54 & 55 Vict. c. 70, s. 3, any person making a false or fraudulent statement in any return required by the Board of Agriculture as to the weight and sale of cattle at markets and fairs shall be guilty of a misdemeanor, and by sec. 4 the section is extended to auctioneers unless exempted by the Board of Agriculture.

**Falsely Pretending to be an Officer of Inland Revenue.**—By the Inland Revenue Act, 1890 (53 & 54 Vict. c. 21) sec. 12, 'If any person not being an officer takes or assumes the name, designation, or character of an officer for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any act which he would not be entitled to do or procure to be done of his own authority, or for any other unlawful purpose, he shall be guilty of a misdemeanor, and shall, in addition to any other punishment to

(m) 45 & 46 Vict. c. 51.

which he may be liable for the offence, be liable on summary conviction to be imprisoned with or without hard labour for any term not exceeding three months.'

**Police Pensions.** — By the Police Act, 1890 (53 & 54 Vict. c. 45), sec. 9, 'If a person obtains or attempts to obtain for himself or for any other person any pension, gratuity, or allowance under this Act, or any payment on account of such pension, gratuity, or allowance by means of any false declaration, false certificate, false representation, false evidence or personation, or by malingering or feigning disease or infirmity, or by maiming or injuring himself, or by causing himself to be maimed or injured, or otherwise producing disease or infirmity, or by any other fraudulent conduct, he shall be liable on summary conviction to imprisonment with or without hard labour for a term not exceeding four months, or to a fine not exceeding £25, to be paid (notwithstanding anything in any charter or in any other Act, whether relating to municipal corporations or otherwise) to the pension fund of the force from which he obtained or attempted to obtain the pension, gratuity, or allowance, and on conviction by a jury, to imprisonment, with or without hard labour, for a term not exceeding two years, and also in either case to forfeit any pension, gratuity, or allowance so obtained.'

**Voting Papers.** — By sec. 9 of the First Schedule to the Public Libraries Act, 1890 (53 & 54 Vict. c. 68), if any person appointed to collect voting papers fails to shew the writing appointing him, to any voter on request, 'or if any unauthorised person fraudulently receives or induces any voter to part with a voting paper, such person shall be guilty of a misdemeanor, and liable on conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding £20, or to both imprisonment and fine.'

**Debtors Act, 1869.** — As to a person being guilty of a misdemeanor under The Debtors Act, 1869, if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud, see The Debtors Act, 1869, sec. 11, subsec. 13, *ante*, p. 409.

We have already seen the provisions relative to fraudulent proceedings by bankrupts. (*n*)

**Mutiny Acts.** — The annual Mutiny Acts usually contain clauses providing for the punishment of apprentices and other persons fraudulently enlisting themselves. (*o*)

Cheats and frauds and false personation, for the purpose of obtaining the pay, prize-money, &c., of soldiers or sailors are mentioned in subsequent chapters. (*p*)

**Merchant Shipping Act, 1894.** — By the Merchant Shipping Act, 1894, (57 & 58 Vict. c. 60) sec. 70, 'If the master or owner of a British ship does anything or permits anything to be done, or carries or permits to be car-

(*n*) *Ante*, p. 407.

(*o*) In *R. v. Jussup*, Dears. C. C. 619, it was held that a recruit could not be convicted under the 18 & 19 Vict. c. 11, s. 57, where he had falsely answered questions on enlistment, which were not contained in that Act, or the 11 & 12 Vict. c. 11; but the recent Mutiny Acts contain different provisions. As to similar offences by persons

enlisting into the *marine* forces, see the annual Acts relating to those forces. We have seen that it was a cheat or fraud at common law for an apprentice to enlist as a soldier, and obtain the king's bounty. Jones's case, *ante*, p. 458. And see Burn's *Just. Military Law*.

(*p*) See *post*, On the Forgery of Official Papers, &c.: and On False Personation.

ried any papers or documents with intent to conceal the British character of the ship from any person entitled by British law to inquire into the same, or with intent to assume a foreign character, or with intent to deceive any person so entitled as aforesaid, the ship shall be subject to forfeiture under this Act, and the master, if he commits or is privy to the commission of the offence, shall, in respect of each offence, be guilty of a misdemeanor.'

In addition to the statutes which have been thus mentioned there are others relating to cheats or frauds practised by servants and others, in particular trades, and punishable by pecuniary fines or summary proceedings before magistrates, which will be found arranged under their proper titles in Burn's 'Justice of the Peace.'

## CHAPTER THE THIRTY-THIRD.

### OF FORGERY.<sup>1</sup>

FORGERY at common law has been defined as 'the fraudulent making or alteration of a writing to the prejudice of another man's right;' (a) or, more recently, as 'a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit;' (b) the word 'making' in this last definition being considered as including every alteration of, or addition to, a true instrument. (c) It has also been very clearly defined by Lord Blackburn as the fraudulent making of an instrument which purports to be that which it is not. (cc) Besides the offence of forgery at common law, which is of the degree only of misdemeanor, there are a great many kinds of forgery, especially subjected to punishment by the enactments of a variety of statutes. (d)

The statutes on this subject which, for the most part, made the forgeries to which they related capital offences, were consolidated by the 1 Will. 4, c. 66. (e) At present it will be attempted briefly to review the doctrine of forgery at common law, together with such principles and decided points as (though some of them may have arisen in prosecutions upon particular statutes) appear to be of general application.

**Publication.**—In the first place, however, it should be observed that the offence of forgery may be complete, though there be no publication or uttering of the forged instrument. For the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument be the medium

(a) 4 Blac. Com. 247.

(b) 2 East, P. C. c. 19, s. 1, p. 852. R. v. Parkes, 2 Leach, 785. 2 East, P. C. c. 19, s. 49, p. 965.

(c) Id. Ibid. As to the word *forge*, it is said in 3 Inst. 169, 'To forge is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what

fashion or shape he will: the offence is called *crimen falsi*, and the offender *falsarius*: and the Latin word to forge is *falsare* or *fabricare*.'

(cc) R. v. Ritson, L. R. 1 C. C. R. 200; 39 L. J. M. C. 10.

(d) 4 Blac. Com. 248.

(e) Repealed by the 24 & 25 Vict. c. 95.

#### AMERICAN NOTE.

<sup>1</sup> See P. v. McKee, Addis. 33. C. v. Searle, 2 Binn. 332. S. v. Kimball, 50 Maine, 409. S. v. Thompson, 19 Iowa, 299. P. v. Rhoner, 4 Parker, C. R. 166. C. v. Ray, 3 Gray, 441. P. v. Flanders, 18 Johnson, 164 Corbett v. S., 31 Ala. 329. Van Duser v. Howe, 21 N. Y. 531.

Barfield v. S., 29 Ga. 127. Biles v. C., 8 Casey, 529. C. v. Baldwin, 11 Gray, 197. Clay v. Schwab, 1 Mich. N. P. 168. Forgery may be against the government of a particular State or against the United States or against both. Bishop, ii. s. 612.

by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. (*f*) Thus, in a case where the note, which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. (*g*) At the present time, most of the statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive offence.

## SEC. I.

*Of the Making or Alteration of a Written Instrument necessary to constitute Forgery.*

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this although it be afterwards executed by another person ignorant of the deceit. (*h*) And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versa*, will also be forgery. (*i*) Thus it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it out of his own head. (*j*) So if a man insert in an indictment the names of those against whom, in truth, it was not found. (*k*) Or if, finding another name at the bottom of a letter, at a considerable distance from the other writing, he caused the letter to be cut off, and a general release to be written above the name, and then take off the seal and fix it under the release. (*l*) And it appears to have been considered that if a party make a copy of a receipt, add to such copy material words, not in the original, and then offer it in evidence on a suggestion of the original being lost, he may be prosecuted for forgery. (*m*) The fraudulent alteration of a material

(*f*) 2 East, P. C. c. 19, s. 4, p. 855.

(*g*) Elliott's case, 1 Leach, 175. 2 East, P. C. c. 19, s. 44, p. 951. 2 New R. 93, note (*a*). And see also Crocker's case, B. & R. 97. 2 Leach, 987, where it appears to have been holden by Le Blanc, J., that though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him; yet it was a question for the jury, under all the circumstances of the case, whether the note had been made innocently, or with an intent to defraud.

(*h*) 2 East, P. C. c. 19, s. 4, p. 855.

(*i*) Id. Ibid.

(*j*) Noy. 101. Moor, 759. 3 Inst. 170. 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery*

(*A*). See *R. v. Collins*, *post*, p. 571.

(*k*) *R. v. Marsh*, 3 Mod. 66. 1 Hawk. P. C. c. 70, s. 2.

(*l*) 3 Inst. 171. 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (*A*). *E. Maurice*

was convicted at the O. B. Sessions, October, 1772, for forging a promissory note for £108 10s. Maurice, who was a lodger, paid the prosecutrix some money for rent and by taking two pieces of paper, lapping them over each other, and making them just stick together with some gum water, he so ordered it that the body of the receipt should fall on the uppermost piece, and the name on the lowermost, so that when the paper came to be separated, the body of the receipt which was taken off left room for the body of the note to be written in its stead, and the name at the bottom appeared in its true place. *R. v. Evan Maurice*, Annual Reg. for 1772, p. 134. But he received a free pardon, Ann. Reg. 145, but on what ground it does not appear.

(*m*) By Lord Ellenborough, C. J., in *Upfold v. Leit*, 5 Esp. 100. The words inserted were 'in full of all demands.'

part of a deed is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D into an S; or the making a bond for £500, expressed in figures, seem to have been made for £5000: (*n*) and though it seems to have been thought that a deed so altered is more properly to be called a false than a forged deed, not being forged in the name of another, nor his seal nor hand counterfeited; (*o*) yet, according to the better opinion, such an alteration amounts to forgery; on the ground that the fraud and villany are the same as if there were an entire making of a new deed in another's name; and also that a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such an alteration, is no more his deed than a stranger's. (*p*) Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment, would come within the same rule. (*q*) So altering a bill payable at three months, into a bill payable at twelve months, is forgery. (*r*) And upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery; it was holden, in one case, that where a note of country bankers was made payable at their house in the country, or at their banker's in London, and the London banker had failed, it was forgery to alter the name of such London banker to the name of another London banker, with whom the country bankers had made their notes payable subsequent to the failure. The judges held that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house. (*s*). And upon the general principle that the alteration of a true instrument makes it, when altered, a forgery of the whole instrument, it was holden, that where the indictment charged the prisoner with 'making, forging, and counterfeiting' a bill of exchange, and with uttering it, knowing it to be forged, and the evidence was of an alteration of the bill of exchange from £10 to £50 in the part of it in which the sum is expressed in figures, and also in the part in which it is expressed in letters, the prisoner was properly convicted; though the statute, on which the

(*n*) *Blake v. Allen*, Moor, 619. 1 Hawk. P. C. c. 70, s. 2. So in *Elsworth's case*, 2 East, P. C. c. 19, s. 58, p. 986, where a cypher being added after the figure 8, the bill, which was for £8, became a bill for £80. But if a man alter a bond given to himself for £100 into a bond for 100 marks, this is not forgery, because he thereby avoids the bond, and prejudices no one except himself. But if he had increased the sum, or had diminished it to avoid any collateral prejudice to himself, as to be free from any covenant, arbitrament, or like thing, or to prejudice another, this is forgery. Moor, 619.

(*o*) 3 Inst. 169.

(*p*) 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (A) in the notes.

(*q*) *Master v. Miller*, 4 T. R. 320. 2 East, P. C. c. 19, s. 4, p. 853.

(*r*) *R. v. Atkinson*, 7 C. & P. 669, J. A. Park, J.

(*s*) *R. v. Treble*, 2 Taunt. 328, 2 Leach, 1040. R. & R. 164. The alteration was effected by pasting a slip of paper bearing the words Ramsbottom and Co. over the words Bloxham and Co., in the same manner as the prosecutors had themselves altered their re-issuable notes after the failure of their first London bankers, Bloxham and Co.<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> So in America, adding the name of a certain city to the name of a bank to make the note appear to be that of another bank

of the same name is a forgery. *S. v. Robinson*, 1 Harrison, 507.



indictment proceeded, 7 Geo. 2, c. 22, contained the word *alter* as well as the word *forge*; 'if any person shall falsely make, alter, forge, or counterfeit,' &c.; from which it was contended that to *alter* a bill of exchange was made a distinct offence. (t) Making a special endorsement a general one has been holden to be altering an endorsement. (u)

The prisoner was station master at a railway station, and W. Bowers collected and distributed parcels that were sent from and arrived at the station. For each service he was entitled to payment, which the prisoner ought to have made him; the prisoner was furnished with printed forms like the following:—

## EXPENSES.

| Delivery.                   | Collecting.                 |
|-----------------------------|-----------------------------|
| Paid to Bowers . . . £2 0 0 | Paid to Bowers . . . £1 0 0 |
| 2 0 0                       | 1 0 0                       |
| at 2 0 0                    | at 1 0 0                    |
| 2 0 0                       | 1 0 0                       |
| 2 0 0                       | Recd. pro Wm. Bowers 1 0 0  |
| 2 0 0                       | Jno. Allen 1 0 0            |
| 2 0 0                       | 1 0 0                       |
| 2 0 0                       | 1 0 0                       |
| 2 0 0                       | 1 0 0                       |
| 2 0 0                       | Stamp. 1 0 0                |
| 2 0 0                       | £39 0 0 1 0 0               |
| 2 0 0                       | 1 0 0                       |
| 2 0 0                       | 1 0 0                       |
| £26 0 0                     | £13 0 0                     |
|                             | Superintendent.             |

These printed forms he had to fill up and return. He told Bowers that the company had determined not to pay him anything for delivery. Bowers assented. This statement was untrue, and he continued to charge the company with payments purporting to be made to Bowers for delivery. In order to furnish a voucher to the company for these alleged payments the prisoner continued to fill up the sheets as before. The prisoner paid Allen, Bowers' servant, the amount of the right-hand column only, and then wrote on the right-hand side of the dividing line, 'Recd. pro Wm. Bowers,' and procured Allen to sign the receipt, and when Allen had signed it, the prisoner, unknown to Allen or Bowers, put a receipt stamp under Allen's

(t) Teague's case, 2 East, P. C. c. 19, s. 55, p. 979. R. & R. 33. The judges held that the point was governed by Dawson's case, 1 Str. 19. 2 East, P. C. c. 19, s. 55, p. 978, where the prisoner having altered the figure of 2 in a bank note to 5 (£220

to £520) ten of the judges agreed that it was forging and counterfeiting a bank note; and that 3 Inst. 171, 172, was not law in this respect. R. v. Post, R. & R. 101.

(u) R. v. Birkett, R. & R. 251.

name, and on it put a sum in figures the aggregate of the two columns. The jury found that the document thus added to meant differently to what it meant before; and, upon a case reserved, it was held that this was forgery. (v)

So if a person gives another a blank acceptance, and at the time limits the amount either by writing upon it or otherwise, and if in the filling up of the acceptance that amount be exceeded, with intent to defraud either the acceptor or any other person, that is forgery. (w)

Filling in the body of a blank cheque to which a signature is attached, without any authority, is a forgery. (x)

On an indictment for forging a cheque it appeared that the prisoner was clerk to Messrs. Sewell and Cross, and had been in the habit of getting blank cheques signed by the firm, and filling in the amount himself to meet the demands on the firm. He brought the cheque in question to one of the partners and asked him to sign it, saying that Mr. Sewell had told him to pay certain rent due from Mr. Sewell to Mr. Gardiner, but that the amount was not ascertained. The cheque when completed was as follows:—

‘No. 7476.

‘London, Dec. 18th, 1844.

‘London and Westminster Bank.

‘Pay to 1238 or bearer £100.

‘SEWELL & Co.’

At the bottom was written, ‘Pay in notes;’ but neither this, nor the date, nor the amount was filled in when it was signed by the partner, who gave the prisoner no authority to receive cash for the cheque or to appropriate it otherwise than for the rent: the prisoner received the amount, and the notes were traced to parties to whom the prisoner had paid them on account of gaming debts of his own. The rent due to Gardiner was much more than £100. Neither Sewell nor Gardiner was called. It was objected that the prisoner had authority to fill in a larger sum than he had inserted, and therefore was not guilty of forgery, and that no subsequent disposal of the property could make that forgery, which was not so at the time the cheque was completed. And that Sewell might have given directions which the prisoner had obeyed; or that the rent might have been paid. Erle, J., ‘I think the prisoner must be acquitted. It is clear that he had authority to fill up the cheque in some way or another, and that authority was derived from Sewell, and there is no evidence to shew that his directions were not to get a blank cheque filled up for £100, and appropriate it as it has been. Moreover, it should have been shewn that Gardiner did not authorise him to receive the money.’ \* \* \* As some doubt seemed to exist as to the law in cases of this sort, Erle, J., added, ‘If a cheque is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it the

(v) *R. v. Griffiths*, D. & B. 548. It is not stated for what the prisoner was indicted, but it is presumed that it was for forging a receipt for money.

(w) *R. v. Hart*, R. & M. C. C. R. 486. S. C. 7 C. & P. 652.

(x) *Wright's case*, 1 Lew. 135. *Flower v. Shaw*, 2 C. & K. 703. S. P. Wilde, C. J.

crime of forgery is committed. If the blank cheque was delivered to him with a limited authority to complete it, and he filled it up with an amount different from the one he was directed to insert, or if after the authority was at an end he filled it up with any amount whatever, that would clearly be forgery.' Patteson, J., 'I quite agree with my learned Brother that if the prisoner filled up the cheque with a different amount, and for different purposes than those which his authority warranted, the crime of forgery would be made out.' (y)

The indictment charged the prisoner with forging a warrant and order for the payment of money, which was as follows:—

**‘No.**

' Liverpool, Dec. 8th, 1847.

**'To the Cashiers of the Liverpool Borough Bank.**

**‘ Pay**

or bearer

**Two hundred and fifty pounds.**

**‘JOHN McNICOLL & Co.’**

**‘£250.’**

The prisoner was clerk to John McNicoll. A bill for £156 9s. 9d. falling due on the 8th of December, Mr. M. on that day signed a blank cheque, and gave it to the prisoner, directing him to fill the cheque up with the correct amount due on the bill (which was to be ascertained by reference to the bill-book), and the expenses (which would amount to about ten shillings), and after receiving the amount at the Liverpool Borough Bank, to pay it over to a Mr. Williamson, in order that the bill might be taken up. Instead of doing so the prisoner filled up the cheque with the amount of £250, which sum he immediately received at the bank, and without paying any part of the money over to Mr. Williamson, retained the whole of it in his possession, in satisfaction of a claim for salary, which he alleged to be due to him, and in support of which he gave some evidence, but which his master entirely denied to be due. On the day after the receipt of the money on the cheque, he sent in an account of his claim, giving his master credit for the sum received on the cheque. It was objected that as the signature to the cheque was the genuine signature of Mr. M., and as the prisoner was entrusted to fill it up for a specified sum, the filling it up for a different sum, though it was a breach of trust, was not a forgery; but Coltman, J., held that it was a forgery. It was further urged that there was no proof of an intention to defraud Mr. M., but only to obtain from him a sum of money which the prisoner might honestly believe to be due to him. With reference to this point Coltman, J., told the jury that, if they were satisfied that the prisoner was authorised only to fill up the cheque for the amount of the bill and expenses, and to pay the proceeds to Williamson, and that he filled it up for a larger sum, and applied the money, when received, to his own purposes, that was evidence of an intention to defraud Mr. M. The jury convicted, and upon a case reserved, Coltman, J., said, 'that he had felt some doubt whether the question of the reality of the prisoner's claim ought not to have been left to the jury. But he and all the judges agreed that whether he

(y) **R. v. Bateman**, 1 Cox, C. C. 186. A.D. 1845.

had a claim or not there was no shadow of authority thereby given to draw a cheque for a larger sum than his master had expressly authorised; and the drawing a cheque to a larger amount fraudulently was forgery, on the authority of *R. v. Hart*.<sup>(z)</sup>

On an indictment for forgery it appeared that the prisoner had the management of the prosecutors' business, who had an account with Messrs. Gurney, to which it was his duty to pay all sums not necessary for the current expenses of the concern; and on that account the prisoner was authorised to draw when the cash in hand was not sufficient to meet those expenses. In doing this the prisoner, with the sanction of the prosecutors, did not always draw in favour of a particular creditor for the exact amount due to him, but drew in his own favour such sum as he required, or was supposed to require, for his disbursements, and paid the creditors out of it. He was indicted for having forged a cheque, which he had drawn for £11 10s., and entered in the prosecutors' books as having been paid to the E. C. R. Co.; but which he had paid to his landlord for his own rent. Williams, J., held that the prisoner must be acquitted. There was a distinction between cases where there was an authority to fill up a bill to a limited amount, as in *R. v. Hart*,<sup>(a)</sup> and where there was a general authority to draw. There was no doubt in this case a discretion vested in the prisoner to draw cheques, and so create a balance in his hands to meet the demands made on the firm; the prisoner, therefore, did not necessarily exceed his authority in drawing for this amount, and the criminal act was rather the subsequent appropriation of it.<sup>(b)</sup>

But where the instrument is imperfect as a bill, when the name of another is written upon it, it is not a forgery of the acceptance. Upon an indictment for forging and uttering a forged acceptance of a bill of exchange, an accomplice proved that the prisoner produced a blank stamp from his pocket, and wrote the names 'Stiff and Sims' across it, and then gave it to the witness, who two days after in the absence of the prisoner drew the bill for £1000 on the stamp, Patteson, J., doubted whether the charge of forgery could be supported; because at the time when the names 'Stiff and Sims' were written on the stamp by the prisoner, it was a blank paper.<sup>(c)</sup> And where the prisoner was indicted for forging an acceptance of a bill of exchange, and it appeared that at the time when the prisoner caused a lad to write the name of 'John Chapman' across the bill, as the acceptor thereof (which the lad innocently did), a blank was left in the bill for the drawer's name; Parke, B., held that the indictment was not supported, as the instrument, to which the forged acceptance was affixed, was not, at the time of such supposed forgery, a bill of exchange, there being no drawer's name. His lordship referred to the terms of the 1 Will. 4, c. 66, s. 4, which do not make it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange.<sup>(d)</sup>

(z) *R. v. Wilson*, 1 Den. C. C. 284. 2 C. & K. 527. A.D. 1847.

(a) *Supra*.

(b) *R. v. Richardson*, 2 F. & F. 343. A.D. 1860.

(c) *R. v. Cooke*, 8 C. & P. 582. His lordship did not think the point material,

because the prisoner had uttered the bill after it was completed, and, as he wrote the names on it, he must have known the acceptance to be a forgery.

(d) *R. v. Butterwick*, 2 M. & Rob. 196. Rosc. Cr. Ev. 474. The bill when produced had upon it the names 'Elastob and Butter-

The expunging by means of lemon juice (laid in the indictment to be a certain liquor unknown to the jury), an endorsement on a bank note was holden to be a *raising* of the endorsement within the 8 & 9 Will. 3, c. 20, s. 36 (now repealed), which related to the altering or raising any endorsement on any bank bill, &c. (e)

In a case where the prisoner procured a deed to be forged, as from one J. M. and his son, conveying a certain estate for life to M. K.; and, after the death of one of the supposed grantors, had procured the forged deed to be altered by enlarging the grantee's estate to a fee; and was convicted of forging and uttering it in the state to which it was so altered; this was holden to be well by all the judges; as being no less a forgery after than before such alteration. (f)

It seems that a man cannot be guilty of forgery by a bare *non-feasance*; as if, in drawing a will, he should omit a legacy which he was directed to insert: but it appears to have been holden that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery. (g)

Upon an indictment for forging a lease and release, it appeared that Hastings was a freeman of Durham, entitled to the freehold property described in the deeds, and could neither read nor write. The prisoner went to his lodgings, and said he had come to ask him for his vote, and had brought him a requisition to sign for the purpose of bringing another whig candidate forward. The prisoner laid the two deeds on the table, and asked Hastings to sign them; he said he could not write, but would put his mark, and did accordingly put his mark at the foot of the two deeds; nothing was said in the presence of Hastings about delivering the deeds: but there was contradictory evidence as to there being seals on the deeds at the time Hastings made his mark. For the prosecution, 2 Russ. C. & M. 319, 2 Deac. C. L. 1402, were cited. Rolfe, B., said he could by no means subscribe to the authority of the cases cited by Russell and Deacon, and expressed a clear opinion, and so charged the jury, that if they thought the seals had been affixed previously to the mark of Hastings being obtained, and that they were on the deeds when he put his mark, the prisoner was entitled to be acquitted, though liable to an indictment for a very gross fraud; that if a different doctrine were laid down, the consequence would be that any party might be indicted for forgery who prevails on a man to execute a deed by misrepresenting its legal effect. On the other hand, he was clearly of opinion that the prisoner was guilty of the crime imputed to him if he obtained Hastings' mark to the parchments and afterwards affixed the seals. (h)

wick,' as the drawers. There seems to have been no count for uttering in this case. C. S. G.

(e) *R. v. Bigg*, 3 P. Wms. 419.

(f) *Kinder's case*, 2 East, P. C. c. 19, s. 4, p. 355.

(g) *Moor*, 760, Noy. 101. 1 Hawk. P. C. c. 70, s. 6. *Bac. Ab. Forgery*. 2 East, P. C. c. 19, s. 4, p. 356. 3 Inst. 170.

(h) *R. v. Collins*, 2 M. & Rob. 461. In

*R. v. Skirret*, 1 Sid. 312, the defendants were indicted for reading a release to an illiterate person in other words than it was written, whereby he sealed it, &c.; and, though several objections were taken and overruled on a motion to quash, no objection was taken on the ground that this was not an indictable offence. This appears not to have been an indictment for forgery, at least in the usual form. See the 24 & 25 Vict.

So where upon an indictment for forging a receipt for £12 it appeared that the prisoner, an attorney, had been employed by one Crowther to settle an action against him at the suit of a building club, and a meeting took place, at which Allatt, the treasurer, and Goodall, the steward of the club, attended, and the club agreed to take £9 in satisfaction of their demand. The prisoner then produced a piece of paper, on which was a stamp, and a receipt was written on it and handed to Allatt, who read it aloud, and returned it to the prisoner, and shortly afterwards it was returned to Allatt, and he and Goodall signed it, the prisoner paying the £9. A fresh demand being afterwards made on Crowther for a further sum, the receipt was produced, purporting to be for £12, and the figures written on an erasure. The receipt, after it was read aloud by Allatt, was sufficiently long in the hands of the prisoner to enable him to substitute the figures 12 for the figure 9 before he returned it to Allatt to be signed; and it was contended for the prosecution that even if this was the fact, and the prisoner in that manner induced Allatt and Goodall to sign the receipt, believing it to be still a receipt for £9, this would constitute the crime of forgery. But Rolfe, B., told the jury that he was clearly of opinion that, if they thought the alteration of the document was made before Allatt and Goodall signed it, such conduct on the part of the prisoner, however fraudulent, would not constitute the crime of forgery. (i)

It has been holden to be a forgery for a person to make a feoffment of certain lands to I. S., and afterwards to make a deed of feoffment of the same lands to I. D. of a date prior to that of the feoffment to I. S.; for herein he falsifies the date in order to defraud his own feoffee, by making a second conveyance, which at the time he had no power to make. (j) And it is also said that his crime would have been the same if, by his conveyance, he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent ante-dated conveyance endeavoured to avoid it. (k)

A., by deed bearing date on the 7th of May, 1868, conveyed on that day certain lands to B. in fee. Subsequently, on the 26th of April, 1869, C. produced a deed, bearing date the 12th of March, 1868, purporting to be a demise of the same land for a long term of years, as from the 25th of March, 1868, from A. to C. It was found by the jury that the alleged lease was executed after A.'s conveyance to B., and ante-dated for the purpose of defrauding B. Held, that A. and C. were guilty of forgery. (kk)

c. 96, s. 90, *ante*, p. 469, which will include some cases of this class.

(i) *R. v. Chadwick*, 2 M. & Rob. 545. Rolfe, B., added that he had last year had occasion to give that point much consideration in the preceding case.

(j) 3 Inst. 169. Pult. 46 b. 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (A). 27 Hen. 7, 3 pl. 21.

(k) 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (A) in the notes. Moor, 655.

(kk) *R. v. Ritson*, L. R. 1 C. C. R. 200; 39 L. J. M. C. 10, *et per* Martin, B., 'It is laid down in 3 Inst. 169; also by Sir M. Foster, and in Russell on Crimes, in the passages referred to in the course of the argument, as well as in Tomlin's Law Dictionary, that when a party makes a feoffment of land, and afterwards makes a feoffment of the same land, in which he falsifies the date, he is guilty of forgery.'<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> There seems to be some difference of opinion upon this point in the American courts. In Massachusetts, it does not appear to have been adopted; and in *C. v. Baldwin*, 11 Gray, 197; 71 Am. D. 703, the doctrine

is expressly repudiated; but Mr. Bishop distinctly adopts the expression of the law laid down in *R. v. Ritson*, and the definition of forgery there given by Lord Blackburn. Bishop, ii. s. 585.

Where Brown gave Brittain a cheque for £7 on the Bank of London, which, having been presented and paid, was by them returned, cancelled in the usual way, to Brown, who altered it in the handwriting, and then took it back to the bank, declaring that it was a forgery, and wrote a statement to the effect that the cheque was forged by Brittain; Cockburn, C. J., is reported to have held that there was no forgery by Brown; the real offence committed by Brown, as regards the cheque, was obtaining money on credit by means of a false pretence that it was forged, whereas it was genuine. (*l*)

If a bill of exchange, payable to A. B. or order, get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee, in whose favour it was drawn, endorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (*ll*)

The uttering of a note, as the note of another person, has been holden to be forgery, though such note was made in the same name as that of the prisoner.

The point arose in the following case: two prisoners, named Parkes and Thomas Brown, were indicted for forging a promissory note, of which the following is a copy:—

‘Rington, Salop, April 20, 1796.

‘No. B. 248.

‘I promise to pay to bearer, on demand, at Messrs. Down, Thorton, and Co.’s, Bankers, London, the sum of Five Guineas, for value received. For Self and Co.

‘THOMAS BROWN. (*m*)

‘FIVE GUINEAS.

‘Entered, T. B.’

There was a second count for uttering the same, knowing it to be forged. The prisoner Brown uttered the note to one Hulls, a shoemaker, in part payment for a quantity of boots and shoes which he had bought, under a pretence that he was a Captain Brown of the 17th regiment, and going immediately to the West Indies. At the time when he bargained for the articles at Hulls’s shop, he told Hulls that if he would send his boy with him he would send back the money: but Hulls declined this, and went himself with the prisoner. While on their way, Brown said that his brother was agent to the 17th regiment, and would buy all the shoes Hulls had: and upon their coming to a public-house, he invited Hulls to go in, saying he should see his brother presently. They then sat down together on a bench in the garden of the public-house; and Brown proceeded to speak further of his brother, who, he said, had just married a lady with a fortune of £15000, and had deposited it in the hands of Down and Co. After some time, the brother not appearing, Brown went into the house, and returned again, using expressions of disappointment at the

(*l*) *Brittain v. The Bank of London*, 3 F. & F. 465. The case is very unsatisfactorily reported. It does not shew in what the alteration consisted, &c.

(*ll*) *Mead v. Young*, 4 T. R. 28.

(*m*) The words, ‘I promise to pay the bearer on demand,’ and also the words, ‘the sum of five guineas, for value received. For Self and Co.,’ were *printed* in the note.

absence of his brother, and added: 'I am sorry I cannot pay you in gold: but I can give you what is just as good, one of my brother's drafts, for which I have been into the house to get cash, but the landlord has not enough by him.' He then produced the note in question, and gave it to Hulls, who asked if it was on the money lodged with Down and Co.'s: Brown said that it was; and added that his brother and he always paid in that manner on demand, for they wanted no credit. He then appointed Hulls to meet him in the afternoon, at another place, where he would pay him the balance. The note was soon discovered to be a forgery, and Hulls could hear nothing more of Brown. Parkes and Brown were connected together; and when Parkes was taken up, more than forty of these five-guinea notes, in blank, were found upon him, dated Ringhton, Salop; and a few of the same sort of notes were also found concealed under a board in a shop where Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the handwriting of Parkes; and the name Thomas Brown was also in the handwriting of Parkes. In Parkes's pocket-book was found a receipt under a cover, addressed to Thomas Brown, at the Compter (the prison to which Brown had been committed), for £21, for four five-guinea bills. Down and Co. had no such customers as Thomas Brown, of Ringhton, in Shropshire; and there was no evidence that the prisoner Brown had any residence or connection at that place. The jury found both prisoners guilty; and stated that they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. It was objected: first, that the name *Thomas Brown* was the real name of one of the prisoners; secondly, that it was no forgery in Parkes to sign the name of Thomas Brown, with his consent; thirdly, that if Parkes were not guilty of forgery, Brown could not be guilty of uttering the note knowing it to be forged; and fourthly, that the subsequent misrepresentation of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown would utter the note: the principle being, that misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making. These points were submitted to the consideration of the twelve judges, who held the conviction wrong as to Parkes, on a ground irrelevant to the subject now under consideration; but all of them held the conviction right as to Brown; and Grose, J., afterwards delivered their opinion. He observed, 'as to the first objection, that the definition of forgery was, "the false making a note, or other instrument, with intent to defraud; which might be done either by using the name of one who did not exist, or of one who did exist, without his consent." That this was of the former description; being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist: and that the circumstance of its being made in the same name as his own could not make any difference; being uttered as the note of another, and not his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, as the signer of the note, applied, there could be no



consent given to sign the name. It was signed by the authority of a Thomas Brown, but not of *the* Thomas Brown for whose note it purported to be given. For the person in whose name the note was made, was, according to the description of him in the note, then a resident at Ringhton, in Salop; and it imported that he was a correspondent of Down and Co., and had money in their hands; and he was also represented to be the brother of the prisoner; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that Brown uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged*; and therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it. (*n*)

John Hevey was indicted for forging an endorsement of a bill of exchange in the name of Barnard M'Carty, with intent to defraud W. Masters and E. Beauchamp, &c.; and the indictment contained a count for uttering a forged endorsement in the name of Barnard M'Carty, with the like intention. The bill of exchange in question was in the following form:—

'No. 59.                    £30.

'Bath Bank, Nov. 19, 1781.

'Thirty-one days after sight, pay Mr. Barnard M'Carty, or order, thirty pounds, value received, for Smith, Moore, and Co.

'JER. CONNELL.

'To Rich. Beatty and Co.

'No. 19, Great St. Helen's, London.'

The prisoner came to the shop of Beauchamp and Masters, who were pawnbrokers, to buy a watch, and offered them the bill in question, with the endorsement then written on it; they hesitated about taking it, upon which he told them it was a good bill, that his name was Barnard M'Carty, that he had endorsed it, and that Beatty and Co., by whom the bill purported to be accepted, were agents to the Bath Bank. The pawnbrokers were not satisfied, and sent their servant to St. Helen's, to inquire about the acceptance; but upon his returning and saying that he had seen a person at St. Helen's, who said the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. The prisoner had procured the plate to be engraved some time before, containing the form of the bill in question, and had printed several hundred copies; he had always been known by the name of John Hevey; and no such person as Smith, Moore, and Co. could be found in Bath, though there were such names put on the door of a house, from whence the person who had been there had run away. The names of Beatty and Co. were on a counting-house door in Great St. Helen's, where a man of the name of Beatty, who said he was a clerk, had lived; but was since taken up and lodged in prison. There was such a man as Barnard M'Carty, and the endorsement was in

(\*) *R. v. Parkes*, 2 Leach, 775. 2 East, P. C. c. 19, s. 49, p. 963. Brown accordingly received sentence of death, but was

not executed. 2 Leach, 788. This case is observed on, and doubted in 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 580.

fact of his handwriting. The jury found a verdict of guilty, and found specially that there was such a person existing as Barnard M'Carty, and that the endorsement was of his handwriting; that the prisoner was not that person, but had passed himself upon the prosecutors as such at the time he tendered the bill in payment; and, on a case reserved, the judges were all of opinion that it did not amount to forgery, for there was no false endorsement, the jury having found that the endorsement was truly made by a real person whose name it purported to be. (*nn*)

And it was afterwards holden by a majority of the judges that the adopting a false description and addition, where a false name was not assumed, and where there was no person answering the description or addition, was not a forgery. The bill of exchange upon which the indictment proceeded was addressed to Mr. Thomas Bowden, baize manufacturer, Romford, Essex, and drawn by the prisoner in his own name. The prisoner uttered this bill, with an acceptance thereon in the handwriting of Thomas Bowden, whom the prisoner had known for many years, but who never had carried on the business of a baize manufacturer at Romford, nor ever resided there. The bill was accepted by Bowden, payable at No. 40, Castle-street, Holborn; and the person who lived at that house, and who knew Bowden, and was well acquainted with his handwriting, stated that he was surprised at Bowden's accepting the bill, payable at his house, as he did not reside there, and had no authority from the witness to make any bills payable at that house. The learned judge left it to the jury, in the first place, to consider whether there was any such person as Thomas Bowden; and, if there was, whether the acceptance was his, and that if there was no such person, or the acceptance was not his, and the prisoner, at the time he offered the bill to the prosecutors, knew either that there was no such person, or if there was that he had not accepted it, they should find him guilty. He also gave them other directions, but the jury found that there was no such person as Thomas Bowden, and the prisoner was convicted. The learned judge, however, being of opinion, from the evidence, that there was such a person, and that the acceptance was his handwriting, reserved the case for the opinion of the judges, on the point whether, assuming that the acceptance was the handwriting of Bowden, the prisoner, by the giving on the face of the bill a false description of Bowden, and uttering the bill after it was accepted by Bowden, with this false description, with intent to defraud, brought himself within any of the counts of the indictment which charged a forgery of the bill, and an uttering and publishing the forged bill, and also a forging of the acceptance, and the uttering and publishing such forged acceptance. And a majority of the judges held the conviction wrong. (*o*)

A bill was addressed to Messrs. Williams and Co., bankers, Birchin-lane, London; and it appeared that possibly the figure 3, on the lower left-hand corner of the bill, might have been inserted originally as part of the address, but the evidence left that matter in doubt. The prisoner was asked at the time when he was drawing the bill,

(*nn*) Hevey's case, *cor.* Ashhurst, J. in Hil. T. 1782. 1 Leach, 229. 2 East, O. B. 1782, and considered by the judges P. C. c. 19, s. 5, p. 856.

(*o*) R. v. Webb, R. & B. 405.

whether the acceptors were Williams, Birch, and Co., and his answers imported that they were. Williams, Birch, and Co. lived at No. 20, Birchin-lane; and it was proved not to have been their acceptance. There were no known bankers in London using the style of Williams and Co. except Williams, Birch, and Co.; but at No. 3, Birchin-lane, the name 'Williams and Co.' was on the door; and some bills addressed to Messrs. Williams and Co., bankers, Swansea, had been accepted, payable at No. 3, and had been paid there. There was no evidence as to the person who lived at No. 3; but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there. It was holden, upon these facts, that the prisoner was improperly convicted of uttering a forged acceptance, knowing it to be forged. (oo)

The first count charged the prisoner with forging a bill of exchange, the second with uttering the same bill, the third with forging an acceptance of a bill of exchange, and the fourth with uttering the acceptance. There were other counts not material. The instrument in question was as follows:—

|  |                    |   |
|--|--------------------|---|
| <p>'No.                    £148 7s. 9d.<br/>'Three months after date pay<br/>one hundred and forty-eight<br/>pence, value received.</p> <p>'To Mr. Wm. Wilkinson,<br/>    'Halifax,<br/>    'Pyble, London.'</p> | William Wilkinson. | <p>'Leeds, October 22nd, 1847.<br/>to myself or order the sum of<br/>pounds seven shillings and nine-<br/>pence.</p> <p>'ALEXR. BLENKINSOP.</p> |
|--|--------------------|---|

The prisoner had in his employ one William Wilkinson, a mechanic, at sixteen shillings a week, and without any other property. This man proved the acceptance to be in his handwriting, so far as the mere name; he stated that he wrote that on a stamped paper, blank, except some printed parts of a bill, among which was the place of date, 'Leeds;' that he wrote it at the prisoner's house at Leeds, the prisoner having called him out of the yard and said to him, 'I have some money to send up this morning; there is no one about; you'll do as well as any one else. I want you to write your name here. I'll fill it up.' The witness said he knew what a bill of exchange was; that he left his master to fill it up as he pleased, and that he was at liberty to make it payable at a banker's in London if he liked, or anywhere else. He himself had never lived at Halifax, nor received authority from any one there to accept a bill for him. It was admitted that, at the time the acceptance was thus written, the prisoner intended to make the drawing to be on a William Wilkinson, of Halifax, and that there were persons of that name resident there, from none of whom any authority had been received. When uttered by the prisoner, the bill was drawn as above set out, and accepted, and over the acceptance were the words, 'payable at Smith, Payne, and Co., bankers, London.' The jury having convicted, upon a case reserved, it was contended that there was no forgery generally or by alteration. It was not a forgery of an acceptance generally, because

(oo) R. v. Watts, R. & R. 436.

the bill was not in existence when the acceptance was written. It was not a forgery by alteration or addition; for the alleged alteration or addition formed no part of the bill. The bill was complete before the prisoner wrote the word 'Halifax.' Neither was it a forgery of the bill by alteration; but all the judges present were of opinion that the putting an address to the acceptor's name, while the bill was in the course of completion, with intent to make the name of the acceptor appear to be that of a different existing person, was forgery. (*p*)

On an indictment for forgery it appeared that the prisoner had in his service George Beard as foreman, and he got him to write his acceptance on a bill drawn by himself at three months for £32 11s. 8d., and directed to 'Mr. George Beard,' without any address. He then, without, as far as appeared, G. Beard's knowledge or consent, filled in the address, 'Rottingdean, near Brighton.' The prisoner took this bill to a discount company, and said he (quære Beard or the prisoner) was 'good for the amount.' There was a George Humphrey Beard at Rottingdean, but he was a youth of seventeen, and knew nothing of the prisoner, and there was no other George Beard there. George Beard, the foreman, had lived near Brighton, and had accepted bills for a person who lived at Rottingdean, but he denied that he had led the prisoner to suppose that these bills were addressed to him at Rottingdean. He had written this acceptance in the prisoner's shop, and he did not observe that there was an address upon it, nor did he believe that there was; but he admitted that he never read the bill. *R. v. Blenkinsop*, 1 Den. C. C. 282, was cited for the Crown; Willes, J., however, pointed out that in that case there was evidence that the prisoner intended to make the drawing to be on a different person, and here there was no evidence of that, and directed an acquittal. (*pp*) The prisoner was then tried for another forgery. He had gone to one Woods, a bill discounter, and stated that he had business transactions with 'Mr. Beard, seedsman, Rottingdean,' and asked him whether, if he could get an acceptance of this Mr. Beard, he would discount it; and, after making inquiries, Woods said he would, and then discounted a bill, which, like the other, had been accepted by the prisoner's foreman, who lived then at Maidstone, and had never lived at Rottingdean, and was no further a seedsman than having been foreman for years in that business. In this case the acceptance had been written by George Beard on a blank stamp, which the prisoner afterwards filled up, and put the address 'Rottingdean,' without, so far as appeared, Beard's knowledge or consent. There was no George Beard at Rottingdean. The false address was not added to the acceptance but to the address. *R. v. Blenkinsop* was cited for the prisoner to shew that the address must be that of a different *existing* person. Willes, J., said that could not have been the ground of the decision, as it was clear law that there may be a forgery in the name of a non-existing person, and it was too plain for argument that if a person added an address to a bill, so as to make it appear that the acceptance, though really written by a person of the same name, was that of

(*p*) *R. v. Blenkinsop*, 1 Den. C. C. 276.  
2 C. & K. 531. A.D. 1847. 'Suppose any one in the street were to sign the name "Thomas Coutts," that being his real name,

and afterwards the word banker was added, would not that be forgery?' Per Alderson, B., *ib.*

(*pp*) *R. v. Epps*, 4 F. & F. 81.

a different person, whether such person existed or not, he was guilty of forgery. Here the bill was so altered as to make it appear that the acceptor was a seedsman, whereas he was a servant. It was then urged that the indictment was for forging the acceptance, not the bill, and that the acceptance was not altered. Willes, J., held that that did not matter, for in point of law there was no acceptance until the bill was drawn. It was, therefore, really the effect of the acceptance that was altered, and that was a forgery. It was then urged that the body of the bill, including the prisoner's address, was all in the prisoner's handwriting, and therefore it could not be forgery to alter what purported to be his own handwriting; and *R. v. Webb*, R. & R. 406, was cited; but Willes, J., said that that made no difference, and that the question for the jury was whether the bill was passed off to Woods as that of a seedsman and customer, instead of what it really was, that of a mere servant; and he told the jury that 'forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document, as it appears on the face of it, when in fact there is no such genuine document really in existence, as it appears on the face of it to be. Consequently, if the prisoner passed off this acceptance as that of one Beard of Rottingdean, thereby meaning one Beard, a seedsman, then find him guilty.' (q)

The prisoner was indicted for forging, &c., the following bill of exchange:—

'London, March 1st, 1851.

'£300. Six months after date pay to the Rev. James Nisbett or order the sum of three hundred pounds, for value received.

'RICHARD MITCHELL.

'To William Robert Nisbett,

'Fort Nisbett,

'Barrell-a-Bane, Ireland.'

'Accepted. William Robert Nisbett; payable at Messrs. Scott and Co., bankers, Cavendish-square, London.'

The indictment also charged the forgery and uttering of the acceptance. The bill bore the prisoner's endorsement, and when he produced it to the prosecutor he asked who the parties to the bill were, and the prisoner said one was his brother, who was his tenant in Ireland, and the other was Mr. Mitchell, a clerk in the goods department at Nine Elms station. It was proved that no clerk of the name of Mitchell had been employed in that department between September, 1847, and November, 1851. On the part of the prisoner it was proved that Robert (r) Mitchell was now a barrister's clerk, but in 1843 he had been a clerk at the Nine Elms station, and the prisoner must have known, in 1850, that he had left the station. In 1850 the prisoner asked Mitchell if he would permit his name, as usual, to appear on the prisoner's bills, Mitchell having previously given him permission to use his name, and the prisoner at the same time produced some bills with Mitchell's name on them, and at last Mitchell consented that his name should be used as drawer. The prisoner had married

(q) *R. v. Epps*, 4 F. & F. 83.

(r) *Quære*, a mistake for Richard?

Mitchell's sister. It was also proved that W. R. Nisbett, whose name appeared as the acceptor, was the prisoner's brother, and went to America in 1850, and the handwriting was not his, but like the prisoner's. Williams, J., told the jury that if a representation were made that an individual was worth £1000, in order to obtain advances, and it should turn out that he was not worth ten shillings, it could not be maintained that the person so represented was fictitious, as he was really in existence; but, in the present case, it was for the jury to say whether the prisoner had tendered the bill with a knowledge that there was no such person at the Nine Elms station, and if they were of that opinion, and that the prisoner tendered the bill as that of a person who did not in fact exist, then the charge of forgery was sustained. Again, did the jury believe that the prisoner had forged the name of his brother? (s)

The prisoner was indicted for forging two promissory notes in the following form: —

‘£34.

‘Kilkenny, Jan. 6, 1854.

‘One month after date we jointly and severally promise to pay Messrs. Brown, Son, and Company, or order, at the Provincial Bank of Ireland, Kilkenny, thirty-four pounds sterling, for value received.

‘P. MAHONY.

‘A. WATTERS.’

The prisoner being indebted to Brown, Son, and Co., their agent pressed him for payment; he had previously ascertained that Mrs. Watters, the prisoner's mother-in-law, was a solvent person, but he did not know her Christian name; he offered to give the prisoner time if he got his mother-in-law to join him in notes for the amount; this the prisoner agreed to do, and in the prisoner's presence he drew the body of two notes which the prisoner signed. The prisoner said he would go to his mother-in-law, and get her to sign them; and he took away the notes and returned in an hour, and handed the notes to the agent, saying, ‘Here are the notes; they will be paid before they arrive at maturity.’ The agent took the notes, believing they had been executed by the mother-in-law. It was proved that her name was Catherine, and that she had neither signed nor authorised any one to sign the notes; but they had been signed by her daughter Anne, the prisoner's wife, in her usual handwriting. The jury were told that if the prisoner got his wife to sign the notes in the name ‘A. Watters,’ he at the time intending to pass them as the notes of his mother-in-law, and that he afterwards passed them to the agent for Messrs. Brown, Son, and Co. as the notes of his mother-in-law, the indictment was supported. The jury found that he got his wife to affix the signature ‘A. Watters,’ he at the time intending to pass them to the agent as the genuine notes of his mother-in-law. On a

(s) *R. v. Nisbet*, 6 Cox, C. C. 320. A.D. 1853. The following written questions were given to the jury: ‘Do you believe that the prisoner forged the acceptor's name with intent to defraud? Did he utter the bill knowing it to be forged? Did he forge the

name of the drawer with a felonious intent? Did he forge the name of the drawer as a fictitious person?’ The jury answered all the questions in the affirmative; but if they had only so answered the last the case would have been reserved.

case reserved, it was urged that this was not forgery, as it was the signature by the prisoner's wife in her maiden name. There was no false making of the notes. It was answered that this was a false signature, and intended as such, and that Watters was not the name of the prisoner's wife. Lefroy, C. J., 'It is well settled that the making of a written instrument, with a view to defraud, may be either by the false making of the signature of a non-existing person, or of an existing person without permission. Now here it was not to represent a fictitious person, but an existing person who was known, namely, the mother-in-law of the prisoner, that the prisoner put this signature to these notes. He professed to get her name, and he brings to the prosecutor what purports to be her signature, and an execution of the notes by her. It is true that the signature is "A. Watters," not "C. Watters," but we are of opinion that the prisoner cannot avoid the consequences of his fraudulent act by a variation in the signature, which would not put a party on an inquiry as to its regularity and authenticity. He brought these notes to the prosecutor as the instruments which he had promised to procure, namely, the notes of his mother-in-law; and whether he put this signature to them himself, or got a person to do it by his directions, he is equally guilty. We are, therefore, of opinion that the case was left to the jury, as it should have been, and that the conviction should be confirmed.' (t)

The cases in which a party committing forgery has used a name different from his own, consist either of those in which the name used has been of a real existing person, or those in which the name used has been of a person non-existing and fictitious. (tt)

It is said to be clearly settled, that in the case of forgery committed in the name of a person really existing, it matters not whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such, the credit in such case not being given to the impostor personally without any relation to another, but to that other person whom he represents himself to be. (u)

Elizabeth Dunn was indicted for forging the following promissory note, with intent to defraud Edward Hooper :—

'London, 27th July, 1765.

'I promise to pay to Mr. Edward Hooper, the sum of *three* (the word *pounds* being omitted) thirteen shillings and sixpence, or order, seven days after date, value received by me.

her  
'MARY ✕ WALLACE.  
mark.

'Witness, John Whattal'

(t) R. v. Mahony, 6 Cox, C. C. 487. A.D. 1854. Jackson, J., said, 'It is very common with the humbler classes in the south to call married women by their original name, when the Christian name, and not Mrs., is used. Except for this, there does not seem to be a doubt that the signature was a forgery.' Monahan, C. J., said,

'It is plain that the "A" was written in such a way as to render it difficult to say whether it was "A" or "C."'

(tt) As to the meaning of a 'fictitious or non-existing person' the case of *Vagliano v. Bank of England*, 1891, A. C. 107, may be consulted with advantage.

(u) 2 East, P. C. c. 19, s. 49, p. 962.

In June, 1765, the prisoner applied to Hooper at his office for receiving seamen's wages, calling herself Mary Wallace, and desired him to advance her money to pay the fees for the probate of her husband's will, which was in the hands of a proctor. She returned soon after with the probate of the will of John Wallace, therein described to be a seaman on board the *Epreuve*; when Hooper required her to produce a certificate to shew that she was the Mary Wallace named in the will. A few days afterwards she brought a certificate, and pressed Hooper to lend her money on the credit of the wages due to J. Wallace, when he let her have three guineas and a half, and wrote the body of the promissory note in question, to which she subscribed her mark, after which his clerk attested it. She was then asked what name he was to put to her mark, to which she answered, 'You know my name; you may write Mary Wallace,' which he did. It was proved clearly that her name was Elizabeth Dunn, and that the whole account was a fabrication. The jury were directed to find the prisoner guilty, if they believed that she subscribed the note produced in a false name, either by a mark intended by her to express such false name, (*uu*) or by words at length, with intent to defraud Hooper, and the jury accordingly found her guilty; and, on a case reserved on the question whether as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another, in contradistinction to herself, the offence amounted to forgery, nine of the judges were of opinion that the prisoner was properly convicted. (*v*)

This case appears to have proceeded upon the ground of the prisoner having assumed the character of executrix of Wallace, a real person actually entitled to wages. Amongst the principles there laid down, it appears to have been holden, that if a note be given in the name of another person who is either really existing, or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery; and that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him; for then he could not know that such impostor was not really the person whose name he assumed, and, therefore, the other would be equally deceived. (*w*) This case occurred before any decision had established the principle, which will be presently noticed, of the use of a mere fictitious name being of itself sufficient to constitute a forgery. (*x*) And it is observed, that after the authorities by which it was settled, that such a case was within the Acts respecting forgery, it would have

(*uu*) There is no doubt forgery may be committed by using a mark by way of signature, see *R. v. Fitzgerald, post*, p. 605.<sup>1</sup>  
 (*v*) Dunn's case, 1 Leach, 57. 2 East, P. C. c. 19, s. 49, p. 962. Two of the

judges were absent, and Aston, J., did not concur in the opinion.

(*w*) 2 East, P. C. c. 19, s. 48, p. 961.

(*x*) See *post*, 588.

#### AMERICAN NOTE.

<sup>1</sup> In America, it has been held that forgery had been committed though the place for the mark was left blank. *Le Masters v. S.*, 95 Ind. 367.



been quite sufficient to have shewn, that the prisoner, with a fraudulent intent, signed a promissory note in the name of Mary Wallace, and it would have been unnecessary to resort to the additional circumstance of the fraudulent object being to obtain credit in respect of money actually due to the deceased John Wallace, of whom Mary was falsely alleged to be the representative. (y)

Upon an indictment for uttering a forged acceptance it appeared that in September, 1844, the prisoner called at the warehouse of the prosecutor at Halifax, and bought some wool of his clerk, to whom he tendered in payment a bill of exchange, bearing the acceptance of 'John Cooper,' and directed to 'Mr. John Cooper, Leeds.' The prisoner said the bill was as good as cash; whereupon the clerk said that he knew that a respectable Leeds merchant of the name of Cooper attended Huddersfield market, and he asked the prisoner if this was the same person; to which the prisoner replied, 'Yes, it is.' The clerk then took the bill in payment, and delivered the wool to the prisoner. A few weeks afterwards, and before the bill became due, the prisoner called again, and bought more wool of the same clerk, for which he tendered in payment three other bills, all of them accepted by 'John Cooper,' and addressed to 'Mr. John Cooper, Leeds.' One of these was the bill mentioned in the indictment. The prisoner stated that the bills were as good as cash, and that the acceptor was the same as on the former bill. The clerk took the bills in payment. The only persons at Leeds named Cooper, who attended the Huddersfield market, were the partners in a firm of 'David and John Cooper,' none of whom had accepted any of these bills, or authorised the acceptance. On behalf of the prisoner another John Cooper was called, and stated that he was an occasional assistant in a stable-yard at Leeds, and had no other means of subsistence; that he had for several years been in the habit of accepting bills for the accommodation of the prisoner, and had accepted the bills in question, as usual, at the prisoner's request; that he had never been a merchant, and never attended the Huddersfield market; that he accepted the bills in question on the days of their respective dates. The three bills above mentioned all of them bore date after the first and before the second transaction. For the Crown it was urged that, as there is in respect of forgery no difference between the forgery of the name of an existing person and the use of a name that is purely fictitious, the question for the jury was whether, at the time the prisoner got Cooper to accept the bill in question, he did so with intent to use it as the acceptance of any other person, real or imaginary. Cresswell, J., after consulting Coleridge, J., told the jury that 'the facts charged might amount to forgery in two or three points of view. The prisoner asks Cooper to draw bills for his accommodation; Cooper does so, not knowing how they are to be used. This is no forgery on the part of Cooper. But if a man signs or procures another to sign the name of another person to a bill without his authority, it is forgery. It is also forgery if the name so signed be that of an imaginary person. Where a person employs an innocent agent to do an act, he himself is responsible. Cooper is innocent as regards this charge. If, when the prisoner got Cooper to sign the bill,

he meant to pass it as the bill of D. and J. Cooper, or of an imaginary J. Cooper, and uttered it with the purpose of fraud, he is guilty. The facts as to the uttering of the first bill are material. Did the prisoner know who was meant by the inquiry of the clerk as to attending Huddersfield market? If he did, "Yes, it is," must have meant that it was the bill of D. and J. Cooper, and is evidence of the purpose of the original concoction. If he did not know D. and J. Cooper, it might be that he meant a non-existing person. But before you can find the prisoner guilty you must go further. You must be satisfied that he got John Cooper to put his name to the bill for the purpose, on the part of the prisoner, of putting off the bill either as that of D. and J. Cooper, or of a non-existing person. The clerk's question might first put it into his head: if so, the first bill was not a forgery. After the credit on the first bill he again goes to John Cooper. What passes in his mind when the three other bills were drawn is a different question from what passed in his mind when the first was drawn. Do you find that he got the second bill accepted with intention to pass it as the bill of some John Cooper, real or imaginary, other than the John Cooper who accepted it? In either of these events the prisoner is guilty of forgery.' (z)

Writing the acceptance of an existing person to a bill of exchange without authority, or the name of a firm or person non-existing in acceptance of a bill, with intent to defraud, is forgery; and if a person write an acceptance in his own name to represent a fictitious firm, with intent to defraud, it is a forged acceptance; for, if an acceptance represent a fictitious firm, it is the same as if it represented a fictitious person. (a)

An indictment alleged that the prisoner, James Parke, had in his possession a bill of exchange of the Bank of England, and forged an endorsement thereon which was as follows, &c. Messrs. John Parke and Son carried on business near Preston, and consigned certain pieces of shirtings to Messrs. Birt, of Manchester, to be forwarded to Messrs. Butchard, in America. Messrs. Cotesworth, of London, were the correspondents both of Messrs. Birt and Butchard, and received from Messrs. Butchard, by the Helena, a remittance, with a list of parties among whom it was to be divided, in which John Parke and Son, of Manchester, were included. Messrs. Cotesworth forwarded a letter addressed on the outside to Messrs. J. Parke and Son, but in the inside to Messrs. John Parke and Son, as follows:—

'London, May 11, 1843.

'Gents.,—We have received of Messrs. Butchard and Co., on your account, by the Helena, 667 dollars 64 cents, which we will remit.'

This letter arrived in Manchester; but was put among the dead letters, as the parties were not to be found there. Two or three days afterwards a postman met the prisoner, who had been both a bankrupt and insolvent, and said to him, 'Here is a letter addressed to John

(\*) *R. v. Mitchell*, 1 Den. C. C. 282. A very material fact is omitted in this report, viz., whether the bills were accepted

in blank or with the address, 'Mr. John Cooper, Leeds,' upon them.

(a) *R. v. Rogers*, 8 C. & P. 629, *cor.* Bosanquet, Coleridge, and Coltman, JJ.

Parke and Son. Do you know such a firm?' He said, 'Of course it will be for me;' and asked how he could get it. The postman told him, by sending a note or calling at the post-office. The prisoner sent a man to the post-office with the following note: 'Have the kindness to deliver any letter directed to J. Parke and Son, or J. Parke and Co., to the bearer;' and the letter was given to him. Letters had been sometimes directed to the prisoner in the name of J. Parke and Co., and J. Parke, and one directed to J. Parke and Son had been given to him, but that he took to John Parke and Son, the prosecutors, saying he supposed it was for them, and it turned out to be so. The prisoner afterwards wrote as follows to Messrs. Cotesworth:—

'Manchester, May 16, 1843.

'Gents.,—We await the promise of yours of the 11th inst., and beg it may be as early as possible. Send us £100 immediately.

'For self and partner, J. PARKE,'

and, not receiving an answer, he wrote another letter asking for an answer by return of post, and then Messrs. Cotesworth forwarded a bank post bill for £133 15s. 6d. in the following letter, addressed to J. Parke and Son, Manchester:—

'London, May 22, 1843.

'Gents.,—Having sold the bullion by the *Helena*, we beg to inform you that the produce of your interest therein, viz., 667 dollars 64 cents, we hold at your disposal.'

The prisoner obtained this letter from the post-office, and went to Messrs. Cunlittes' Bank at Manchester, and produced the bank post bill, which was made payable to J. Parke and Son, and endorsed it 'Jas. Parke and Son,' but when he handed it to the clerk, he said, 'This is a mistake; our firm is J. Parke and Co., Spinners, Otham.' It was objected that this was not the forgery of an endorsement. 'This endorsement could not deceive the party to whom the bill was passed, as the name in the body is J. Parke and Son, and that on the back Jas. Parke and Son, and therefore it cannot be taken as the forgery of the name in the body of the bill.' Wightman, J.: 'It seems to me that I must take all the evidence together, and from that the bill appears to have been intended for John Parke and Son, and that the prisoner, having obtained it by representing himself to be *John* Parke, afterwards endorsed it "Jas. Parke," which is not the designation of the person for whom it was intended. It is true that J. Parke and Son may mean any one, John or James; but I think it will be a question for the jury whether he did not intend to defraud John Parke and Son when he added the words "and Son," which is not his firm.' After consulting Cresswell, J., who concurred, Wightman, J., told the jury, 'The endorsement being Jas. Parke and Son, the charge against the prisoner is, that the name is forged, and that it is an endorsement of a non-existing firm; and, undoubtedly, if the name of a non-existing firm, or other fictitious person, be applied, with an intention to defraud, it will be forgery. With reference to the indictment, the objection, which is a technical one, does not apply here; because the indictment is in

general terms, and charges him with forging an endorsement to a certain instrument, styled, &c., without saying that it was intended to represent any particular person, or the said J. Parke and Son mentioned in the note. The question is, whether he intended by that endorsement to defraud any of the parties named in the indictment. The words in the letter are, "Messrs. John Parke and Son:" that is not the name of the prisoner, nor the name of the firm under which he trades. It also names that they had received so much money from the proceeds of the *Helena*. If you are satisfied that at the time he received this letter he knew it was not for him, but for those persons to whom he had formerly delivered the letter directed "John Parke and Son," or for some other person than himself, but that he nevertheless adopts the letter containing the money, and adopts that equivocal mode, writing J. Parke, and not James Parke, and received the bill knowing at that time it did not belong to him, but to certain other persons, and put the name of Jas. Parke and Son upon it, there being no such firm in existence, and if in so doing he intended to defraud any of the parties mentioned in the indictment, you must find him guilty.' (b)

In a case where the prisoner was convicted and executed for forging a bill of exchange, the facts were, that he had appeared in the neighbourhood of the lakes in Cumberland, pretending to be the Hon. Alexander Augustus Hope, brother of the Earl of Hopetoun, and in that name induced a young woman to marry him, and imposed upon several persons in the neighbourhood; and that, during such residence, he drew the bill in question upon a gentleman to whom he was known by that name, and who probably would have paid the bill, if the deception had not in the mean time been discovered. It is observed, as a material ingredient in this case, that the prisoner assumed the name and character of a really existing person. (c)

With respect to the cases in which the name used has been that of a non-existing and fictitious person, it is laid down, as a clear proposition, that the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery, as if it had been made in the name of one who was known to exist, and to whom credit was due. (d)

Where the prisoner was indicted on the 2 Geo. 2, c. 25, for uttering a forged deed, purporting to be a power of attorney, from Elizabeth Tingle, administratrix of her father Richard Tingle, deceased, late a marine belonging to His Majesty's ship the *Hector*, to F. Predham, of Barnard's-inn, &c., empowering the said Predham to receive all prize-money due to her, &c., the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained whether, as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve judges. Eleven of them were very clearly of opinion that the case was within the letter and meaning of the Act. (e)

(b) *R. v. Parke*, 1 Cox, C. C. 4.

(c) *Hadfield's case*, *Carlisle*, 1803. 6  
Ev. Col. Stat. Pt. V. Cl. xii. p. 580.

(d) 2 East, P. C. c. 19, s. 46, p. 957.

(e) *Lewis's case*, O. B. 1754. *Fost.* 116.  
It is stated that the doubt arose from the

A person endorsing a fictitious name on a bill of exchange, to give it currency, will be guilty of forgery; and in a case which was stated to the judges, they were all of opinion that a bill of exchange drawn in fictitious names, when there are no such persons existing as the bill imports, was a forged bill within the 2 Geo. 2, c. 25. (f)

It has been held that a forged order on a banker, for the payment of money, purporting to be made by one who kept cash with him, was within the 7 Geo. 2, c. 22, though made in a fictitious name, (ff) or in the name of one who had no authority to draw on him. (g)

It is immaterial whether any additional credit be gained by using the false name.

Edward Taft was tried for forging an endorsement on a bill of exchange, for fifty pounds, in the name of John Williams. The bill of exchange was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was endorsed generally, and it afterwards became the property of one William Whewall, out of whose pocket it had been picked or lost, with other things, at Leicester races. The prisoner had, on the same night, endeavoured to negotiate it at Leicester; but, being disappointed, he proceeded to Market Harborough, where he bought a horse of the landlord of the inn, and offered him the bill to change. The landlord, not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had endorsed it, and that if the landlord would put his name on the back of it, it should be immediately discounted. The landlord, however, not knowing the person from whom he had received it, refused to endorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him. He accordingly went to the prisoner, who accompanied him to the banker's, where the clerk told the prisoner that it was the rule of their house never to take a discount-bill unless the person offering such bill endorsed it; but that if he would endorse the bill in question, it should be discounted. The prisoner immediately endorsed it by the name of 'John Williams,' and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner's name was not John Williams. The judges, on a case reserved, were unanimously of opinion that this was a forgery within the statute on which the indictment was framed; for, although the fictitious signature was not necessary for the prisoner's obtaining the money, and his intent in writing a false name was probably only to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill and on the person who discounted it; as the one lost the chance of tracing his property, and the other lost the benefit of a real endorser, if by accident the prior endorsements should have failed. (h)

passage in 3 Inst. 169, where Lord Coke, speaking of forgery, says, 'this is properly taken when the act is done in the name of another person.' But it was thought that Lord Coke's description of the offence, on which the doubt was grounded, was apparently too narrow. Foist. 116.

(f) Wilks's case, Bodmin, 1767. 2 East, P. C. c. 19, s. 46, p. 957. See Bolland's case, 1 Leach, 83.

(ff) As to the meaning of this phrase, see *Vagliano v. Bank of England*, 1891, A. C. 107.

(g) Lockett's case, 1 Leach, 94. 2 East, P. C. c. 19, s. 38, p. 940; and *S. P.* in *Abraham's case*, 2 East, P. C. ibid. 941.

(h) Taft's case, 1 Leach, 172. 2 East, P. C. c. 19, s. 47, p. 959. The judges also referred to the case of *R. v. Lockett*, *supra*,



had obtained the bill fraudulently; that the better to elude inquiry after him it was necessary to conceal his name; and that his object was to defraud the real owner of the bill of its value: the Court held that if he intended to defraud anybody by the fictitious signature it was sufficient to constitute forgery. The jury having found the prisoner guilty, upon a case reserved eleven of the judges were of opinion that, though the prisoner did not gain any additional credit by signing the name 'W. Wilson' to the receipt, as the bill was not by the endorsement made payable to the person whose name was used, yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent the person receiving the money from being so readily traced. (i)

The following proposition has been the subject of much difference of opinion:—'That, if a person give a note or other security, as his own note or security, and the credit thereupon be personal to himself, without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for, in such a case, it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view.' (j) This principle has now been entirely affirmed by the Court for Crown Cases Reserved. (jj)

In one case, where the credit was without doubt given personally to the prisoner, the security tendered being considered as his alone, the judges agreed unanimously that the offence amounted to forgery. The prisoner was indicted for uttering the following order for payment of money, knowing it to be forged, with intent to defraud James Elliot. (k)

'Green-street, 31st July, 1781.

'Sirs,—Pray pay to Mr. John Atkins, or bearer, Six Pounds Six Shillings, value received.

'Yours, &c.

'H. TURNER.

'To Messrs. Brown, Collinson, and Co., Lombard-street.'

The prosecutor was a silversmith, and the prisoner, having looked out several goods at his shop, to the amount of six guineas, pulled out his purse, as if going to pay for them, saying, 'I believe I have not cash enough about me, but here is a draft on a banker, which is the same thing as money, for it will be paid when presented.' He accordingly laid the draft on the counter, and desired to see some silver spurs; but the prosecutor not having any of the kind which he described, the prisoner said that he must send him a pair. Mr. Elliot looked at the draft as it lay on the counter; and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner

(i) Taylor's case, 1 Leach, 214. 2 East, P. C. c. 19, s. 46, p. 960. Buller, J., doubted.

(j) One of the principles laid down in Dunn's case, 2 East, P. C. c. 19, s. 48, p. 961. *Ante*, p. 582, *et seq.*

(jj) R. v. Martin, 5 Q. B. D. 34. (Cock-

burn, C. J., Huddleston B., Lush, Lindley, and Hawkins, JJ.)

(k) In the report of the case in 2 East, P. C. c. 19, s. 50, p. 967, it is stated that the prisoner was indicted for forging the order. Probably there were counts for forging, and for uttering the order, knowing it to be so forged.

having a genteel appearance: and he then took his order-book, for the purpose of making a memorandum of the prisoner's direction: and supposing his name to be the same as that in which the draft, which he conceived to be the prisoner's, was signed, he wrote, 'H. Turner, Esq.' The prisoner looked over him, and desired him to add, 'Junior, Noah's Row, Hampton Court,' and then went away. Mr. Elliot further stated, that he gave credit to the prisoner, and not to the draft. No person of the name of H. Turner kept cash at Brown and Collinson's, or lived in Green-street; nor could such a place as Noah's Row, or such a person as H. Turner, jun., be found at Hampton Court. The jury found the prisoner guilty, and, on a case reserved on the question whether, as Mr. Elliot had sworn that he gave credit to the prisoner, and not to the draft, it could amount to the crime of forgery, the twelve judges were unanimously of opinion that the conviction was right; for it was a false instrument, not drawn by any such person as it purported to be, and the using a fictitious name was only for the purpose of deceiving. (l)

But in the following case, which occurred only a few years afterwards, though not easily to be distinguished in principle from that which has been just cited, the judges were much divided in opinion.

J. H. Aickles was indicted for forging a promissory note, in the following form, with intent to defraud one R. H. Gedge. A second count charged him with uttering such note, knowing it to be forged.

'London, Dec. 18, 1786.

'Three months after date, I promise to pay to H. Byron, Esq., or order, £25 10s. 0d. value received.

'£25 10s. 0d.

'JOHN MASON,

'No. 4, Argyle-street, Oxford-road.

The note in question was, on the 9th of January, 1787, tendered by Byron to Gedge's shopman, in payment for some linens that were shewn by him to Byron. Upon being asked who John Mason was, Byron described him as a gentleman of fortune, with whom he was concerned in a coal-mine, living at No. 4, Argyle-street. The shopman declined leaving the goods with him; but promised to send them, if, upon inquiry, the note was good. He immediately went to No. 4, Argyle-street, and inquired for Mr. Mason; the prisoner appeared, and said his name was John Mason, and that the note was drawn by him, and should be paid when due. Before the 9th of January the prisoner had taken the house No. 4, Argyle-street, in the name of John Mason, Esq., and the person who let the house had inquired concerning him, by this description, at the British Coffee-house, and received a favourable account of his character. He had always passed by the name of John Henry Aickles, and had been tried several times at the Old Bailey, and was known by that name since the year 1780, until the present time. Grose, J., entertained some doubt, and directed the jury that they could only convict the

(l) Sheppard's case, O. B. Sept. 1781. Taylor's case (*ante*, p. 589), and Dunn's case (*ante*, p. 582), were relied on. Mich. T. 1781. 1 Leach, 226. 2 East, P. C. c. 19, s. 50, p. 967, where it is said that



prisoner in case they believed that this note was drawn by him in consequence of a concerted scheme between him and Byron to defraud Gedge, that the prisoner had never gone by the name of John Mason before, and had assumed it for the purpose of this fraud. And he said that, if they were satisfied on these points, they might find the facts. Thereupon the jury found specially that the prisoner intended to defraud Gedge, and assumed the name of Mason for the purpose of this fraud; that he had never gone by that name before; and that they disbelieved a witness on the part of the prisoner, who had deposed that two years before he was inquired for and known by that name at the British Coffee-house. On this a verdict of guilty was taken by consent, subject to the opinion of the judges on the case. The opinion of the judges was pronounced upon this case by Ashurst, J., to the effect that it did not amount to forgery. But the judgment appears to have been given under a misconception that the judges had so decided; when, in fact, the case had been adjourned for further consideration. (*m*) It afterwards underwent further discussion, when many of the judges seemed to entertain an opinion that it was forgery; but several thought otherwise; and they never came to any final resolution on the matter. (*n*)

The following reasons are given as those upon which Gould, J., and the other judges who coincided with him, thought that the case amounted to forgery. There was an apparent design for fraud in general; and the jury was satisfied that the prisoner had assumed the name of Mason, which was not his name, nor had ever been used by him before, but always Aickles, with intent to defraud Gedge. He, therefore, made the note in the name of another, as if his own, and clearly with an intent to defraud. Whether there existed a person of that name or not was immaterial; the felony consisted in the intent to defraud under the falsity. One might assume a feigned name, and make a draft in it, and yet innocently; as if he concealed himself to avoid arrest, and had appointed his friend on whom he drew to pay his bills; or, giving notes, took care to pay them when due. But the prisoner, having no such intention, but, on the contrary, to defraud the party, by making the note under such disguised name, by which, after he left the place of concealment, he could not be traced; the case amounted to forgery. There was no ground, he thought, to distinguish this from the common case where the draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas, in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

The judges, who inclined against the conviction, went on the doubt whether, to constitute forgery, it was not necessary that the instrument should be made as the act of another, (*o*) according to the definition of Lord Coke, whether that other existed or not. Whereas, here the note was made as the prisoner's own, and avowed by him

(*m*) 2 East, P. C. c. 19, s. 50, p. 969.  
1 Leach, 440.

(*n*) Aickle's case, 1 Leach, 438. 2 East,  
P. C. c. 19, s. 50, p. 968.

(*o*) See Lewis's case, *ante*, p. 586, note  
(*c*).

to be so. The credit was given to the person, and not to the name; and the person, and not the name, was the material thing to be considered. (p)

Sir E. H. East enters at some length into the discussion of this point; and endeavours to ascertain the grounds upon which the judges, who inclined against the conviction, might possibly have proceeded. But he again repeats that it seems very difficult to distinguish the case from that of Sheppard: and he says that he cannot help suspecting that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together. (q) Another learned writer observes that it may be difficult to admit that the case involved any real ground of doubt when the specific fraudulent intention was expressly found, and the taking the house was only a part of the machinery of the fraud: and, with respect to Sir E. H. East's suggestion, that the difficulty may have arisen from mistaking matters of fact for matters of law, he further observes that this seems to be the true view of the case; for, if the use of the assumed name is intended to commit a fraud in the particular instance, there is no reason for not treating it as a forgery, although that may only be part of a more general system of fraud, which such assumption is intended to carry into effect. (r)

The indictment charged the prisoner, Samuel Whiley, with forging a bill of exchange for £60, dated Bath, Jan. 5th, 1805, drawn in the name of Samuel Milward, payable to his own order on Messrs. Stephenson and Co., bankers, in London, with intent to defraud H. Thurston; and in a second count with uttering such bill knowing it to be forged. The prosecutor was an upholsterer in Bath; and on the 27th Dec., 1804, the prisoner, being at that time a stranger to him, came to his house, and applied to take a coach-house and stable, which the prosecutor let him for three months. The prisoner then bespoke some goods of the prosecutor to the amount of £16 2s., which he directed to be sent to him, writing his direction in the prosecutor's book, 'Samuel Milward, No. 12, Kensington-place, Bath.' In the course of three days the goods were sent, and the prisoner came shortly afterwards and ordered more goods; and before all the goods were delivered he told the prosecutor to get his bill ready by four o'clock on Old Christmas eve, at which time he would call for it. He called at the time appointed; and the bill, amounting to £49 10s., was given to him. He said the bill was very right; that it was his rule to discharge all bills on Old Christmas eve; and that he would return again in ten minutes, which he did, bringing with him the bill of exchange in question; and saying that he would give the prosecutor a draft on his banker in London for £60. The prosecutor looked at the bill of exchange, which was endorsed with the name 'Samuel Milward,' and, upon the prisoner saying it was a good one, gave him the balance of ten guineas. The prisoner then told the prosecutor that he should want more goods, and should be a very good customer to him. The bill of exchange having been sent to the bankers, in

(p) 2 East, P. C. c. 19, s. 50, p. 970.

(q) Ibid.

(r) 6 Ev. Col. Stat. Part V. Cl. xii. p. 580; and Hadfield's case is cited. See *ante*, p. 586.

London, was returned to the prosecutor on the 25th Jan., dishonoured, and the prosecutor went immediately to the prisoner's house, in Bath, but he found it shut up, and saw nothing more of the prisoner till he was in custody. A clerk from Messrs. Stephenson and Co. proved that they knew no such person as Samuel Milward. The prisoner's real name was Samuel Whiley : he was baptised as the son of persons of that name, was married by that name, had gone by the same name at Bath when he lodged there for about a week in the July preceding this transaction ; and at Bristol in the following October ; as also at Bath again on the 4th of December ; and on the 20th of December (which was about a week before he first came to the prosecutor) he had taken a house in Worcestershire, under the same name. But on the 28th of December (the day after his first application to the prosecutor) he ordered a brass plate to be engraved with the name of 'Milward,' which was fixed on the door of his house on the following day. The prisoner stated, in his defence, that he had understood from his father that he was christened by the name of Samuel Milward ; and that, being under difficulties, and afraid of arrests, he had omitted the name of Whiley. In answer to questions put by Thomson, B., the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know ; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary ; but that if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods, and have taken the draft from him and paid him the balance as he had done when he came under the name of Milward. Thomson, B., left it to the jury to say whether the prisoner had assumed the name of 'Milward' in the purchase of the goods, and given the draft, with intent to defraud the prosecutor. And the jury saying that they were satisfied of the fact, found the prisoner guilty : and, upon a case reserved, the judges were of opinion that the question of fraud being so left to the jury, and found by them, the conviction was right. (s)

In a subsequent case the prisoner was indicted for forging an order for the payment of money, in which, by the name of James Cooke, junior, he requested Messrs. Praed and Co., bankers in London, to pay Mrs. Ware, or bearer, £15. On the 15th August, 1808, the prisoner took lodgings at the house of Mrs. Ware, by the week, and continued there till the 9th of September following, on which day he gave Mrs. Ware the order in question for a bank note of £15, which she advanced to him upon his applying to her for change. Mrs. Ware paid the order away to a neighbour, who took it to the bankers ; and, upon payment being refused, brought it back to Mrs. Ware, who immediately informed the prisoner of its being returned. The prisoner, first reading over the order, said that he saw he had made a mistake, and had forgotten to put the word 'junior,' which word he then added, and said that Mrs. Ware would find it would be right. Shortly afterwards the prisoner left the house, saying he should return to tea ; but he never did return. The order, with the addition, was presented at Messrs. Praed and Co.'s the next morning, and payment refused, the drawer not being known at that house, and no person of that name

(s) Whiley's case, MS. and R. & R. 90. S. P. R. v. Marshall, R. & R. 75 ; and R. v. Francis, id. 209, and *infra*.

keeping cash there. The prisoner's real name was John Francis, though he had occasionally gone by other assumed names. The case was left by the learned judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of James Cooke, junior, with a fraudulent purpose; and they found a verdict of guilty: but upon some doubts occurring whether the facts in evidence went to establish a forgery, or only a fraud, the case was referred to the consideration of the twelve judges, who held the conviction right; and were of opinion that if the name were assumed for the purpose of the fraud, and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit; though the case would have been different if the party had habitually used and become known by another name than his own. (*t*) But it seems that it must satisfactorily appear that the fictitious name was assumed for the purpose of fraud in the particular instance of the forgery in question, and that it will not be sufficient to shew that the fictitious name had been assumed for general purposes of concealment and fraud: as in a subsequent case, in which the prisoner was charged with forging an acceptance upon a bill of exchange in the name of Scott, the majority of the judges, being of opinion that it did not sufficiently appear upon the evidence that the prisoner had not gone by the name of Scott before the time of accepting the bill in that name, or that he had assumed the name for that purpose, held that a conviction for such forgery was wrong. (*u*)

But forging in a false name assumed for concealment, with a view to a fraud, of which the forgery is part, is sufficient to constitute the offence. And if there be proof of the prisoner's real name, it is for him to prove that he used the assumed name before the time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question. (*v*)

On an indictment for forging an acceptance of a bill for £20, it appeared that the prisoner opened an account with the prosecutor for lace goods; he represented that he was in partnership with J. F. Whiffen, who was his brother-in-law. The account was a monthly account, and the first and second were paid; but afterwards the prisoner got in arrear, and wanted the prosecutor to draw upon the firm, which at last he consented to do. The bill in question was drawn, and the prisoner accepted it in the name of J. F. Whiffen and Co. Whiffen proved that he had never been in partnership with the prisoner, and had never given him any authority to use his name. It was objected that to support the charge it was necessary to shew that the name had been assumed expressly for the purpose of the forgery in question; (*w*) but here long before the bill was accepted the prisoner had traded under the name of Whiffen and Co. It was answered that it was a question for the jury whether, when the prisoner first assumed the name, it was not with a view, among other things, of drawing bills, and so supporting a false credit. But it was held that it was a question for the jury whether he assumed the name of Whif-

(*t*) Francis's case, MS. and R. & R. 209. Mansfield, C. J., the Chief Baron, Grose and Lawrence, JJ., were absent.

(*u*) R. v. Bontien, R. & R. 260.

(*v*) R. v. Peacock, R. & R. 278.

(*w*) R. v. Bontien, *supra*.

fen and Co. with a view of defrauding the parties with whom he dealt, by issuing false bills of exchange, of which this was one. It would not be sufficient that he assumed the name for the purpose of fraud generally; but the jury must find that he contemplated issuing this particular bill, and there was no sufficient evidence to warrant them in coming to such a conclusion. (x)

The prisoner was indicted for forging and uttering a cheque. He had asked Mr. Remington to endorse the cheque for him; which he refused, but he wrote a letter to the Craven Bank, which he gave to the prisoner, speaking to the identity of the prisoner. The prisoner took this letter and the cheque endorsed 'Regd. Remington' to the bank, and there saw the clerk, who objected that the endorsement was not very like Mr. Remington's, and the prisoner produced his letter, and said that he saw him sign his name at the back of the cheque. There was no proof that the cheque was not a valid one; but it was returned dishonoured on presentation. The endorsement was proved not to be Mr. Remington's. Willes, J., held that the endorsement, if genuine, would have rendered Mr. Remington liable on the cheque, the same as an endorsement on a bill of exchange, and if the writing of Mr. Remington's name was intended to obtain credit with the bankers, it was a forgery with intent to defraud, and the case was left to the jury to determine whether the prisoner had endorsed Mr. Remington's name with the intention of inducing the bank to cash the cheque for him; and, if so, they were directed to find the prisoner guilty. (y)

If a person put the name of another on a bill of exchange as acceptor without that person's authority, expecting to be able to meet it when due, or expecting that such other person will overlook it, this is forgery. But if the prisoner either had authority from such other person, or from the course of their dealings *bond fide* considered that he had such authority, it is not forgery. (z)

Where upon an indictment for forging and uttering an acceptance on a bill of exchange in the name of John Woodman, Woodman was called, and proved that the acceptance was not in his handwriting, and that he did not authorise any person to accept the bill; but he admitted that he had known the prisoner eight years and had had money transactions with him, and in 1829 had been connected with him in trade, as a partner in a hat manufactory, and had had many bill transactions with him, and they had trusted each other largely; a mutual accommodation existed between them; none of those bills were accepted by procuration; the prosecutor had accepted for his accommodation since 1836 to take up former acceptances; the prosecutor did not always know what the acceptances were for, as he depended on the prisoner's honour; and he might have drawn on the prosecutor five or six years before without apprising him of it; but the prosecutor had never before paid any bill on which the prisoner had used his name, and he always signed J. Woodman, which the prisoner must have known. Coleridge, J., in the course of summing up the case to the jury, said, 'We now come to the statement Mr.

(x) R. v. White, 5 Cox, C. C. 290. Alderson, B., and Talfourd, J.

(y) R. v. Wardel, 3 F. & F. 82.

(z) R. v. Forbes, 7 C. & P. 224.

Woodman makes, and upon which it is supposed that the prisoner may rely for an acquittal; because he says that he has been for the last eight years in habits of great intimacy and in partnership with him. Now I put the question whether, though he had not authorised the signing of his name on that particular bill, he had ever given the prisoner a general authority. If he had said to the prisoner, "You may use my name whenever you like," it would be idle to say that the acceptance was a forgery. It is not merely writing another man's name, but writing it without authority and with intent to defraud. But I go further, because I think that if a person had reasonable ground for believing, from the acts of the party, that he had authority to accept, and did in point of fact act upon that, it would not be forgery. Put the case that upon a former occasion the prisoner had done what he is supposed to have done here, and on the bill being presented, Mr. Woodman had paid it without remark or remonstrance. If he had done that on three or four occasions, he might fairly say, "I infer that he authorised me to do it," and after that he could not be said to come within the description of a person who forged. But I cannot go the length which has been suggested. Let me suppose one or two cases:—Suppose the prisoner to have meant to raise £200 for two or three months, and trusted that at the end of the time he should receive £1000 and would be able to repay it, if he used another person's name without authority, and not believing that he had authority, that would be a distinct forgery. No man has a right to use another's name, trusting that he may be able to take up the bill. So, if a person having no authority were to say, "I want to raise a sum of money, and I am sure my father is so fond of me that he will not proceed against me criminally," and were to write his father's name to an acceptance, that would be forgery. No man has a right to trust to the kindness of another man. If you are of opinion that the prisoner acted in either of those ways, knowing that he had no authority, but meaning to repay the bill or trusting that Mr. Woodman would not prosecute, in either of those cases this would be forgery. There can be nothing short of the person believing that he had authority, and having a fair ground for that belief from the other party. The authority need not be express; it may be implied from acts. I put the question to see whether the prisoner had any reason for thinking that he had authority to use Mr. Woodman's name. Now you are to judge whether you have any reason to believe, looking at the circumstances fairly between the Crown and the prisoner, not stretching it on one side or on the other, that the prisoner believed that he had authority and from circumstances had reasonable grounds for so believing. There was great intimacy between these parties: there had been great dealings between them. All which is to be taken into account. You certainly find that the moment Mr. Woodman is called upon he does not pay the bill, and he does not in the least adopt the act that was done by the prisoner: that is really the only point in the case.' (a)

By the Public Health Act, 11 & 12 Vict. c. 63, s. 25, 'If any voter cannot write, he shall affix his mark at the foot of the voting paper in the presence of a witness, who shall attest and write the name of the

(a) *R. v. Beard*, 8 C. & P. 143. *R. v. Parish*, 8 C. & P. 94.

voter against the same,' &c. The prisoners were indicted for forging and uttering certain voting papers purporting to have been signed under this provision, and the charge against them was that they had put the marks of the voters to the voting papers, and signed their names as attesting these marks, whereas the voters had neither put their marks, nor authorised their being put; but it appeared that the voting papers had been filled up by the prisoners, either with the express or implied consent of the voters, or with the consent of some person whom the prisoners might reasonably believe to have authority; and Crompton, J., thereupon directed an acquittal. It was possible that the irregularity committed might be indictable; as it was clear the statute intended that the voter should affix his mark *propria manu*; but the attestation in the mode adopted in this case was not forgery. The essence of the crime of forgery is making a false entry or signature knowing it to be without authority, and with intent to defraud. (b)

On an indictment for forging a cheque for £120 it appeared that the prisoner was the nephew of the prosecutor, and had been employed as his attorney to conduct several matters in which the prosecutor was engaged; and one settlement was proved to have taken place by the production of the prisoner's receipts; but the prosecutor admitted that no payment but that one had been made for law charges, and that he had received an account and demand for £120 in the matter of 'Holl's executors,' in which the prisoner had been employed by the prosecutor, and the cheque in question had the words 'Holl's executors' written in the margin; and shortly before the issue of the cheque the prisoner had written the following letter, to which the prosecutor had made no reply: 'I shall be glad if you will let me have the whole or part of the amount. Let me hear from you by return of post, or I will draw on you for the amount. It is time it was paid. I shall take your silence as an assent to my requirement unless I hear to the contrary.' Lord Campbell, C. J., directed an acquittal. (c)

So where on an indictment for forging a bill of exchange it appeared that the prisoner on the day of the date of the bill, which purported to be accepted by one Ottoway, telegraphed to Ottoway, with whom he had bets and dealings in bills, that he had got a bill 'done' in his name, and next day wrote to him to the same effect; and Ottoway, though he denied any authority to use his name, stated that he had not taken any notice of the letter; Byles, J., said it was impossible that the jury could convict the prisoner, when the person whose name was alleged to be forged, being informed of the use of his name at the time, had not repudiated it; and he directed an acquittal. (d)

(b) *R. v. Hartshorn*, 6 Cox, C. C. 395.

(c) *R. v. Beardsall*, 1 F. & F. 529. In the course of his employment, the prosecutor had given to the prisoner blank cheques, signed by himself, to fill up with sums due to the creditors of one Smith, and after this matter was completed, several of the cheques remained in the prisoner's hands, and he had filled up one of them with £120, payable to

himself, and no express authority had been given by the prosecutor to use any of the cheques after the completion of Smith's business.

(d) *R. v. Smith*, 3 F. & F. 504. This must not be taken to be a direction in point of law. Of course in such a case it would be extremely unsafe to convict.<sup>1</sup>

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AMERICAN NOTE.

<sup>1</sup> See as to this case *Bishop*, ii. s. 579 (3).

As the crime of forgery is not committed where the act is done under the honest belief that the party doing it had a right to do it, although in point of fact he had really no such right, evidence, which tends to shew that there was reasonable ground for such belief, is admissible on behalf of the prisoner. Upon an indictment for forging a receipt for £5, it appeared that the prisoner had in November, 1844, procured one Bartlett to sign the name of W. Smart to a post-office order for £5, by means of which that sum was obtained from the post-office; for the defence it was elicited that when the prisoner was apprehended he stated that he had received a letter from W. Smart desiring him to procure Bartlett to obtain the money, and it was proposed to put in a letter purporting to come from W. Smart, dated August the 30th, 1844, and bearing the Bristol and Cheltenham post-marks of that date. That letter purported to inform the prisoner that W. Smart, who had been in America to avoid a charge of felony, had just returned, but was afraid of it being discovered where he was, and that he wanted money from his father, and for the purpose of avoiding detection he requested the prisoner to write to any friend he had to ask him to post a letter to his father asking for the money, and that the prisoner was to copy any letters sent by W. Smart in order to conceal him; and it was contended that this letter was evidence for the prisoner; for whether it was written by W. Smart, or by his authority, or by some one without his authority, was immaterial; for if the jury believed that the prisoner acted as he had done in consequence of this letter, the prisoner was not guilty of forgery. Platt, B., having consulted Pollock, C. B., 'Supposing no post-mark at all were on the letter, yet his lordship thinks with me that the statement of the contents of the letter may be made, as it is pertinent to the matter in issue. But this letter having the post-marks of Bristol and Cheltenham upon it, and at a time before any of the frauds alleged against the prisoner were committed, the Lord Chief Baron has not the least doubt that it may be laid before the jury.' (e)

If a person having authority in conjunction with two others to draw out money from a bank, draws out such money by means of a cheque in the presence of two other persons, who personate the two persons, in conjunction with whom he had authority to draw out the money, this is a forgery of the cheque, and the intent may be laid to defraud the bankers. The prisoner was indicted for forging a cheque on the prosecutors, Jones, Lloyd, and Co., with intent to defraud them. The prisoner and Dawson and Davies were members of the Hydraulic Packers' Society, which was established for maintaining the members of the society, who should, by depression in trade or other circumstances, be thrown out of employ. The funds of the society were provided by weekly contributions, and a sum of £400 was deposited in the bank of Jones, Lloyd, and Co., in the names of the prisoner and Dawson and Davies, and it was not to be paid out unless all three attended to receive it. The bankers were not acquainted with the signatures of any of the three. The prisoner, having procured two

(e) *R. v. Clifford*, 2 C. & K. 202. This and the two preceding cases are inserted here, as it seems more convenient to place all the cases bearing on the question of au-

thority together, than to place some here, and some under the head of *Evidence in Cases of Forgery*.



persons to personate Dawson and Davies, went with them to the bank, and drew out the money. The clerk who paid the money asked their names, and the names of the three members were given; and the clerk after referring to the ledger and to the pass-book, which was brought by the prisoner, and finding the names to accord, paid the money. It was objected that the bankers would not be liable over to the society, the money having been drawn out by fraud by one of the depositors. Patteson, J., 'The bankers, being authorised to pay the money to three persons in particular, and to them only, pay it to one of those persons, and to two who are strangers to the transaction, and that without any authority, genuine or colourable, from the real parties. I am therefore of opinion that this was a forgery with intent to defraud Jones, Lloyd, and Co.' (f)

Having thus treated of the name in which a forgery may be committed, we may proceed to consider how far the *validity* in law of the thing forged, supposing it were true, is essential to forgery.

Though it is said to be in no way material, whether a forged instrument be made in such manner as that, if it were in truth such as it is counterfeited for, it would be of validity or not; (g) yet it seems to be material that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame. (h) One of the definitions of forgery is given, as 'the false making an instrument, which purports *on the face of it* to be good and valid for the purposes for which it was created, with a design to defraud.' (i)

Upon the ground that it is not material whether a forged instrument be so made as that, if it were in truth such as it is counterfeited, it would be of validity or not, it has been adjudged that the forgery of a protection in the name of A. B., as being a member of parliament, who in truth at the time was not a member, is as much an offence at common law as if he were so. (j)

In a case where the defendant was convicted upon an indictment on the 5 Eliz. c. 14, which stated that one Garbut and his wife were seised in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clackton, in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed, for a valuable consideration, to convey to him 'all that park called Jawick, in the parish of Clackton, in Essex, containing eight acres in circumference, with all the deer, wood, &c., thereto belonging;' it was

(f) Dixon's case, 2 Lew. 378. Wright's case, 1 Lew. 135, *ante*, p. 568, was cited to shew that the bankers were not liable over to the society.

(g) 1 Hawk. P. C. c. 70, s. 7. 2 East, P. C. c. 19, s. 43, p. 948.

(h) 2 East, P. C. c. 19, s. 43, p. 948.<sup>1</sup>

(i) By Eyre, B., in Jones's case, 1 Leach, 367.

(j) Deakins's case, 1 Sid. 142. 1 Hawk. P. C. c. 70, s. 7. 2 East, P. C. c. 19, s. 43, p. 948.

#### AMERICAN NOTE.

<sup>1</sup> "There is a distinction between the case of an instrument apparently void, and one where the invalidity is to be made out by the proof of some extrinsic fact. In the former case, the party who makes the instrument cannot in general be convicted

of forgery; but in the latter he may." P. v. Galloway, 17 Wend. 540, 542. Brown v. P., 8 Hun, 562. S. v. Fitzsimmons, 30 Mo. 236. Price v. S., 2 Head, 591. P. v. Krummer, 4 Par. Cr. 217.

moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the Court held that it was not necessary there should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (*k*)

So where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shewn in the indictment that J. S. had any lands; it was holden upon motion in arrest of judgment that the indictment was good, upon the principle that it was not necessary to shew that the party was prejudiced. (*l*)

Upon the same principle, the doctrine is established by several cases, that forgery may be committed by the false making of an instrument, purporting to be the will of a person who is still living; notwithstanding the objection that during the life of a party his will is ambulatory, and can have no validity as a will until his death. (*m*) On an indictment for forging a will, the probate of that will unrevoked is not conclusive evidence of its validity so as to be a bar to the prosecution. (*n*)

The prisoner was indicted under the 1 Will. 4, c. 66, s. 3, for forging the will of Jane Warner, and it appeared that there was no such person; on which it was objected that the forgery of the will of a non-existing person was not a forgery within that statute. Patteson, J., 'There is nothing to limit the offence to the forgery only of the wills of persons that have existed, and it has been expressly held that forgery may be committed by the false making of the will of a living person.' (*o*)

Upon an indictment for inciting Susannah Richards to forge an administration bond, it appeared that S. Richards had gone to Doctors' Commons, and executed the bond in question in the name of Elizabeth Stewart in order to obtain, as sister and next of kin, administration to the effects of John Stewart. The bond was also executed by two sureties in their own names. The evidence shewed that this was done for the purpose of fraudulently obtaining certain stock standing in the name of J. Stewart at the time of his death. It was objected that the 22 & 23 Car. 2, c. 10, provided that all ordinaries shall 'of the respective person or persons to whom any administration is to be committed, take sufficient bond with two or more sureties;' and that in fact the bond in question was so taken; and, though in a wrong

(*k*) Crook's case, B. R. 2 Str. 901. 2 East, P. C. c. 19, s. 33, p. 921.

(*l*) Goate's case, 1 Ld. Raym. 737. But it seems clearly to be necessary that there should be a possibility of prejudice to the party. See the definitions, *ante*, p. 564, and Ward's case, 2 East, P. C. c. 19, s. 7, p. 862.

(*m*) Murphy's case, 10 St. Tri. 183. (Hargr. ed.) 2 East, P. C. c. 19, s. 43, p. 949. Sterling's case, 1 Leach, 99. Coogan's case, 1 Leach, 449. 2 East, P. C. c. 19, s. 43, p. 948.

(*n*) R. v. Buttery, R. & R. 342.

(*o*) R. v. Avery, 8 C. & P. 596. Lewis's case, *ante*, p. 586, was cited for the Crown. There was another indictment against the prisoner, charging the transaction as a false pretence, the prisoner having raised money by means of the will, and the prisoner pleaded guilty to this indictment, and was sentenced upon it, and no sentence passed upon him on the conviction for forging the will.

name, the bond was taken from the very person to whom administration was granted, and therefore was a bond taken in pursuance of the statute, and not a forgery. If an action had been brought upon the bond against S. Richards in the name of E. Stewart, she would be estopped by her execution of it in that name from denying her name to be Stewart. But Gurney, B., Williams and Maule, JJ., were of opinion that the evidence shewed that the bond was forged, as it appeared that S. Richards in the name of E. Stewart, that not being her name at all, executed the bond as if she was really E. Stewart. (*p*)

Forging a deed was holden within the 2 Geo. 2, c. 25, s. 1, though subsequent statutes contain directory provisions as to instruments, for the purpose for which such forged deed was intended, being in a particular form, or complying with certain requisites, and the forged deed had not been made in pursuance of such provisions; for the directory provisions have not the effect of making a deed, not in the form prescribed, and without the requisites, altogether void. (*q*)

Upon the same principle also, of its not being necessary that the instrument charged to be forged should be such as would be effectual if it were a true and genuine instrument, it has been holden that forgery may be committed of an instrument on *unstamped* paper.

The prisoner being indicted for forging a bill of exchange, an objection was taken on his behalf, that the bill in question was not stamped pursuant to the 22 Geo. 3, c. 33; 23 Geo. 3, c. 49, s. 14; and 23 Geo. 3, c. 58, s. 11; (*r*) and that it was not, therefore, a lawful bill of exchange, but a piece of waste paper incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or he must have been grossly negligent, the defect being visible on the face of it. But Buller, J., overruled the objection, on the ground that the Stamp Acts were merely revenue laws, and did not purport in any way to alter the crime of forgery; and that the false instrument had the semblance of a bill of exchange, and was negotiated by the prisoner as such. And, on a case reserved, the judges were all of opinion that the prisoner was properly convicted. (*s*)

The point underwent further discussion after the 31 Geo. 3, c. 25, s. 19, had prohibited the stamping of a bill or note after the time of their being made. The prisoner was indicted for uttering a forged promissory note, which, on being produced in evidence, appeared to have been drawn on unstamped paper; and the case was saved for the opinion of the judges, as well on the principal point as on the 31 Geo. 3, c. 25, s. 19, which passed after *Hawkeswood's case*, and prohibited the stamp to be afterwards affixed. The question underwent much consideration, and was debated by the judges in the course of several terms. Two or three of the judges doubted at first the propriety of

(*p*) *R. v. Barber*, 1 C. & K. 434. The statement here is more correct than that in C. & K. The point is altogether misreported in 1 Cox, C. C. 62. *R. v. Richards*.

(*q*) *R. v. Lyon*, R. & R. 255, and see *R. v. Froud*, R. & R. 389, *post*.

(*r*) The provisions of the Acts are to the effect that no bill of exchange, &c., not

stamped as these Acts direct, shall be pleaded, or given in evidence in *any* Court, or admitted in *any* Court to be good or available in law or equity.

(*s*) *Hawkeswood's case*, 1 Leach, 257. 2 East, P. C. c. 19, s. 45, p. 955. *Lee's case*, 1 Leach, 258, note (*a*).

*Hawkeswood's case*, if the matter were *res integra*, yet they all agreed that they must be governed by that case, as it was an authority in point; and that the 31 Geo. 3, c. 25, s. 19, made no difference in the question. And most of the judges maintained the principle in *Hawkeswood's case* to be well founded; for they held that the Acts of Parliament which had been referred to and relied on, being mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering on it in a court of justice; but it might be received in evidence for collateral purposes; and they instanced the 6th and 10th sections of the Act, which made the party drawing such a bill liable to the statute duties, and to a penalty of £20; in both which cases the bill must be used in evidence. And they considered that in order to constitute forgery it was not necessary that the instrument should be available; that though a compulsory payment, by course of law, could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him; that if this were a sufficient defence, forged securities might be published on improper stamps with impunity, which would carry the mischief to an alarming extent; that the stamp itself might be forged; and it would be a strange defence to admit in a court of justice, that because a man had forged the stamp he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. (t)

So where it appeared that the forgery charged against the prisoner was the alteration of a £10 bill of exchange into one for £50, it was holden to be not less a forgery from the circumstance of the bill having been re-issued three times as a £10 bill without being re-stamped, and being, therefore, not available in a civil action at the time the alteration in it of £10 into £50 was effected. The judges, on a conference, said that it had been decided that the Stamp Acts had no relation to the question of forgery; and that supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete. (u)

And it is well observed that if the matter be duly considered the words of the Stamp Acts before mentioned can only be applicable to a true instrument; for a forged instrument, when discovered to be such, never can be made available, though stamped; and that the Acts, therefore, can only be understood as requiring stamps on such instruments as were available without a stamp before those Acts passed, and which would be available afterwards with a stamp. (v)

So where on an indictment for forging an order for the payment of money, the order was a banker's cheque, dated the 29th of August,

(t) *Morton's case*, 2 East, P. C. c. 19, s. 45, p. 955.<sup>1</sup>

(u) *Teague's case*, 2 East, P. C. c. 19, s. 55, p. 979. *R. v. Pike*, 2 Moo. C. C. R.

70. *Reculist's case*, 2 Leach, 703. *Davies's case*, 2 Leach, 707, note (b). 2 East, P. C. c. 19, s. 45, p. 956.

(v) 2 East, P. C. c. 19, s. 45, p. 956.

#### AMERICAN NOTE.

<sup>1</sup> The law in America seems to be the same upon this point according to Mr. Bishop, vol. ii. s. 540, and note (5), although there have been cases to the contrary.

but uttered by the prisoner on the 28th of August, Cresswell, J., held that the case was within the 1 Will. 4, c. 66. (*w*)

It has been spoken of as a material circumstance that the false instrument should carry on the face of it the semblance of that for which it is counterfeited. (*x*) But it is not necessary that the resemblance to the known instrument should be exact: it seems to be sufficient if the instruments be so far alike that persons in general using their ordinary observation upon the subject may be imposed upon by the deception, though it would not impose upon persons having particular experience in such matters. (*y*)

Thus where the prisoner was indicted for the forgery of bank notes, and a witness for the prosecution, who came from the Bank of England, stated that he could not have been imposed upon by the forged notes, the difference between them and the true notes being to him very apparent in several particulars, but it appeared that others had been deceived at first by them, though they were very ill executed; Le Blanc, J., proceeded upon the foregoing principles. (*z*)

The doctrine had previously been sanctioned by the opinion of the judges in the following case. The prisoner was indicted for forging a bank note of the following tenor:—

‘No. 1773.

‘I promise to pay Mr. Jos. Crook or bearer, on demand, the sum of Fifty

‘£ Fifty.

‘London, 20 June, 1775.

‘For the Govr. and Company of the Bank of England.

‘Entd. C. BLEWERT.

‘THOS. THOMPSON.’

The fifth count, which was that on which the question turned, alleged that the prisoner ‘did forge a certain promissory note for the payment of money, with the name of *Thomas Thompson* thereunto subscribed, purporting to bear date, &c., and to have been signed by one *Thomas Thompson*, for the governor and company of the Bank of England, for the payment of £50 to Mr. Joseph Crook or bearer, on demand, the tenor of which, &c., with intention to defraud the governor and company of the *Bank of England*.’ It appeared that the note had never been published, being found in the prisoner’s possession at the time he was apprehended; but the forgery was brought home to him and he was convicted. The officers of the Bank of England proved that the note was in every respect, both in paper and print, similar to a bank note, both in the written and printed parts of it, except, first, that the number was not filled up; secondly, that the word ‘pounds’ was omitted in the body of the note; thirdly, that the texture of the paper was rather thicker than that used by the bank; and fourthly, that, in the fabric of it, the water-mark, viz., the words

(*w*) R. v. Taylor, 1 C. & K. 213. Cresswell, J., said, ‘It was an order for the payment of money within the statute, and that to make it such it was not necessary that the party should be bound to pay it at once if genuine.’

(*x*) *Ante*, p. 599.

(*y*) 2 East, P. C. c. 19, s. 6, p. 858, and s. 44, p. 950.

(*z*) Hoost’s case, 2 East, P. C. c. 19, s. 44, p. 950.

'Bank of England,' were not inserted; but they said that a bank note, with a like omission of the word 'pounds' in the body of it, being regular in other respects, would be paid, by the usage of the bank, after it had passed the examiner's office. And a real bank note of the same date and tenor, except as above excepted, was produced in evidence. It was contended that this was not a note resembling a bank note for want of the water-mark; and also that it was not a note for fifty pounds, the word 'pounds' being omitted; but, on a case reserved, the judges were of opinion that the conviction was right; as in forgery there need not be an exact resemblance, and it is sufficient if the instrument is *prima facie* fitted to pass for a true instrument. The majority of the judges inclined to think that the omission of the word 'pounds' in the body of the note, had nothing else appeared, would not have exculpated the prisoner; and that it was a matter to be left to the jury, as it was done, whether it purported to be a note for fifty pounds, or any other sum; and all the judges agreed that the 'fifty' in the margin of it removed every doubt, and shewed that the fifty in the body of the note was intended for fifty pounds. (a)

Upon the same principles, in a case where the prisoner engraved a counterfeit medicine stamp, so as to be like to a genuine stamp, except only that the centre part, which in a genuine stamp specifies and denotes the duty, was blank in the first instance, but cut out before the counterfeit stamp was used, a paper with the words 'Jones, Bristol,' on it being pasted over the vacancy, and then uttered such counterfeit stamp, it was holden that he was guilty of a forgery and uttering. Grose, J., in delivering the opinion of the twelve judges on this case, after stating that it was proved that those parts of the counterfeit stamp which remained were a perfect resemblance of the same parts on a genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer, further said, 'An exact resemblance or fac simile is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient' (b) It has been determined on the 25 Edw. 3, stat. 5, c. 2, that splitting the great seal, and closing it again to a false patent, is a counterfeiting of the seal: (c) and that where the seal is substantially counterfeited, the adding or omitting of a crown, the leaving out words in the style, or adding others, or making any other minute variation in the counterfeit, which is often done purposely, and by way of eluding the law, will not alter the case. (d)

And it seems that a mere literal mistake in the framing of the instrument itself, well laid in the indictment, will not make any difference. And it is observed that in a case where the prisoner,

(a) Elliot's case, 1 Leach, 175. 2 East, P. C. c. 19, s. 44, p. 951. 2 New R. 93, note (a). De Grey, C. J., and Smythe, C. B., were absent.

(b) Collicott's case, 2 Leach, 1048. 4 Taunt. 300. R. & R. 212, 229.

(c) 1 Hale, 178, 184.

(d) Robinson's case, 2 Roll. R. 50, 1 East,

P. C. c. 2, s. 25, p. 86. This was an indictment under the 1 Mary, c. 6, for counterfeiting the privy signet. In 1 East, *ubi supra*, it is said, 'The disparity, however, may be so great between the true and false seal that it would not amount to a counterfeiting within the statute, as if it be evident to the view of every man's eye.'

in forging an order for the delivery of goods, blundered in spelling the name, using *Desemockex* for *Desormeaux*, no stress was laid on such circumstance, though on other grounds the indictment was holden bad. (e)

The prisoners Fitzgerald and Lee were indicted for forging the last will and testament of Peter Perry, late a seaman on board His Majesty's ship the Lancaster, with intent to defraud the King. The will began — 'In the name of God, Amen, I, *Peter Perry*,' &c., and his ended 'John ~~P~~ Perry.' The prisoner, Fitzgerald, carried the will to mark

the office of the deputy-registrar, who, on observing the difference of the Christian names, told him that he must produce the person who had written the will, or the person who was present when it was executed, in order to account for this error, before the probate could be granted. Fitzgerald accordingly produced the other prisoner Lee, who, in the name of Welsh, swore that he was one of the subscribing witnesses; that the name of the deceased was Peter Perry; that the said Peter Perry did make his mark to and deliver the said will; and that he (Welsh) by mistake had written the name John Perry instead of Peter Perry. Upon this a probate of the will was granted. The prisoners having been found guilty, the question was reserved, whether this was in law a forging of the will of Peter Perry, as laid in the indictment? And, though no opinion was ever publicly delivered, the prisoners were afterwards executed pursuant to their sentence. (f)

Where the prisoner took a bill of exchange (ff) which he was indicted for forging and uttering, knowing, &c., to a banker's, in order to get it discounted, and, upon receiving the discount, endorsed it there, but not in his own name; and though there was the endorsement of another name upon the bill besides that which the prisoner endorsed, yet there was no endorsement upon it of the names or firm of the drawers who were also the payees; it was objected that, as there was nothing upon the bill purporting to be an endorsement of the drawers, it could not pass as a bill of exchange, nor was capable of defrauding the persons whose names were forged. (g) But Wood, B., overruled the objection; and, upon the point being afterwards submitted to the consideration of the judges, they were of opinion that the conviction was right. (h)

(e) 2 East, P. C. c. 19, s. 45, pp. 952, 953. The case referred to is Clinch's case, 1 Leach, 540. 2 East, P. C. c. 19, s. 37, p. 938.

(f) *R. v. Fitzgerald*, 1 Leach, 20. 2 East, P. C. c. 19, s. 45, p. 953.

(ff) A bill of exchange is now defined as 'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer. Any instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a

bill of exchange.' Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3. See *Chamberlain v. Young* (1893), 2 Q. B. 206.

(g) Amongst other cases, *Moffatt's case*, *post*, p. 614, and *Wall's case*, *post*, p. 615, were cited.

(h) *R. v. Wicks*, MS. and R. & R. 149. Bayley, J., was not at the meeting of the judges, but he thought the conviction wrong, on the ground that for want of an endorsement the bill was not negotiable, and therefore, if genuine, would not have been of value to the taker of it. And see *R. v. Cartwright*, R. & R. 106, where an indictment was held bad, on the ground that the instrument given in evidence was not, as stated, an order for money; and a question by

Upon an indictment for forging the following instrument, which was described as a bill of exchange,

‘Flintshire District Banking Company.  
 ‘Twenty-one days after date pay (without acceptance) to the order  
 of Mr. James Henderson, £70,  
     ‘For value received,  
     ‘For the Company,  
     ‘J. WATKINS, Manager.  
 ‘To the London and Westminster Bank,  
     Throgmorton-street, London,’

it was objected that the instrument was not a bill of exchange; to constitute a bill of exchange there must be a person drawing, a person on whom it is drawn and who is to accept, and a person to whom payment is to be made, and here the drawer expressly prohibited acceptance. Pattenon, J., ‘This instrument certainly differs from all others that I have seen as bills of exchange, by reason of the words “without acceptance.” I do not, however, consider that the insertion of those words alters the character of the instrument, so as to prevent its being a bill of exchange. All that is necessary to constitute a bill is, that the party making the instrument should direct it to some other party, requiring that other party to pay the money therein mentioned to some third person or his order, or to the order of the party so making the instrument. The drawer may in each case prescribe the terms upon which the payment is to be made. Here he has chosen to prescribe that the drawee is to make the payment “without acceptance;” the meaning of which I take to be that the holder is not to be put to the trouble of presenting it to the drawee before it becomes due; but still if he should choose to present it, there is nothing to prevent the drawee from accepting it; actual acceptance, of course, is not necessary to make the instrument a bill of exchange. Bills are daily noted and protested as bills for non-acceptance; they must, therefore, be bills before acceptance. Bills at sight are not, in fact, commonly accepted. I think, therefore, that the instrument is properly described as a bill of exchange.’ (i)

Where the prisoner drew a bill upon the treasurer of the navy, payable to blank or order, and signed it in the name of a navy surgeon, it was holden, that to constitute an order for payment of money, there must be some payee; and that a direction to pay to blank or order was not sufficient. (j) So where the prisoner was indicted for forging and uttering a navy pay bill, which was made payable to blank or order, it was holden that there must be some payee, and the conviction was held wrong. (k)

It has been holden that an instrument in the form of a bill of exchange with an acceptance on it is a bill of exchange, although there be no person named as drawee in the bill. The indictment

Le Blanc, J., there mentioned in the note (b), whether this paper, though not directed to any person as a drawer, might not, under the circumstances, have been treated as a bill or order.

(i) *R. v. Kinnear*, 2 M. & Rob. 117.

(j) *R. v. Richards*, R. & R. 193.

(k) *R. v. Randall*, R. & R. 195.



charged that the prisoner having in his possession a bill of exchange as follows :—

‘ £20.

‘Birmingham, 9th August, 1837.

‘Two months after date pay to my order the sum of twenty pounds for value received.

‘EDWARD HAWKES.

‘General Provision Warehouse, Baker, &c.,  
Unett-street, Well-street, Hockley,’

on which was written a forged acceptance, as follows :—

‘Accepted, payable at Messrs. Gillett and Tawney’s, Bankers, Banbury,

‘WILLIAM SELLERS,’

uttered the same, knowing the acceptance to be forged. Bosanquet, J., thought that the writing upon the instrument purported to be an acceptance by Sellers as drawee of the bill, and if not, that it was an acceptance for the honour of the drawer; and, upon a case reserved, upon the question whether the instrument upon which the forged acceptance was written, was properly described as a bill of exchange, not being addressed to any person as drawee, the judges were of opinion that the conviction was right, except Parke, B., Patteson and Coleridge, JJ., who thought otherwise. (*l*)

The prisoner was convicted of uttering the following instrument :—

‘Bristol, 17th February, 1843.

‘£150. Three months after date pay to the order of Mr. Smith the sum of one hundred and fifty pounds for value received, as advised by the Bristol Old Bank.

‘HENRY BUSH & COMPLY.

‘At Messrs. Prescott, Grote, & Co., Bankers, London.’

Endorsed by S. S. Smith and several others. Rolfe, B., had some doubt whether such an instrument, there being no drawee and no acceptor, could be said to come within the description of a bill of exchange, a promissory note, an order for the payment of money, or a warrant for the payment of money; and, therefore, reserved the question for the opinion of the judges, who all thought the instrument a bill of exchange, and the conviction right. *Gray v. Milner* was considered in point. (*m*)

But where a prisoner was convicted of uttering a bill of exchange in the following form :—

‘Hylton, Feb. 17, 1841.

‘Please to pay on demand to the bearer the sum of twenty pounds for value received, as witness our hand,

‘Messrs. THOMAS GALLY & Co.’

(*l*) *R. v. Hawkes*, 2 Moo. C. C. R. 60. land, B., were absent. *Gray v. Milner*, 8 Littledale, and J. A. Park, JJ., and Bol-Taunt. 739, was cited.

(*m*) *R. v. Smith*, 2 M. C. C. R. 295.

Upon a case reserved the conviction was held bad, and the case was distinguished from *R. v. Hawkes* (n) in this, that there the act of putting the acceptance was a sort of estoppel to say it was not a bill of exchange. (o)

And in a subsequent case where an instrument was not addressed to any person, great doubts were expressed whether an instrument could be a bill of exchange unless it had both a drawer and a drawee; and Alderson, B., thought he was wrong in *R. v. Hawkes*, (p) and that in that case the fact was not adverted to that *Gray v. Milner* (q) might be explained on the ground that a bill made payable at a particular place or house is meant to be addressed to the person who resides at that place or house; therefore in that case the bill was on the face of it directed to some one, and the Court held that as the defendant promised to pay it, that was conclusive evidence that he was the party to whom it was addressed; and Parke, B., said that the fact of the defendant's acceptance was conclusive evidence that he lived at that house, and consequently the drawer was induced to look no further. (r)

The prisoner was indicted for forging a warrant for the payment of money, which purported to be a cheque on Messrs. Sparrow, bankers, drawn in the name of the Essex Provident Society, and signed by the chairman and three members of the Dunmow sub-committee of the society. The Essex Provident Society had various branches in different parts of the county, and one at Dunmow. By the rules of the society all cheques drawn on the bankers of the society — Messrs. Sparrow — on account of the society, were to be signed by the chairman and three members of a sub-committee (that is, a committee of some branch of the society), and were then to be countersigned by Bassenwhite, the clerk of the society. The prisoner brought the cheque alleged to be forged, bearing four signatures, which purported to be those of the chairman and three members of the Dunmow sub-committee, to Bassenwhite, and he, supposing the signatures to be genuine, countersigned the cheque in the usual manner. The four signatures were forgeries. The cashier of Messrs. Sparrow knew nothing of the four signatures, or of the persons whose signatures they purported to be, and he said that the bankers did not know who the members of the sub-committee were, but relied on the signature of Bassenwhite as authenticating the cheque. He added that a cheque signed by the members of the committee, but not countersigned by the clerk, would not be paid. It was objected that there was no complete instrument forged. Without the name of Bassenwhite the instrument was not complete. It was answered that it was a complete order without Bassenwhite's signature, which was no part of the instrument, but merely a guarantee that the other signatures were genuine; and Lord Denman, C. J., was clearly of opinion that there was nothing in the objection. (s)

(n) *Supra*.

(o) *R. v. Curry*, 2 M. C. C. R. 218.

(p) *Supra*.

(q) *Supra*.

(r) *Peto v. Reynolds*, 9 Exch. R. 410. When this case was in error, 11 Exch. R. 418, the Court avoided expressing any opinion on this question. And in *Fielder v.*

*Marshall*, 9 C. B. (N. S.) 606, a similar course was adopted. The latter case shews that sometimes an instrument of this kind may be a promissory note, and therefore in any case of doubt the indictment should contain counts for forging, &c., a promissory note.

(s) *R. v. Lee*, 3 Cox, C. C. 80.

An indictment charged the uttering of the following forged document, described as a warrant for the payment of money in one count, and as an order for the payment of money in another.

'Leeds, Bradford, and Halifax Junction Railway Company's  
Offices, Great Northern Station, Bradford, 9th June, 1856.

'No. 338. £13 11s. 7d.

'The Leeds Banking Company, Leeds.

|               |  |               |
|---------------|--|---------------|
| on demand     |  |               |
| Draft payable | <table border="1"> <tr> <td>L. B.<br/>&amp; H.</td> </tr> </table> | L. B.<br>& H. |
| L. B.<br>& H. |  |               |
|               | or receipt.  |               |
| One penny.    |  |               |

'Pay to Thomas Thompson Cunliffe Lister  
or order thirteen pounds eleven shillings and  
sevenpence, which charge to the Company's  
revenue account.

'MARTIN CAWOOD,  
'Secretary.'

'The shareholder's name must be endorsed at the back of the  
cheque.'

(Endorsement) 'T. T. CUNLIFFE LISTER.'

The prisoner was in the employment of the said railway company, and it was the duty of him and a fellow-clerk to fill up the dividend warrants payable to the proprietors, and to place the stamps on them, and put the initials of the company on the stamp, and to take them to the secretary of the company to sign, and afterwards to post them. The instrument in question was regularly, and in the course of their duty, made out by the prisoner and his fellow-clerk, and was properly stamped and initialed by them, and was afterwards duly signed by the secretary. The endorsement of T. T. Cunliffe Lister was afterwards forged, and the prisoner uttered the document with the forged endorsement on it. The bankers would not have paid the money mentioned in the order, even to the proprietor himself, without his endorsement; and, upon a case reserved, it was held that, as there appeared to have been no authority to pay the money mentioned in the document without the endorsement of the proprietor, that endorsement might be considered as necessary to make the instrument a perfect order or warrant authorising or requiring the payment. Whether the document be regarded as the warrant or order of the company upon their bankers, or as the warrant or order of the proprietor to the bankers to pay out of the company's funds (made subject to his order to the amount specified in the instrument), it still was imperfect without the proprietor's endorsement, and contained neither an authority or request to pay without such endorsement. And therefore the forging of the signature of the proprietor amounted to a forgery of the entire document. (t)

The prisoner was indicted for forging and uttering an order and warrant for the payment of money. J. W. Caley was one of the

(t) R. v. Autey, D. & B. 294.

overseers of New Windsor; the prisoner was assistant overseer; and there were three churchwardens and four overseers in the parish. The practice was for the majority of the parish officers to draw cheques on the treasurer of the Union, which he paid. On the 26th of February the prisoner had brought him a cheque drawn in favour of J. Secker for £1 3s. 6d. This cheque was then signed by Mr. Caley only. On the same day the prisoner paid the managing clerk of Mr. Secker £1 3s. 6d. in cash, which was the amount then due to him from the parish officers; when the cheque was cashed at the counting-house of the treasurer, it was for £3 3s. 6d.; but there was no evidence to shew who presented it. At the time it was cashed it was as follows:—

‘Windsor Union, 26th February, 1848.

Parish of New Windsor with Dedworth.

‘To John Deacon, Esq., Treasurer of the above Union.

‘Pay John Secker, Esq., or bearer, the sum of *three pounds three shillings and sixpence*,

‘JOHN CLODE, Jun., Churchwarden.

‘J. W. CALEY,

‘J. F. LAWRENCE, } Overseers.

‘GEORGE JENNER, }

‘GEORGE TURPIN, Assistant Overseer.

‘N.B. Unless this cheque is signed by a majority of the parish officers it will not be cashed.’

There was no evidence to shew in what state the cheque was at the time when it was signed by any of the officers except Caley. It was objected that if the cheque was altered after Caley had signed, and before any of the others signed, it was not a forgery, as it was an incomplete instrument till it was signed by a majority of the officers. Platt, B., ‘Until the signatures of a majority of the parish officers were attached to this cheque it was an incomplete instrument, and was neither an order on the treasurer for the payment of the money, nor a warrant to him to pay money; and the altering it when incomplete is, therefore, no forgery.’ (u)

It is also laid down as clear, that it is no objection to the charge of forgery that the instrument is not available, by reason of some collateral objection not appearing upon the face of it. (v) So that, where a prisoner was indicted for forging an order for the payment

(u) *R. v. Turpin*, 2 C. & K. 820. This decision seems very questionable. *R. v. Bingley*, R. & R. 446. *R. v. Kirkwood*, R. & M. 304, and *R. v. Dade*, *ibid.* 307, vol. i. p. 173, shew that if several make distinct parts of a forged instrument, each is a principal, though it is finished by one alone in the absence of the others. It is plain, therefore, that a party may be guilty of forging an instrument, though at the time he executes part of it, such instrument is in an incomplete state. If, therefore, a person alters an incomplete instrument, with intent that it shall afterwards be completed, and it is afterwards completed, it should seem that he is then guilty of forging such instrument,

especially where the only false part is that executed by himself. In this case also the prisoner appears to have signed the cheque last, and until he signed there was not a majority of the officers who had signed; the forged instrument, therefore, was completed by the prisoner himself. Again, the prisoner must have uttered the cheque to some one, and to whom is immaterial, if it was then in its altered state, and of that no question seems to have been made, and therefore he ought to have been convicted of uttering. See *R. v. Cooke*, 8 C. & P. 582. *Ante*, p. 570. C. S. G.

(v) 2 East, P. C. c. 19, s. 45, p. 956.

of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable; under such circumstances his genuine order would not have been valid by the provisions of the 32 Geo. 3, c. 34, s. 2, unless made in the manner therein prescribed; the offence was holden to be forgery, the order itself purporting, on the face of it, to be made at another place beyond the limited distance. (*w*)

The indictment against the prisoner was for forging and uttering the following order:—

‘No.

‘Aylsham Union, the 14th day of Nov., 1837.

‘To John Ringer, Esq., Treasurer.

‘Pay to B. P. Drouet, or bearer, the sum of £149 10s. 10d.

‘JOHN WARNES, Presiding Chairman.

‘JOHN RUMP, }  
‘JOHN CROSS, } Guardians.

‘HENRY PIKE,

‘Clerk to the Board of Guardians  
of the said Union.’

The signatures of Warnes and Rump were proved to have been written by them at a meeting of the guardians of the union, but it was not proved that Warnes was the presiding chairman when he signed the order. The signature of John Cross was proved to be forged. Upon a case reserved, it was contended that though the instrument purported to be signed by the presiding chairman, and so was on the face of it valid, yet it might be shewn on the part of the prisoner that in fact the person signing and describing himself as presiding chairman did not fill that character, and that the instrument would then be equally invalid, as if the deficiency had been on the face of the instrument; but the judges were unanimously of opinion that there was nothing in the objection. (*x*)

But the offence will not be forgery where the false instrument does not carry on the face of it the semblance of that for which it is counterfeited, or where it is illegal in its very frame. (*y*)

In a case where the instrument charged to be forged was an order in the name of a creditor to a gaoler, for the discharge of a debtor who was in prison under an attachment for a contempt, it was objected that such instrument was a mere nullity in itself, even if genuine; but it became unnecessary to decide upon the objection. (*z*)

Where the false instrument was in the following form, without any signature:—

(*w*) *M'Intosh's case*, 2 East, P. C. c. 19, s. 39, p. 942. 2 Leach, 883.

(*x*) *R. v. Pike*, 2 Moo. C. C. R. 70. Per Lord Abinger, C. B., ‘It does not lie in the prisoner's mouth to set up that Warnes was not in fact chairman. By uttering the bill he represents the whole as true.’

(*y*) *Ante*, p. 599.

(*z*) *Fawcett's case*, 2 East, P. C. c. 19, s. 7, p. 862, and s. 45, p. 952, where the learned writer says that it does not appear whether the judges decided the case on that ground; as, at any rate, the indictment was holden good as a cheat. And see *Gibbs's case*, 1 East, R. 173. 2 East, P. C. c. 19, s. 7, p. 864.

'No. F. 946.

'I promise to pay John Wilson, Esq., or bearer, Ten Pounds.

'London, March 4, 1776.

£ Ten.

'For Self and Company, of my  
Bank in England.'

'Entered, JOHN JONES,'

and it was laid in one set of counts as a paper writing, purporting to be a bank note; and in another as purporting to be a promissory note, for the payment of money; it was holden that the prisoner was entitled to an acquittal, though it was specially found by the jury that the prisoner averred that the instrument was a good bank note, and uttered and published it as a good bank note. The Court said that the representation of the prisoner could not alter the purport of the instrument, which was what appeared upon the face of the instrument itself; and that, although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of a felony. (a)

In a case where a bill of exchange was directed to '*John Ring*,' and the acceptance was by '*John King*;' and the indictment stated that the bill purported to be directed to *John King* by the name of *John Ring*, and that the prisoner forged the acceptance in the name of *John King*; judgment was arrested, because *Ring* could not purport to be *King*. (b)

Forging or uttering a note which, for want of a signature, is incomplete, was holden not to be an offence within the statute, by which forgery of notes was subjected to capital punishment. The prisoner was convicted of the offence of uttering a forged promissory note for the payment of £40, with intent, &c. The note in question had been originally issued by the Bedford bank as a one pound note, and was then as follows:—

'No. 16209.

'Bedford Bank, £1.

'I promise to pay the bearer One Pound on demand here or at Sir Charles Price, Bart., & Co., Bankers, London.

'Value received.

'Bedford, the 17th day of October, 1817.

'For Barnard, Barnard, and Green.

'THOMAS BARNARD.'

The note was afterwards altered by cutting out or obliterating the word one and pasting in or inserting in the place of it the word forty, and by cutting off the last line which contained the signature, and by some other smaller alterations. The note then was as follows:—

(a) Jones's case, Doug. 300. 1 Leach, 204. 2 East, P. C. c. 19, s. 11, p. 883, and s. 45, p. 952. Upon this case, Mansfield, C. J., in the case of R. v. Collicott,

4 Taunt. 303, observed, 'Jones's crime was that of telling a falsehood.'

(b) Reading's case, 2 Leach, 590. 2 East, P. C. c. 19, s. 45, p. 952, and s. 56, p. 981

‘No. 16209.

‘Bedford Bank.

‘I promise to pay the bearer Forty Pounds on demand here or at Sir Charles Price, Bart., and Co., Bankers, London.

‘Value received.

‘Bedford, the 17th day of October, 1817.

‘For BARNARD, BARNARD, and GREEN.’

And in this form it was uttered by the prisoner, as a note for forty pounds, and the prosecutor gave him forty pounds in change for it. Objection was taken on behalf of the prisoner, that this note as uttered by him was incomplete, and was not, nor did it purport to be, a promissory note, for want of the signature; and that, therefore, it was not the subject of forgery within the statute: and, on a case reserved, the judges were unanimously of opinion that the objection was fatal, and the conviction wrong. (c)

Where the prisoner had been convicted of a misdemeanor, as for an offence at common law, for disposing of, &c., an instrument in the form of a promissory note, the count upon which the prisoner was found guilty charged in substance as follows; namely, that the prisoner unlawfully and fraudulently did dispose of and put away to one J. H. a certain forged *promissory note*, which was as follows:—

No. 6414.

Blackburn  
Bank.

30 Shillings.

‘I promise to take this as thirty shillings on demand, in part for a two pound note value received.

‘Entd. J. C.

‘Blackburn, Sept. 18, 1821. No. 6414.

‘For Cunliffe, Brooks, & Co.’

30 Shillings.

R. Cunliffe.

with intent, &c. It was objected that this instrument could not in any legal sense be denominated a promissory note, as charged in the indictment; and the learned judge reserved the point, it appearing also to him that there was great doubt whether the genuine instrument or writing, supposed to be forged and uttered, had any legal validity; and whether it was not a mere nullity, for the forgery of which no indictment could be sustained; and the judges decided that judgment should be arrested. (d)

So where the prisoner was indicted for forging and uttering a bill of exchange in the following form:—

(c) *R. v. Pateman*, R. & R. 455. See *R. v. Harper*, 7 Q. B. D. 78, and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3.

(d) *R. v. Burke*, R. & R. 498. It may be observed of the instrument stated in the

indictment that it was not payable to the bearer on demand; that it was not payable in money; that the maker only promised to take it in payment; and that the requisitions of the 17 Geo. 3, c. 30, were not complied with.

‘ Nov. 10, 1840.

Please to pay to your order the sum of forty-seven pounds for value received.

'To Mr. G. PECKFORD,  
'Yeovil.'

‘ J. BISHOP.

‘Accepted, G. Peckford,’ and endorsed ‘J. Bishop;’ it was objected that this was not a bill of exchange; it was nothing more than a request to a man to pay himself, and the acceptance of such a document laid the acceptor under no obligation to a third party; Erskine, J., said he would reserve the point, and the prisoner was convicted, but the learned judge afterwards thought the objection so clearly good, that he recommended a pardon for the offence. (e)

Where the indictment was for uttering, as true, a forged acceptance of a bill of exchange, and it appeared that the bill in question was absolutely void by the provisions of a statute at that time in force, it was helden that a conviction could not be supported. The bill of exchange was of the following tenor:—

‘SIR,

**‘Navy Office, 21st December, 1786.**

Seven days after date, please to pay to Mr. John Moffat, or his order, the sum of three pounds three shillings, and place the same to the account of

**'WALTER STERLING.**

'To GEORGE PETERS, Esq.,  
'Bank of England.

'Accepted, G. PETERS.'

And the question was, whether, supposing this bill of exchange to be void by the provisions of the 17 Geo. 3, c. 30, s. 1, not being drawn according to the form therein prescribed (as it neither specified the place of abode of the payee, nor was attested by any subscribing witness, though for less than £5), the forging of it could be considered as a capital offence within the 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22, on which the indictment proceeded. All the judges were of opinion that the conviction was wrong; on the ground that, if the bill in question had been a genuine instrument, it would have been absolutely void, and nothing could have made it good: and that, by the 17 Geo. 3, c. 30, such an instrument was no bill, and had not the appearance or semblance of one. (f)

The prisoner was convicted upon an indictment for forging and uttering a will of land of one John Skidmore, deceased, attested by only two witnesses; and, as it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was, so that it might be presumed to be freehold, and therefore

(e) **R. v. Bartlett**, 2 M. & Rob. 362.<sup>1</sup>

(*f*) Moffat's case, 1 Leach, 431. 2 East, P. C. c. 19, s. 45, p. 954.

## AMERICAN NOTE.

<sup>1</sup> Mr. Bishop, vol. ii. s. 562, doubts if this case is rightly decided, and cites *C. v. Butterick*, 100 Mass. 12, 16, to the con-

trary, where an English case, *Lloyd v. Oliver*, 18 Q. B. 471, is referred to.



the will was void and of none effect, by the express enactment of the Statute of Frauds, (g) for want of the attestation of three witnesses, the judges held the conviction wrong; on the ground that, as it was not shewn to be a chattel interest, it was to be presumed to be freehold. (h)

So it has been held, upon a case reserved, that an order for relief of discharged prisoners from a county gaol under the 5 Geo. 4, c. 85, being in many instances ungrammatical and at variance with the Act, will not support an indictment for forgery. (i)

Upon an indictment for uttering an order for the payment of money with intent to defraud Blake in one count, and Woodman in another, it appeared that the prisoner applied to Blake, the relieving officer of the Berkhamstead Union, for payment of money under the instrument described in the indictment, and represented herself as the wife of William Henry therein mentioned, and stated as a reason for his not presenting it personally, that he was sick. Blake stated that, except as relieving officer, he was not an overseer of Berkhamstead, but that he was authorised by Woodman, the overseer, to pay money to persons producing prisoners' passes under the 5 Geo. 4, c. 85. The instrument in question, after reciting the provision in the 5 Geo. 4, c. 85, as to discharged prisoners being entitled to a certain allowance from the overseers of the poor of any place through which they might pass to the places of their settlement, proceeded, 'And whereas William Henry, his wife, and eight children, corresponding in appearance and account he gives of himself to the description after mentioned, has come before us, two of the visiting justices of the House of Correction at Sandwich, and is deemed by us to be a fit object to receive the regulated allowances under the said Act; this is to certify the same, and to require the overseers of the poor of the places mentioned in the route, to issue to the discharged prisoner the said allowance specified in the said route, as required by the said Act: provided that the discharged prisoner produces the said route himself, and that the description corresponds with his appearance and agrees with the account he gives of himself and the number of children he has with him. Given under our hands and seals this 20th day of November, 1843.' The instrument contained the 'Route for William Henry, his wife and eight children, from Sandwich, in the County of Kent, to Kenilworth, in the County of Warwick,' which specified 'the names of the places through which the discharged prisoner is to travel' (amongst which Berkhamstead was *not* included), the rate per mile, the sum paid by the overseer, &c. The instrument also contained 'directions for filling up the passes,' and 'description of the discharged prisoner.' The seals to it were small pieces of paper, affixed to it by wafers. Upon a case reserved after conviction, it was objected, 1. That this instrument was not a warrant. The statute, sec. 23, required it to be sealed with the county seal, or with a seal to be specially provided for that purpose—in this case the seals were common paper seals without any impression. The forgery, therefore, was incomplete. The

(g) 29 Car. 2, c. 3, s. 5.

(i) R. v. Donnelly, R & M. 438.

(h) Wall's case, 2 East, P. C. c. 19, s. 45, pp. 953, 954.

overseer could not be deceived by it, nor would he, if he had paid the money under it, have been entitled to recover that money again. 2. The justices, who purport to have signed this pass, are only described as visiting justices of the House of Correction at Sandwich, not saying in what part of the United Kingdom Sandwich is, and the statute only relates to prisons in England and Wales. 3. There is a proviso in the pass, 'that the discharged prisoner produces the said route himself.' The presentment here was by the woman, and therefore void. 4. The statute says that the overseer shall pay the discharged prisoner, and take a receipt from such prisoner. This, therefore, was clearly a conditional order. 5. This is not an order for the payment of money. The statute speaks of it all through as a pass. When a statute designates an instrument by a particular name, it must be described by that name: and it is not true, because a document contains one little ingredient of a particular nature, that therefore the instrument itself should be so designated. Lastly, if Blake had been a servant of Woodman's, an uttering to him might have been deemed an uttering to his master, but he holds a distinct office under the Board of Guardians. But the judges were unanimously of opinion that the conviction was right. (*j*)

In *R. v. Boulton*, 2 C. & K. 604, Cresswell, J., said, 'I have not found any case, in which an indictment for uttering a forged instrument at common law has been maintained, unless some fraud was actually perpetrated by it, which is not the charge in this indictment: and Patteson, J., is not aware of any case on the subject. That the forgery of this instrument was a forgery at common law there is no doubt, but my opinion is that the charge of uttering cannot be sustained, and the judgment must be arrested.'

But this case has been since overruled. The prisoner was indicted for a forgery at common law of a consent of R. Soden to act as next friend to certain infants in a chancery suit; and a second count charged him with uttering the forged consent, which was as follows:—

'In Chancery.

'Miles against Miles.

'I hereby consent to be next friend to the infants, for the purposes of this suit.

'RICHARD SODEN.'

It was contended, on the authority of the preceding case, that the second count charged no offence; but Erle, J., left the case to the jury, who found the prisoner guilty on both counts; and, on a case reserved, the conviction was held right on the first count, but no opinion expressed on the second. (*k*) And where the prisoner was convicted of uttering a certificate from a clergyman that the prisoner had conducted a school with ability and success, and both the preceding cases were cited, the Court expressly overruled *R. v. Boulton*, and

(*j*) *R. v. McConnell*, 2 M. C. C. R. 298.  
1 C. & K. 371.

(*k*) *R. v. Smythies*, 1 Den. C. C. 498.  
2 C. & K. 879.

held that it is a common law offence to utter a forged instrument, the forgery of which is an offence at common law. (*l*)

## SEC. II.

### *Of the Written Instruments in respect of which Forgery may be Committed.*<sup>1</sup>

We may now proceed to consider the written instruments in respect of which forgery may be committed. (*ll*)

At common law, the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (*m*) Also, it is agreed to be forgery to counterfeit any authentic matter of a public nature; as a privy seal, (*n*) or a licence from the barons of the exchequer to compound a debt, (*o*) or a certificate of holy orders, (*p*) or a protection from a parliament man. (*q*) It is also unquestionable that a man may be, in like manner, guilty of a forgery at common law, by forging a deed; (*r*) and, therefore, it seems that one may be equally guilty by forging a will, which cannot be thought to be of less consequence than a deed. (*s*) There seem to be some strong opinions in the books that the counterfeiting of any writings of an inferior nature to those above-mentioned is not forgery at the common law. (*t*) And it has been held, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all. (*u*) But Hawkins remarks, that it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a public prosecution; and that the opinion of their being punishable by no law seems not to be maintainable, since many of them are most certainly punishable by force of the 33 Hen. 8, c. 1; and that it cannot be a convincing argument that they are not punishable by the common law, because they are of a private nature, as much as other writings concerning other matters; no one being ready to affirm that the making of a false deed concern-

(*l*) *R. v. Sharman*, Dears. C. C. 285, *post*, p. 623. In *R. v. Withers*, 4 Cox, C. C. 17, the prisoner was charged with uttering a forged warranty of a horse, and Rolfe, B., seemed unwilling to act on *R. v. Boulton*, but the case failed on the evidence.

(*ll*) As to the forgery of telegrams, see *ante*, p. 398.

(*m*) 1 Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178. 8 Mod. 66.

(*n*) 1 Roll. Ab. 68, pl. 33. Cro. Car. 326. 1 Jones, 325.

(*o*) 1 Roll. Ab. 65, pl. 5. 2 Buls. 137.

(*p*) 1 Lev. 138.

(*q*) 1 Sid. 142.

(*r*) 1 Roll. Ab. 66. T. Raym. 81. Ow. 47. 1 Sid. 278. 3 Leon. 170.

(*s*) Moor, 760. Noy. 101. Dy. 302. 1 Hawk. P. C. c. 70, s. 10.

(*t*) 1 Roll. 431. 1 Sid. 16, 155, 451. 1 Roll. Ab. 66. Winch, 40, 90. 1 Leon. 101. 3 Leon. 231. Cro. Eliz. 296, 853. 3 Buls. 265.

(*u*) Cro. Eliz. 166. Yelv. 146. 3 Buls. 265.

#### AMERICAN NOTE.

<sup>1</sup> See *P. v. Shall*, 9 Cow. 778. *Butler v. Ohio*, 717. *S. v. Gherkin*, 7 Ired. 206. C., 12 Serj. & R. 237. *Barnum v. S.*, 15 C. v. Ayer, 3 Cush. 150.

ing a private matter is not punishable at common law. He further says that, perhaps it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature; that the former is in itself criminal, whether any third person be actually injured thereby or not; but the latter is no crime, unless some one receive a prejudice from it. (*v*)

It is observed as no matter of surprise to find so able a writer as Hawkins treading with so much caution in a path, now indeed too well beaten; but which, previous to the time of the Revolution, when paper securities became much more common, had been but little explored. (*w*) But with respect to the foregoing distinction which he takes, between the counterfeiting of such writings the forgery whereof is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature, it is said that, however plausible this may be, it is by no means a solution of the difficulty but a mere conjecture, which leaves the crime of forgery as indistinct in principle as before, and tends to confound it with the general class of cheats: (*x*) and that it does not appear upon full consideration of the books to which he refers, that it is anywhere adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causa* or *malo animo*, is not punishable as forgery. (*y*) It is also observed, that those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, amount to no more than this, that the imputation of counterfeiting letters or writings frivolous or of no moment, or from whence no damage could ensue, or of uncertain signification, is not actionable; and that such letters or writings are incapable from their substance, not from their form, of supporting a charge of forgery, the chief ingredients of which are fraud and intention to deceive. (*z*)

The points to which this discussion relates were fully considered in the following important case, in which it was holden that the counterfeiting of a release, or acquittance for a sum of money, though without seal, was forgery; and that it would be a most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature. (*a*) And this case is considered as having now settled the rule, that the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. (*b*)

An information against the defendant charged that he being bound to deliver 315 tons and a quarter of alum, of the value of £1000, to the Duke of Buckingham, at a certain day then past, contriving and intending the said Duke of the said alum to defraud, and with a fraudulent intent to avoid the delivery of the said alum on, &c., upon

(*v*) 1 Hawk. P. C. c. 70, s. 11.

(*w*) 2 East, P. C. c. 19, s. 7, p. 859.

(*x*) 2 East, P. C. c. 19, s. 7, p. 859.

And as to the distinction between forgery and cheats, see *ante*, p. 460.

(*y*) 2 East, P. C. c. 19, s. 7, p. 860.

(*z*) 2 East, P. C. c. 19, s. 7, p. 860.

(*a*) Bac. Ab. *Forgery* (B).

(*b*) 2 East, P. C. c. 19, s. 7, p. 861.

the back of a certain certificate in writing, signed by one A. N., falsely forged and counterfeited a certain writing, in the words and figures following:—

|   |   |         |   |                                   |  |   |
|---|---|---------|---|-----------------------------------|--|---|
| ‘Schedule                                 | { | Tons C. | } | ‘Mr. John Ward. I do hereby order |  |   |
|   |   | 660 5   |   |                                   | you to charge the quantity of 660 tons |   |
|   |   | 315 5   |   |                                   |  | and 1 quarter of alum to my account, part |
|   |   | 975 10  |   |                                   |  |   |
| certificate; and out of the money arising |   |         |   |                                   |  |   |

by the sale of the alum in your hands pay to Mr. W. Ward and yourself £10 for every ton according to agreement; and for your so doing this shall be your discharge. — Buckingham. — April 30th, 1706.’ And it charged in a second count, that he published the same forged writing, knowing it to be forged, &c.

The defendant having been convicted, it was moved, in arrest of judgment, that the instrument set forth was not the subject of forgery at common law, and the offence was not, therefore, punishable in this form, but at most punishable only as a cheat; being merely a thing of a private nature, and in effect nothing more than a letter. And it was argued that if the counterfeiting of a letter had been punishable as a forgery at common law, then the making of the 33 Hen. 8, c. 1, to punish those who got the money or goods of others under colour of false tokens or counterfeit letters was nugatory. It was also urged that it nowhere appeared that the Duke of Buckingham had been prejudiced by this; which might have been indictable as a cheat, if he had been so prejudiced; though not as for forgery at common law. But all the Court held that this was indictable as a forgery at common law; that none of the books confine the offence to the particular kinds mentioned in 3 Inst. 169; and that as forging a writing not sealed came within all the mischief of forging a deed, the maxim applied, *ubi eadem est ratio eadem est lex*; that this was recognised in the preamble of the 5 Eliz. c. 14, which recites that the forging of writings, as well as of deeds, was punishable by law before that statute; but that offenders had been encouraged by the too great mildness of the punishments; and that the 38 Hen. 8, c. 1, did not create new offences, but only enhanced the penalty where the fraud was executed. (c)

In the argument upon this case, the following instances of indictments at common law, for forging instruments not under seal, were referred to by the counsel for the Crown, and relied upon by the Court; an indictment for forging letters of credit to raise money, (d) for forging a bill of exchange or a promissory note, (e) a bill of lading, (f) an acquittance, (g) a warrant of attorney, (h) a marriage register, (i) a protection from a member of parliament, (j) with

(c) Ward's case, 2 Str. 747. 2 Lord Raym. 1461. 2 East, P. C. c. 19, s. 7, p. 361.

(d) Savage's case, Styles, 12.

(e) Sheldon's case, Hil. 34, Car. 2 Rot. 35. R. v. Ward (a brother of the present defendant), Mich. 6 Geo. 1.

(f) Stocker's case, 5 Mod. 137. 1 Salk. 342. The Court held the indictment ill for

uncertainty; but not because the offence was not forgery at common law.

(g) R. v. Ferrers, 1 Sid. 278, and the record is in Trem. Entr. 129.

(h) Farr's case, T. Raym. 81.

(i) Dudley's case, 2 Sid. 71. 3 Leon. 170.

(j) Deakins's case, 1 Sid. 142, ante, p. 599.

several other cases. (*k*) And the offence of forgery was distinguished from cheats at common law and upon the 33 Hen. 8, c. 1, where the party received an actual prejudice, which was considered not to be necessary to constitute forgery, in which it was sufficient if the party might be thereby prejudiced. (*l*)

In a subsequent case, *L. Fawcett*, who had been committed to the gaol at York, under an attachment, sued out of the Court of King's Bench, for a contempt in a civil suit, was indicted for forging a certain writing, purporting to be signed in the name of *A. Dawson* (the party who had prosecuted the writ of attachment against him), and to contain the authority of Dawson to the sheriff for his discharge in the following form:—‘To the High Sheriff of the County of York, his Deputy, &c., and Gaoler. — As to any writ, attachment, or any other process or cause whatsoever, at the suit, instance, or promotion of me, *A. Dawson*, by reason whereof *L. Fawcett* is now detained a prisoner in your custody, you may forthwith discharge and set at liberty him, the said *L. Fawcett*, unless detained at the suit of some other person; and for so doing this shall be your warrant and indemnity. (Dated) 26th Feb. 1793. (Signed) *A. Dawson*, and witnessed by one *R. W.*’ The defendant having been convicted, several questions were submitted to the consideration of the judges; and, amongst others, whether the order were a matter of such a public nature, that the counterfeiting of it would be a forgery at common law; and also whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. Lord Kenyon, C. J., and Eyre, C. J., said that there was an injury to a third person, and that it was an interruption to public justice: but the latter thought it was not a forgery, but a cheat. The matter was adjourned to a subsequent term, when Eyre, C. J., was still not satisfied as to the forgery, though he thought the indictment good as for a cheat. But all the judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority also thought it was forgery at common law. (*m*)

So forging an order from a magistrate to a gaoler to discharge a prisoner, as upon bail having been given, is forgery at common law. The prisoner was indicted for a misdemeanor for forging the following instrument:—

‘SIR,

‘I do hereby authorise you to discharge *R. Harris* from your county gaol, Oxford, as *J. Mace* and *J. Anker* are become sureties,

(*k*) See 2 East, P. C. c. 19, s. 7, p. 862, note (*g*), where *R. v. Hales*, 9 St. Tr. 77, *ibid.* 93, *R. v. Gibson*, 1 Sess. Cas. 428, and *ibid.* 432, are referred to, as relating to promissory notes and endorsements; and a reference is made upon the subject in general to 13 Vin. Ab. 460. Trem. P. C. 100. 2 Show. 20. O’Brien’s case, 7 Mod. 378. 2 Sess. Cas. 366. 2 Str. 1144.

(*l*) 2 East, P. C. c. 19, s. 7, p. 862. And see Wilcox’s case, R. & R. 50, where a doubt was entertained whether the offence

came under the denomination of a forgery at common law.

(*m*) Fawcett’s case, 2 East, P. C. c. 19, s. 7, p. 862. And see the note (*a*), in which the learned writer says, that Buller, J.’s MS. only made a *quære* as to the opinion of Eyre, C. J.; but that it appeared from other MSS. as well as Buller, J.’s, that the judges all concurred to sustain the conviction on the general ground only before mentioned.

and bound in a bond of £40 each for his appearance at the next General Quarter Sessions, Oxford, before me, J. W. Jones, one of His Majesty's justices of the peace for the said County of Oxford.

'I am, yours respectfully,  
J. W. JONES.

'To the Governor of the County Gaol, Oxford.'

Harris, being a prisoner in the county gaol for want of sureties for his appearance at the said sessions, caused the said letter to be written and conveyed to the governor of the gaol. The governor stated the usual course to be that where a man was in custody merely for want of sureties, and the governor received a letter from a magistrate of the county, certifying that sureties had been entered into before him, the governor discharged such prisoner upon entering into his own recognisances before a magistrate in the neighbourhood: but he stated that he certainly should not have discharged the prisoner, as he did not believe the letter was in the handwriting of Mr. Jones. Tindal, C. J., felt some doubt whether the counterfeiting the letter amounted to forgery at common law, and reserved the point for the consideration of the judges, who held the conviction right. (n)

Where the defendant was indicted for forging a County Court summons, and the paper in question was a printed form of a distringas, which had had the words respecting the distraining struck out with a pen, and the word 'summon' inserted instead, and it appeared that when the County Court clerk was absent, the clerks in the office, if they were busy, sometimes gave out blank summonses to the attorneys, who filled them up themselves; Patteson, J., said, 'It is highly irregular; but I know that these summonses are sometimes given out in blank. I am not prepared to say, that, after the notice that this trial will give parties, as to the impropriety of the practice, I should not hold that this mode of filling up a summons, or altering a distringas into a summons, was not forgery.' (o)

One count of an indictment alleged that the prisoner unlawfully, fraudulently, &c., did make, forge, and counterfeit a certain writing to the likeness and similitude of, and as and for a true and genuine writing of and under the hand of one W. Neilson, as the master of a vessel called 'The Ruckers,' certifying that he the prisoner, therein described as Francis Toshack, had served with the said W. Neilson as able seaman on board the said vessel called 'The Ruckers,' from the 4th day of November, 1842, till the 1st day of January, 1845, and during such time conducted himself in a sober and orderly manner, with intent thereby and by means thereof to deceive, injure, prejudice, and defraud W. P., G. P., C. F., and E. F. Another count was the same as the last, but alleged the intent to be to deceive, injure, prejudice, and defraud the Corporation of the Trinity House of Deptford Strond. The prisoner was convicted, and, upon a case reserved, the judges held these two counts to be good as charging a misdemeanor at common law. (p)

Upon an indictment for forging and uttering letters with intent

(n) R. v. Harris, R. & M. 393. 6 C. & P. 129.

(p) R. v. Toshack, 1 Den. C. C. 492. See the form of indictment there given.

(o) R. v. Collier, 5 C. & P. 160.

fraudulently to obtain, and whereby the prisoner did fraudulently obtain, the situation of a police constable, it appeared that the prisoner forged and uttered the following letters to the Chief Constable, and by means of them got a situation as constable.

'Chief Constable's Office, Carlisle.

'November 4th, 1857.

'SIR,

'I am directed by the Chief Constable to acquaint you that Constable Moah resigned his situation at his own request; his character very good.

'I am, Sir,

'GEO. W. OAKLEY,

'Supt. C. and W. C. C.

'To whom this may concern.'

'Liverpool, May 18th, 1857.

'No. 7, Pleasant Hill St.

'SIR,

'I hereby certify that I have known Charles Moah upwards of seven years. I can say with confidence that he is a sober, steady man, and I can with great confidence recommend him to the situation as police constable.

'I have had him in my employ for some time, and found him a very upright man.

'I am, yours respectfully,

'W. GODLEY.

'T. DUNNE, Esq.'

And, upon a case reserved, it was held that this was a forgery at common law. (q)

The prisoner was indicted for a misdemeanor at common law in forging and uttering the following document:—

'SIR,

'Mr. and Mrs. Sharman have been known to me for some years, and for some time they had the charge of a large school under my control and superintendence, which they conducted with great ability and success; indeed committee, parents, and children were sorry when they resigned, and some of the latter presented them with some small tokens of their esteem.

(q) *R. v. Moah*, D. & B. 550. *Bramwell*, B., *dubitante*.<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> A false letter directed to "any railway superintendent," stating that the "bearer has been employed, &c., and any courtesies shewn him will be reciprocated" is not a forgery. *Waterman v. P.*, 6 Ill. 91. See *C. v. Hartnett*, 3 Gray (Mass.), 450. A false writing, certifying a particular note to be good, was held to be a mere expression of opinion. *S. v. Givens*, 5 Ala. 747, see also *P. v. Harrison*, 8 Barb. 560. If a statute prescribes a certain form for an instrument, and declares all others void, it appears that

a false document, not following that form, is not a forgery, though it may be very like the form; but merely prohibiting the circulation of a particular note, without declaring it void, will not affect the question of forgery. *P. v. Harrison*, *supra*. *S. v. Jones*, 1 Bay, 207. *S. v. Guttridge*, 1 Bay, 285. *Butler v. C.*, 12 S. & R. 237, 14 Am. D. 679. *Thomson v. S.*, 9 Ohio St. 354. See *contra*, *Rea v. Humphrey*, 1 Root, 53. *Twitchell v. C.*, 9 Pa. 211. See *Nelson v. S.*, 82 Ala. 44.



'I have therefore very great pleasure in bearing my testimony to their excellent moral character, and their suitability for the office of instructor to the rising generation, and can with confidence recommend them for the situation they seek, knowing them to be peculiarly adapted for the right management of children.

'R. H. JOHNSON.'

The situation of schoolmaster being vacant in the parish school of Timmingley, Yorkshire, the prisoner applied for it, and sent in to the Rector a paper purporting to be a copy of a testimonial from the Rev. R. H. Johnson, Rector of Lutterworth; and on the day appointed for producing the original testimonials, he produced the writing set forth in the indictment, and falsely alleged that it was the testimonial of the Rector of Lutterworth. The document was altogether a forgery. Upon a case reserved, after a verdict of guilty of uttering the above document, it was held that the conviction was right; it is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law; and the view of the law taken in *R. v. Boulton*, (r) was not correct. (s)

The prisoner had formerly been a convict in the Lewes convict establishment, from which he had been liberated on a ticket of leave. There was a rule in that establishment by which every prisoner was credited with a sum of money called 'convict money,' and the prisoner was entitled under this rule to a certain sum, which would have been paid him on the production of a certificate signed by two witnesses and the clergyman of the parish, that he was getting his living honestly. He sent to the superintendent of the Lewes convict establishment the following document:—

'I hereby certify that the within-named William Mitchell (the prisoner) is gaining his living by hawking.

'Dated 30th September, 1859.

'CATHERINE BULL, Grocer, Boongate, Peterborough.

'W. B. HOPKINS, Vicar, Wisbech, St. Peter's.'

Both signatures were forgeries. Williams, J., held that this was not an undertaking, warrant, or order for the payment of money within the 1 Will. 4, c. 66. But the prisoner was convicted on an indictment for a misdemeanor. (t)

A forgery at common law must be of some document or writing; therefore forging the name of an artist on a picture is not forgery at common law. A count alleged that the prisoner had in his possession a painted copy of a picture by John Linnell, on which the name of the said J. Linnell was forged, and that he uttered the said copy with the said forged name thereon knowing it to be forged; and, upon a case reserved, it was held that this count charged no offence. A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identi-

(r) *Ante*, p. 616.

(s) *R. v. Sharman*, Dears. C. C. 285.

(t) *R. v. Mitchell*, 2 F. & F. 44. The indictment for misdemeanor contained a count for attempting to obtain money by

false pretences, and one count for forging a certificate, and another for uttering a forged certificate; and all that is reported is that the prisoner was convicted.

fying it, and was no more than if the painter had put any other arbitrary mark as a recognition of the picture being his. (u)

Upon an indictment for forgery it appeared that G. Borwick was in the habit of selling powders called 'Borwick's Baking Powders and Borwick's Egg Powders,' which were invariably sold in packets wrapped up in printed papers. The baking powders were wrapped in papers containing the name George Borwick, but the name was not visible till the packet was opened. The prisoner went to a printer, and, representing his name to be Borwick, desired him to print 10,000 labels as nearly as possible like those used by Borwick. The labels were printed, and a considerable quantity of the prisoner's powders sold by him as Borwick's powders wrapped up in those labels. The genuine label of the baking powders was 'Patronised by the army and navy. Borwick's original German baking powder for making bread without yeast, and puddings without eggs (directions improved by the Queen's private baker).'

'By the use of this preparation' (here followed an enumeration of the benefits and advantages of the powder, and at the end) —

'The public are requested to see that each wrapper is signed,

"GEORGE BORWICK,"

without which none is genuine.'

The imitation label used by the prisoner was exactly like the genuine label, but omitted the conclusion, 'The public, &c.,' and the signature. The genuine and imitation egg powder label was —

'BORWICK'S METROPOLITAN EGG POWDER.'

'A vegetable compound, being a valuable substitute for eggs. One packet is sufficient for two pounds of flour, and equal to four eggs.' Then followed directions for use and price. In neither imitation did Borwick's name appear except in the heading; and, upon a case reserved, it was held<sup>1</sup> that this was not forgery at common law; the real offence was the enclosing the false powder in the false wrapper and selling that. (v)

### SEC. III.

#### *Of the Fraud and Deceit to the Prejudice of Another's Right.*

It may first be mentioned that by 24 & 25 Vict. c. 98, s. 44, upon the trial of an indictment for forging, &c., any instrument, it is not

(u) *R. v. Closs*, D. & B. 460. See this case, *ante*, p. 460.

(v) *R. v. Smith*, D. & B. 566. The Court thought the prisoner guilty of obtaining money by false pretences. See *ante*, p. 554, *et seq.*, as to trade marks. The above cases of *R. v. Closs* and *R. v. Smith* do not

appear to be very satisfactory. If the mark or printed matter be adopted by the prisoner as his own, and is issued by him fraudulently as being that of another person, it would seem to be immaterial in principle whether it was printed or stamped or otherwise impressed in whole or in part. <sup>1</sup>

#### AMERICAN NOTES.

<sup>1</sup> In America, a forgery may be committed of an instrument by printing or engraving

the whole of it. See *C. v. Ray*, 3 Gray, 441. Bishop, ii. a. 527.

necessary to prove an intent to defraud any particular person; it is sufficient to prove that the party accused did the act charged with an intent to defraud.

With respect to the fraud and deceit to the prejudice of another's right, it should always be kept in mind, that though in cases of forgery, properly so called, it is, as we have seen, *(w)* immaterial whether any person be actually injured or not, provided he may be thereby prejudiced, yet the fraud and intention to deceive constitute the chief ingredients of this offence. Thus Buller, J., speaks of it as the making a false instrument 'with intent to deceive;' *(x)* and Eyre, B., as a false signature made 'with intent to deceive.' *(y)* And it is observed, that in the word 'deceive' must doubtless be intended to be included an intent to defraud; *(z)* and that the offence was accordingly defined by Grose, J., as the false making a note or other instrument 'with intent to defraud.' *(a)* Eyre, B., also, in another case defined the offence to be the false making an instrument which purports on the face of it to be good and valid, for the purposes for which it was created, 'with a design to defraud.' *(b)* And it has been argued, that it is no answer to a charge of forgery to say that there was no special intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime; for if a person do an act the probable consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent. *(c)*

Forging a bill of exchange payable to the prisoner's own order, and uttering it without endorsement as a security for a debt, was holden to be a complete offence. *(d)*

The offence of disposing of and putting away forged bank notes was holden to be complete, though the person to whom they were disposed of was an agent for the bank to detect utterers, and applied to the prisoner to purchase forged notes, and had them delivered to him as forged notes for the purpose of disposing of them. The judges held that if the prisoner put the notes off with intent to defraud, the intent existing in the mind was the essence of the crime, although, from circumstances of which he was not apprised, he could not in fact defraud the prosecutor. *(e)*

Uttering a forged stock receipt to a person, who employed the prisoner to buy stock to the amount therein specified, and had advanced the money, was held to be sufficient evidence of an intent to defraud that person; and it was also holden that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, did not repel the presumption of an intent to defraud. *(f)*

If a person gives his employer a forged receipt for money, with

*(w)* Ward's case, *ante*, p. 619.

*(x)* Coogan's case, 2 East, P. C. c. 19, s. 1, p. 853, and s. 43, p. 948. *Ante*, p. 600.

*(y)* Taylor's case, 2 East, P. C. c. 19, s. 1, p. 853, and s. 47, p. 960.

*(z)* 2 East, P. C. c. 19, s. 1, p. 853.

*(a)* R. v. Parkes, 2 East, P. C. c. 19, s. 1, p. 853, and s. 49, p. 963. 2 Leach, 775.

*(b)* R. v. Jones, 1 Leach, 366.

*(c)* By Shepherd, *arguendo* in Tatlock v. Harris, 3 T. R. 176, and it is observed in 1 Leach, 216, note *(a)*, that this doctrine was seemingly adopted by the Court. See Powell's case, 1 Leach, 77. R. v. Bigg, 3 P. Wms. 419. 2 East, P. C. c. 19, s. 3, p. 854.

*(d)* R. v. Birkett, R. & R. 86, *post*.

*(e)* R. v. Holden, R. & R. 15.

*(f)* R. v. Sheppard, R. & R. 169.

intent to make the employer believe that money already obtained has been applied in a certain way, he is guilty of uttering with intent to defraud his employer. (g)

The indictment charged the prisoner with forging and uttering a certain writing in the words and figures following:—

‘Savings’ Bank,  
‘New Street, Huddersfield.  
‘1855. Oct. 30. Received £40 0 0’—

with intent to defraud, and it was described in some counts as an accountable receipt for money, and in others as an acquittance and receipt for money. There was a society, supported by monthly payments, for the relief of sick and burial of deceased members, called the ‘Society of Ancient Shepherdesses,’ of which the prisoner’s wife was a member, and the prisoner was the secretary. At a meeting of the society he was directed by the society to pay into the Huddersfield Savings’ Bank £40, which was at the time given him for that purpose. At the then next meeting the prisoner delivered to the society a book, endorsed ‘Savings’ Bank, New Street, Huddersfield,’ and on the first page was written, ‘1855. Oct. 30. Received, £40 0 0.’ When he delivered the book he said, ‘that is the book belonging to the money.’ The book was put into the society’s box. The actuary of the Huddersfield Savings’ Bank proved that neither the endorsement nor the entry was in the handwriting of himself or of any person employed at the bank. If the money had been paid into the bank on the 30th of October, 1855, and remained in the bank till the 30th of October, 1861, more than £12 10s. would have been allowed on it as interest. The prisoner continued to receive his salary from the society till November, 1861; but did not receive any other money belonging to the society. The fact that the £40 had not been paid into the bank was not discovered until November, 1861. The prisoner never paid any money into the bank to the credit of the society. It was objected that the prisoner, being the husband of one of the members of the society, was part owner of the money, and could not be made criminally liable for defrauding his co-owners, and that the prisoner having received the £40 before he uttered the forged writing, there was no evidence of any uttering with intent to defraud; but the objections were overruled, and the jury were asked, 1st. Whether the prisoner uttered the writing upon and in the book, knowing it to be forged, in order to induce the society to believe that he had paid the money into the bank? 2nd. Did he do this for the purpose of being continued in the office of secretary, and thereby obtaining further moneys? 3rd. Was the society in fact defrauded by his uttering the forged writing? The jury answered all the questions in the affirmative; and, on a case reserved, it was held that all the objections taken on behalf of the prisoner were untenable. It was true that the prisoner, in right of his wife, was jointly interested in the property of the society; but the forgery would defraud the whole of the company, and therefore the indictment would lie. (h)

(g) *R. v. Martin*, R. & M. 483. S. C.  
7 C. & P. 549.

(h) *R. v. Moody*, L. & C. 173, 31 L. J.  
M. C. 156.

So where on an indictment for forging the following receipt :

‘£16 15s. 6d.

‘6th January, 1830.

‘For the High Constable,

‘JAMES HUGHES,’

with intent to defraud E. Grundy, it appeared that the prisoner in 1830, and for many successive years down to 1837, had been assistant overseer of Rivington, and that he was in the habit of receiving warrants from Mr. Grundy, the high constable of the hundred, ordering him to levy on the inhabitants of Rivington their quota of the county rate. In 1830, having levied to the amount of £11 5s. 6d., he paid that sum into a bank at Manchester, to the credit of the high constable, and the clerk of the bank gave him a receipt for £11 5s. 6d. In 1838, the prisoner was removed from his office, and handed over to his successor a great bundle of papers, amongst which the receipt in question was found, but the figures had been altered from £11 5s. 6d. to £16 15s. 6d. The prisoner's accounts had been passed and allowed from time to time. It was contended that there was no felonious uttering of the receipt; it was not delivered over by him with any intention that it should be used as a voucher. His own accounts had been settled, and the time for auditing them had passed. There was no evidence of any intent to defraud the high constable, or that the utterance of the instrument in its altered form would have that effect. Alderson, B., ‘I am of opinion, that if the prisoner handed the receipt over to his successor as one of his vouchers, knowing that the figures had been fraudulently altered, he was thereby guilty of a felonious uttering, and that the intention is correctly described to be that of defrauding Grundy, the high constable: for what is the necessary effect of so handing over the altered receipt? The parish would discover from that receipt that the high constable had been paid £16 15s. 6d. instead of £11 5s. 6d. (to which latter sum only he was entitled); and the effect would be, that the high constable becomes liable to refund to the parish the sum which the receipt shewed that he received in excess. That being the necessary consequence of the prisoner's act, it must be presumed that he intended it, and no proof of such actual intention is necessary. That has been ruled by all the judges, in a case reserved, (i) in consequence of a supposed opinion of Lord Abinger to a different effect. The lapse of time can make no substantial difference. Supposing a party forges a receipt for the payment of a debt of more than six years' standing, it is true the debtor might be already protected by the Statute of Limitations, but still the forged receipt would alter the position in which the creditor would stand, and it would clearly be a felonious forgery.’ (j)

The prisoner was indicted for uttering a forged receipt with intent to defraud his employer. The prisoner was the prosecutor's agent to manage his property, receive his rents and make payments. The receipt was in the prisoner's handwriting, and purported to be the receipt of one Towne; to whom the prosecutor was indebted, and to

(i) R. v. Hill, *post*, p. 628.

(j) R. v. Boardman, 2 M. & Rob. 147.  
2 Lew. 187.

whom the prisoner had professed to the prosecutor to have paid the debt, by handing him the receipt. It was doubtful whether the prosecutor was not, on the whole account, indebted to the prisoner. Erle, C. J., said that, as, if this were so, there could hardly be proof of a fraudulent intent, and the substance of the charge was that the prisoner meant to defraud his employer, the jury had better acquit him. (*k*)

The fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not negative the intent to defraud the bankers; it is still a question for the jury whether there was an intent to defraud. (*l*)

Uttering a bill of exchange, all the names on which are fictitious, is within the Forgery Statutes, though the party uttering intended to provide for the payment of the bill, the fact of the parties not being real not being known to the person taking the bill. In summing up the case, Alderson, B., told the jury (after consulting Gurney, B.) that if they were satisfied that the prisoner uttered the bill in payment of a debt due to Minor [the person to whom the bill was given], knowing at the time he so uttered it that it was a forgery, and meaning that Minor should believe it to be genuine, they were bound to infer that he intended to defraud Minor. The prisoner was found guilty; and the judges, upon a case stated for their opinion, held that the conviction was right. (*m*)

So where the prisoner was indicted for forging and uttering a bill of exchange, which he had given to the National Provincial Bank at Hereford, as a security for the debt he owed them; Patteson, J., told the jury, 'If the prisoner at the time he uttered this bill knew that the acceptance was forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is that he meant to defraud. This was the opinion of the judges in a late case reserved for their consideration. (*n*) There was an earlier case of *R. v. James*, (*l*) tried before me at Gloucester, in which I did not lay down this proposition strongly enough; but the law on the point is as I have now stated.' (*p*) And upon a similar indictment

(*k*) *R. v. Bradford*, 2 F. & F. 859. This case is probably misreported, as it is quite clear that whether the prosecutor was indebted to the prisoner or not was perfectly immaterial. The receipt, if genuine, would have been evidence that its amount had been paid by the prisoner on account of the prosecutor, and, therefore, would in the one case have been evidence of a debt to that amount, and in the other of an addition of that amount to the existing debt, and the natural consequence of the forged receipt would be to establish either the one state of things or the other, and so to defraud the prosecutor of the amount mentioned in the receipt. C. S. G. See the case of *R. v. Wilson*, 1 Den. C. C. 284, *ante*, p. 570, which is directly at variance with the

ruling of Erle, C. J., in *R. v. Bradford*. The *nisi prius* rulings of judges in criminal cases should be carefully considered to see whether they are meant to lay down the law or merely to guide the jury to what appears to be the safer conclusion in the particular case before them.<sup>1</sup>

(*l*) *R. v. James*, 7 C. & P. 553.

(*m*) *R. v. Hill*, 2 Moo. C. C. R. 30. S. C. 8 C. & P. 274. *R. v. Geach*, 9 C. & P. 499. *Et per* Parke, B., 'It appears that this bill has since been paid by the prisoner, but that will make no difference if the offence has been once completed at the time of the uttering.'

(*n*) *R. v. Hill*, *supra*.

(*p*) *R. v. Cooke*, 8 C. & P. 582.

#### AMERICAN NOTE.

<sup>1</sup> For American cases agreeing with the English rule upon this and similar points, see Bishop, ii. s. 598.

against the same prisoner the same learned judge said, 'If a person knowingly pays a forgery away as a good bill, it is a consequence, and almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, and also the person whose name is used; as everything which is the natural consequence of the act must be taken to be the intention of the prisoner.' (q)

Upon an indictment for forging a deed of transfer of shares in the London and Croydon Railway Company, with intent in one count to defraud the said company, in another to defraud D. Lupton, and in another to defraud W. Booth, it appeared that the prisoner was a sharebroker at Leeds in partnership with J. Naylor, and that D. Lupton had employed the firm to a considerable extent, chiefly to buy scrip, and always for ready money. In August, 1845, Lupton went to their counting-house, and looked at his account in their books, and there found himself debited with a number of London and Croydon shares, for the purchase of which he had given no authority. This led to inquiry, and it was ascertained that in July, 1845, the London and Croydon Railway Company had received for registry and registered in the usual way two deeds of transfer of shares; one purporting to be a deed of transfer of eighty-seven shares in that company from E. Robinson to D. Lupton; the other purporting to be a similar deed of transfer for thirteen shares from the same Mr. Robinson to Lupton. Both these deeds purported to be executed by Lupton as vendee, and to be attested by the prisoner. On the 9th of August following, the London and Croydon Railway Company received and registered seven other deeds of transfer, which purported to convey the whole of these 100 shares in the London and Croydon Railway to five different persons; one of these deeds purported to convey ten of those shares to W. Booth, and was the subject of the present indictment. All these deeds purported to be executed by Lupton, and his execution attested by the prisoner. All the signatures in the name of Lupton were proved to be in the prisoner's handwriting, and not an imitation of Lupton's handwriting. Lupton had never authorised Naylor or the prisoner to buy any London and Croydon shares for him, and never authorised or knew of the transfers mentioned in the deeds, and never authorised the prisoner to sign any of the deeds for him. When Lupton went to the counting-house in August, and looked at his account in the books, which were accessible to the clerks of the firm, and in which all the transactions, to which the deeds of transfer related, were entered, Lupton said that these shares were not his; that there was a profit on them; but that the shares were certainly not his; and on this being mentioned to the prisoner, he replied, 'If he won't have a profit, I cannot help it.' It was submitted that there was, on the face of these transactions, a total absence of an intention to defraud, and that the mode in which the transactions were treated in the books shewed clearly that these were fair *bona-fide* transactions, by which it was not intended to defraud any one, and by which no

(q) *R. v. Cooke*, 8 C. & P. 586. See also *R. v. Beard*, 8 C. & P. 143, where Coleridge, J., said, 'As to the intent, I must tell you that every man is taken to intend the natural consequences of his own

act. If I present to you a bill with the name of one of my friends upon it, knowing it to be forged, it would be idle to say that I had no intent to injure him.' *R. v. Todd*, 1 Cox, C. C. 57.

one was or ever could be in fact defrauded. For the Crown it was urged that there was an intent to defraud the company shewn, as they registered the new shareholder on the faith of the supposed transfer, and there was also a fraud on the transferee, who supposed that he had a valid transfer from a party, who in truth did not convey anything, and who had no title to convey. Cresswell, J., 'It is not required certainly to constitute in point of law an intent to defraud, that in these cases the prisoner should have present in his mind an intention to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud some person; but there must, at all events, be a possibility of some person being defrauded by the forgery; and there does not seem to be any such possibility in the present case either as regards Mr. Lupton, Mr. Booth, or the company. With respect to Mr. Lupton, the transfers were made to him in consequence of money actually paid, and the person who so procured the transfer got Mr. Lupton's name into the list of proprietors of the company, so as to entitle him to a dividend in their profits, there being, so far as appears, no call of which the company could enforce payment; so that Mr. Lupton might possibly receive money, but could not, under any circumstances, be required to pay any. Neither was there any possibility of the company being defrauded, as it does not appear that they had any power to demand any further calls from the shareholders; so that the substitution of Mr. Lupton's credit for that of any other person, or the substitution of any other person's credit for his, could do no injury to the company.' It was then submitted that there might be a fraud on Mr. Lupton by the transfer of the shares from him, which in point of fact stood in his name in the books of the company. Cresswell, J., 'It is merely taking from Mr. Lupton something in which he never claimed any interest; and the person to whom the shares are transferred is not prejudiced, inasmuch as he has actually got the shares, for which he has paid his money.' It was then urged that Mr. Lupton might be liable on his covenants in the transfer. Cresswell, J., 'But the shares actually are transferred. The purchaser has got them. How could the transferee be damnified by such a covenant, if there is no one in a position to gainsay it? By the company's act the register is the title. By that act the company are empowered to make certain calls, but so far as appears those calls may all have been made, and the whole money paid on them; in all probability the fact is so. We know that the company have completed the line, and have been working it for a very considerable time.' (r)

The prisoner was indicted for forging a transfer of shares in the Eastern Counties Railway, with intent to defraud Pilling, A. Hoatson, the Railway Company, Lucas, Glover, and Turner, respectively. The prisoner was a sharebroker at Halifax, and had had dealings with Lucas, another broker, at Liverpool. At the latter end of 1844 the prisoner had purchased of Lucas 200 shares in the Eastern Counties Railway, and the transfers as well as the certificates had all come into the hands of the prisoner, except the transfer of twenty of these 200 shares. At the time when the transfer for these twenty should have been delivered to the prisoner, he had become insolvent, owing a large



sum of money to Lucas. The holder of the shares, which had been purchased by Lucas before he sold them to the prisoner, was R. A. Pilling, who at various periods had executed deeds of transfer of different portions of the 200 shares, which from time to time were disposed of by his broker. Lucas having sent to the prisoner according to custom for a 'name' of the proposed transferee to be inserted in the deed for the twenty shares in question, the prisoner sent him that of Glover, with which the transfer deed was prepared. Lucas, in consequence of the prisoner's circumstances, did not forward the deed to the prisoner; and the prisoner took a blank deed, the body of which was in his own handwriting, into his counting-house, and there sent for two boys, G. Fleming and J. Thompson, and caused Fleming to sign the name 'Robert A. Pilling' as transferer and Thompson to attest that signature with his own name, and he then procured his own brother, A. Hoatson, to sign his name as transferee, a clerk in the employ of another broker putting his name as attesting witness to that of A. Hoatson. A. Hoatson proved that he had executed the deed at the prisoner's request; that he had given nothing for the shares, and acted as a mere nominal party, it being customary in the business for one broker to lend his name to another. Another broker proved that he, as the prisoner's agent, had received the shares and this deed from the prisoner, and had sold the shares for him; all the calls upon them being then paid up. Pilling had continued registered proprietor of the shares up to three days after the last-mentioned sale, when the twenty shares were registered in the name of A. Hoatson, and afterwards they passed from him to Turner, in whose name they still stood. The proceeds of the shares, between £400 and £500, had been paid by the broker to the prisoner. It was submitted that there was no evidence of the intent to defraud, because it did not appear that any one could be defrauded. In *R. v. Marcus (s)* Cresswell, J., directed an acquittal on the ground that the interest of the parties alleged to have been defrauded was not such that any prejudice to them could have resulted from the forgery, all the calls in that, as in this case, having been paid up. Rolfe, B., 'I cannot assent to that view of the law. The parties supposed to be in a situation to be defrauded are Pilling, the Railway Company, Lucas, A. Hoatson, Glover, and Turner. There would seem to be no fraud practically as affecting the two latter. But Pilling, up to the date of the forgery, would have some legal right, if it were only that of voting at meetings. Lucas claimed a right of lien for a balance then due to him from the prisoner. It may be doubtful as to the Company, but I think this amounts to a fraud upon them. And A. Hoatson, the transferee, is in a condition to be prejudiced, because he might, if he chose to deal with the shares as his own, have been rendered liable to others, as to Turner, to whom they eventually went. The prisoner's was a wrongful act, whereby others might be damnified. In one respect the case may be said to be a case of misfortune, as perhaps the prisoner considered himself entitled to the transfer; he had, most likely, contemplated helping himself by wrong to what he thought his right. I can, however, perceive no reason for doubting that the act involved a fraud.' And Rolfe, B., directed the jury that the two

(s) *Supra.*

parties as to whom the fraud appeared, in his opinion, to be most obvious, were Pilling and the Railway Company. (*t*)

One count charged the prisoners with uttering the forged will of W. Tuffs, with intent to defraud the heir-at-law of W. Tuffs; another with intent to defraud a certain person or persons whose names are unknown to the jurors. One of the prisoners was the son of W. Tuffs, whose will was forged. A witness stated that he had heard that W. Tuffs had had a son by a former marriage, but had never seen any reputed child or children of the first marriage, and knew nothing of their existence except by report. No other evidence was offered to prove that there had been any former marriage, or any children of the marriage. Coltman, J., thought that under these circumstances the allegation of an intent to defraud the heir of W. Tuffs was not supported, there being no proof of there ever having been any heir-at-law except the prisoner, H. F. Tuffs; but as the forgery was clearly proved, and it appeared highly improbable that such a forgery should be committed except for the purpose of defrauding some one, he left the question to the jury upon the count 'with intent to defraud a person or persons unknown;' and the jury convicted H. F. Tuffs; but Coltman, J., entertained a doubt whether a prisoner could properly be convicted on such a count without proof that the forged instrument was capable of effecting a fraud on some person or other, and therefore reserved the point; and after argument on behalf of the prisoner, the judges were evenly divided upon this question. (*u*)

Upon an indictment for forging and uttering a transfer of shares in the Waterford Wexford Wicklow and Dublin Railway Company from P. Hanstock to E. Piarse, with intent to defraud, it appeared that Captain Owen had been the original proprietor of the shares, and being anxious to protect himself from liability in respect of the shares, had transferred them, without any consideration, to P. Hanstock; but the actual transfer was not proved. In order, however, to shew that Hanstock was registered as a shareholder in respect of those shares, and that he would be treated by the company as a person entitled to deal with them, to receive any dividends payable on them, or to transfer them, the register of shareholders, bearing the seal of the company, and kept according to the 8 & 9 Vict. c. 16, s. 9, was tendered as evidence, and, after objection on the part of the prisoner, received. It was further objected that the title of Hanstock should be shewn, and that the transfer from Captain Owen to him should be proved for that purpose; but this objection also was overruled. The W. W. W. and D. Railway Company had paid no dividend, and there seemed no probability of any being declared at the time of the forgery; the question of winding up the company had been considered; the shares were not of any marketable value, but the company had power to enforce payment of calls, and one of £2 a share was about to be made. The jury were directed, upon the question of intention to defraud, that it was not necessary to find an intent to defraud any one in particular, but they must have in view some person who could be

(*t*) *R. v. Hoatson*, 2 C. & K. 777. A. D. 1847.

(*u*) *R. v. Tynley & Tuffs*, 1 Den. C. C. 319, 18 L. J. M. C. 36. A. D. 1848. See the next case.

defrauded, so that the consequence of the prisoner's act would necessarily or possibly be to defraud some person, and that it was for them to say whether, as Hanstock would be the person to whom the dividends, if any (of which there did not seem to be much probability), would legally be payable, he might not have been defrauded if the company had got into better circumstances; or whether the company might not have been defrauded, if they had been induced by the forgery to insert Piarse's name on the register, and had made a call, which they appeared to be about to do, or whether any person might not have been defrauded if induced to advance money on the shares, in anticipation of the company coming round, and on the faith that Piarse was the real owner of them. The jury having convicted, the Recorder requested the opinion of the judges as to whether he was right in receiving the register of shareholders in evidence, under the circumstances for the purpose above stated, or whether further evidence of the transfer of the shares from Captain Owen to Hanstock was necessary; and also whether he was right in thus leaving the case to the jury; and after argument the judges were unanimously of opinion that the register of shareholders was properly admitted in evidence, 'it being under the seal of the company, and kept pursuant to the Act of Parliament, and it appearing from the register that Hanstock was a shareholder, that it was unnecessary for the purpose of sustaining this indictment that Hanstock's title should be further gone into.' (v) 'The register was part of Hanstock's title if his name was on it. The fraudulent act of the prisoner tended to injure that part of Hanstock's title. The register was admissible to shew that the act of the prisoner might have had that effect. A complete title in Hanstock was not necessary in order that he should be defrauded in respect of something which was a step to a complete title.' (w) With respect to the direction to the jury, 'the substantial meaning of what the Recorder said to the jury was that, though it was not necessary to shew an intent to defraud any particular individual, there must be somebody to be defrauded, and that there were several parties who might have been defrauded.' (x) 'His observations that Hanstock was entitled to the dividends seems to have been grounded on the supposition that, in order to convict a prisoner of an intent to defraud, there must be somebody to be defrauded or hurt in some way; but it is not necessary that any person should be in a situation to be defrauded. If the Recorder had been set right upon that point, it would have been so much worse for the prisoner; for the only chance the prisoner had to get off was the belief of the jury that he could not be convicted unless he intended to defraud somebody in particular, and that to have intended to defraud was not enough;' (y) and the conviction was affirmed. (z)

(v) Per Cresswell, J.

(w) Per Lord Campbell, C. J.

(x) Per Cresswell, J.

(y) Per Maule, J.

(z) *R. v. Nash*, 2 Den. C. C. 493. A. D. 1852. Maule, J., during the argument said, 'The recorder seems to have thought that, in order to prove an intent to defraud, there should have been some person defrauded,

or who might possibly have been defrauded.

But I do not think that at all necessary.

A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person

with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque, either to try his credit, or to imitate his handwriting, there would be

By the 14 & 15 Vict. c. 100, s. 8, a provision was made as well for the allegation of the intent to defraud as for the proof of that intent; but that section is repealed and re-enacted in terms, with the additions in italics, by the 24 & 25 Vict. c. 98, by sec. 44 of which 'It shall be sufficient, in any indictment for forging, *altering*, uttering, offering, disposing of, or putting off any instrument whatsoever, *where it shall be necessary to allege an intent to defraud*, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.'

The prisoner was indicted at common law for forging and uttering a diploma of the College of Surgeons. The indictment was in the common form. The College of Surgeons has not power to confer any degree or qualification, but before admitting any person to its membership, it examines him as to his surgical knowledge, and if satisfied therewith, admits him, and issues a document, called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own. He hung it up in his sitting-room, and on being asked by two medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would shew it if the clerk of the guardians, who were to appoint to the office, would go to his (the prisoner's) gig. He did not, however, then produce or shew it. The prisoner was found guilty, and the facts are to be taken to be that he forged the document in question with the general intent to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he shewed it to two persons with the particular intent to induce such belief in these persons; but that he had no intent in forging, or in uttering or publishing (assuming there was one), to commit any particular fraud or specific wrong to any individual; and, upon a case reserved, it was held that the conviction was wrong. Jervis, C. J., 'The 14 & 15 Vict. c. 100, s. 8, alters and affects the forms of pleadings only, and does not alter the character of the offence charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but whether it is or not, in order to make out the offence, there must have been, at the time of the instrument being forged, an intention to defraud some person. Here there was no such intent at that time, and there was no uttering at the time it is said there was

no intent to defraud, though there would be parties who might be defrauded. But where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be

frauded.' And again, 'This man might have been convicted, though Hanstock's name was not on the register. There may be an intent to defraud without the power or the opportunity to defraud.' See *R. v. Crowther*, *post*, p. 635.

an intention to defraud.' Wightman, J., 'Before the late statute it was necessary to allege an intent to defraud some one, and there must be an intention to do so now. In this case it does not appear that at the time when the forgery was committed there was an intention to defraud any one.' Cresswell and Erle, JJ., and Bramwell, B., concurred. (a)

It has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (b)

Where a forged request for the delivery of goods was addressed in her maiden name to a female, who prior to the date of it had married, it was held that the intent might be laid to be to defraud the husband. (c)

Upon an indictment for forging and uttering an order for the payment of money, signed John Phillips, with intent to defraud F. Rufford and others, it appeared that the order was presented at Messrs. Rufford's bank; but they would not pay the amount; and no person named John Phillips kept cash with them; it was objected that there could be no intent to defraud Messrs. Rufford, as there was not the most remote chance of their paying the money; but it was held that the prisoner's going to Messrs. Rufford's, and presenting the paper for payment, was quite sufficient evidence of an intent to defraud them. (d)

Where on an indictment against an attorney for forging a County Court summons, it appeared that a *distringas* had been altered by striking out the words respecting the distraining and inserting the word 'summon' instead, and this paper had been served on the prosecutor, who paid the costs, as if it had been a genuine summons, and the debt claimed of him; Patteson, J., held that there was no evidence of any intent to defraud the prosecutor, as he would have had just the same costs to pay if the summons had been sued out in the most regular manner. (e)

It is said by Hawkins that the notion of forgery does not seem so much to consist in the counterfeiting a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to

(a) *R. v. Hodgson*, D. & B. 3. A. D. 1856. Mr. Greaves considers this decision erroneous. See 4th ed. of this work, vol. ii. p. 786, note (v), *sed quare*.

(b) *R. v. Mazagora*, R. & R. 291. In this case the jury found that the prisoner had the intention to defraud whoever might take the note, but that the intention of defrauding the bank in particular did not

enter into her contemplation, and it was held that the jury ought to have inferred an attempt to defraud the bank.

(c) *R. v. Carter*, 7 C. & P. 134. The Recorder, after consulting Lord Denman, J. A. Park, J., and Bolland, B.

(d) *R. v. Crowther*, 5 C. & P. 316, Bosanquet, J.

(e) *R. v. Collier*, 5 C. & P. 160.

give it an operation which in truth and justice it ought not to have. (*f*)

But as the fraud and intention to deceive, by imposing upon the world that as the act of another which he never consented to, are the chief ingredients which constitute this offence, so it has been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command. (*g*)

So, if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing of an instrument in another's name, without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. (*h*) Also he cannot be punished as guilty of forgery who rases the word *libris* out of a bond made to himself, and substitutes *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet this it seems would be forgery if by the circumstances of the case it should in any way appear to have been done with any view of gaining an advantage to the party himself, or of prejudicing a third person; and it is holden, that such an alteration, even without these circumstances, is a misdemeanor; though it do not amount to forgery. (*i*) So that it is well observed that at any rate it is very dangerous to tamper in these matters. (*j*)

#### SEC. IV.

##### *Of Principals and Accessories.*

It has been stated in a former part of this work, that it is laid down generally in the books, that all are principals in forgery; and that whatever would make a man accessory before the fact in felony, would make him a principal in forgery; but that it is conceived, this must be understood of forgery at common law, and where it is considered only as a misdemeanor. (*k*) And with respect to a case (*l*) upon the 5 Eliz. c. 14, which would seem to lead to a contrary conclusion, it is elsewhere observed that, from its circumstances, there seems no reason for taking that case out of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all the concomitants of felony, namely, accessories before and after. (*m*) And this doctrine is confirmed by several cases.

(*f*) 1 Hawk. P. C. c. 70, s. 2.  
(*g*) 1 Hawk. P. C. c. 70, s. 2 and Bac. Ab. Forgery (A).

(*h*) Moor, 760. 1 Hawk. P. C. c. 70, s. 5. Bac. Ab. Forgery (A).

(*i*) 1 Hawk. P. C. c. 70, s. 4. Bac. Ab. Forgery (A). As to the rasure of deeds, see Shep. Touch. 68, 69.

(*j*) 2 East, P. C. c. 19, s. 3, p. 854.

(*k*) Vol. i. p. 173.

(*l*) Bothe's case, Moor, 666. *Ante*, vol. i. p. 173.

(*m*) 2 East, P. C. c. 19, s. 52, pp. 973, 974. And see vol. i. p. 173, *et seq.*

**Persons not present at the time of uttering.** — Three prisoners, Soares, Atkinson, and Brighton, were charged by the indictment with feloniously uttering a forged bank note for £5 knowing it to be forged, &c., with intent to defraud the governor and company of the Bank of England. And the indictment also contained the other usual counts, for forging, and for disposing of and putting away the note with the like intent; together with counts stating the intent to be, to defraud the person to whom it was offered in payment. The prisoner Brighton offered the note in question in payment for a pair of gaiters at a shop in Gosport, and the other two prisoners, Soares and Atkinson, were not with Brighton at the time he so offered the note, but were waiting at Portsmouth till he should return to them, it having been previously concerted between the three prisoners that Brighton should go over the water from Portsmouth to Gosport, for the purpose of passing the note, and when he had passed it, should return to join the other two prisoners at Portsmouth; they all three knowing that it was a forged note, and having been concerned together in putting off another note of the same sort, and in sharing the produce among them. The counsel for the prisoners Soares and Atkinson objected, that they were not guilty of the charge made against them in this indictment, not having been present at the time the other prisoner uttered the note, nor so near as to be able to aid and assist him; and that they could be charged only as accessories before the fact. The jury found that the forged note was uttered by the prisoner Brighton, in concert with the other two prisoners, and found them all three guilty. The prisoner Brighton was left for execution: but as to the other two, on a case reserved, the judges had no doubt that they were entitled to an acquittal on this indictment charging them as principals, they not being present at the time of the uttering, or so near as to be able to afford any assistance to the accomplice who actually uttered the note. (n)

**Constructive presence at time of uttering.** — So in a later case, Graham, B., is reported to have said, 'It has frequently been held that what would amount to a constructive presence at common law will not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby. Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at some little distance in the street; it was objected that the latter was not liable as a principal. I saved the point; and the judges were of opinion that the utterer only was liable.' (o)

The case referred to by the learned judge was probably that of *R. v. Davis*, in which it was holden not to be sufficient, to make a person a principal in uttering a forged note, to prove that such person came with the utterer to the town in which it was uttered, went out with him from the inn at which they had put up a little before the time when it was uttered, joined him again in the street a little after the

(n) *R. v. Soares, Atkinson and Brighton*, 2 East, P. C. c. 19, s. 52, p. 974. *R. & R.* 25. And see *R. v. Badcock*, *R. & R.* 249; *R. v. Stewart*, *R. & R.* 363.

(o) By Graham, B., in the case of Brady,

for forging and uttering a cheque, *O. B.* June, 1813, 1 Stark. Crim. Plead. 84, in the note. But see upon this subject, vol. i. p. 162, *et seq.*

uttering, and at 150 yards' distance from the place of the uttering and ran away when the utterer was apprehended. (*p*)

**Constructive presence in the actual forgery.** — But it has been held that where several persons were in combination, and jointly co-operated in making forged Bank of England notes, they were all guilty as principals, though each of them executed by himself a distinct part of the forgery, and though one of them was not present when the notes were completed by the signature. (*q*)

So also if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. (*r*) So also the makers of the paper and plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts were executed. (*s*)

But where three persons were jointly indicted under the 1 Will. 4, c. 66, s. 19, for feloniously using plates containing impressions of forged foreign notes, it was held that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using or assisted in one such act, as by two using, and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to shew that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. (*t*)

And where three prisoners were indicted under the same section, for feloniously engraving a promissory note of the Emperor of Russia, and it appeared that the plates were engraved by an Englishman, who was an innocent agent, and two of the prisoners only were present at the time when the order was given for engraving the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction; it was held, that in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. (*u*)

In the following case a wife was indicted as a principal in a forgery on the 49 Geo. 3, c. 123, s. 13, and her husband as an accessory before the fact at common law. The indictment charged Sarah Morris with forging an order and certificate for receiving prize money, which had become due to one Henry Taylor, a petty officer in the naval service, with intent to defraud the commissioners of Greenwich Hospital; and John Morris, with inciting, counselling, aiding, procur-

(*p*) *R. v. Davis*, Nottingham Lent Ass. 1806, R. & R. 113.

(*q*) *R. v. Bingley*, R. & R. 446.

(*r*) *R. v. Kirkwood*, R. & M. 304; vol. i. p. 174.

(*s*) *R. v. Dade*, R. & M. 307; vol. i. p. 174.

(*t*) *R. v. Harris*, 7 C. & P. 416. Little-dale and Gaselee, JJ.

(*u*) *R. v. Mazeau*, 9 C. & P. 676. Patterson, J.



ing, &c., the said Sarah Morris to commit the said felony. The second count charged Sarah Morris with having uttered the order and the certificate by the incitement of John Morris. And there were many other counts in which the offence was charged, with some variations. It appeared that H. Taylor, whose name purported to be subscribed to the order, was, in the year 1811, a petty officer on board His Majesty's frigate the *Frederickstein*; and in such capacity became entitled to a share of certain prize money arising from the capture of a rich vessel. In November, 1813, the prisoner, Sarah Morris, who was the wife of the other prisoner, John Morris, and real or pretended daughter of H. Taylor, applied to a clerk in the cheque office in Greenwich Hospital, for the payment of the prize money due to H. Taylor; and produced at the same time the order stated in this indictment. She was desired to call again in about ten days, and went away, leaving the order with the clerk. But in about four or five days she came again, and expressed great anxiety to be immediately paid the money, when she was told that the money had not yet come in; and the order was given back to her with a request that she would not apply again until she was duly informed that the money had been remitted to the office. Almost immediately after this second visit, the other prisoner, John Morris, wrote a letter to the Clerk of the Cheque on the subject. On the 8th December, notice was given to Sarah Morris that the prize money was come in, and that she might receive the share of it to which H. Taylor was entitled; upon which she went to the office with the same order and certificate, which she produced; and had nearly obtained the warrant for the payment of the money, when circumstances occurred which caused suspicion, and she and her husband were shortly afterwards apprehended. H. Taylor, whose name purported to be signed to the order, could not write, and was obliged always to make a mark whenever his signature was required; and the name of the officer, by whom the certificate purported to be subscribed, was not in his handwriting. The landlord of the house in which the prisoners lodged, stated that the prisoner, John Morris, had, in two or three instances, ordered his wife, Sarah Morris, to go to Greenwich Hospital respecting about £30 of prize money due to H. Taylor, his wife's father; that he was constantly talking of having been H. Taylor's shipmate; that at one time Sarah Morris told her husband that she had been to Greenwich; that the prize money was not then ready; that the office had not yet received it; and that he, the witness, had lent the prisoner, John Morris, money upon the belief that he had prize money to receive. He also swore that he really believed that Sarah Morris went to receive it in obedience to her husband's orders. And, as to this fact, it was proved that the prisoner, John Morris, had signed a paper, stating that his wife had acted in this business entirely under his orders and directions. It was also proved by a witness who had formerly been a captain's clerk in the navy, that in November, 1813, the prisoner, John Morris, represented to him that there was about £30 prize money due to his father-in-law, H. Taylor, as a caulker in the *Frederickstein* frigate; that he did not like to go to a Jew upon the subject: and that he would be obliged to him if he would fill up the blanks in certain papers which he produced; that the witness accordingly filled up the blanks, excepting

the signatures ; and that, on observing there was a spare half sheet to the papers he so filled up, he advised the prisoner, John Morris, to send it by the post to his father-in-law ; but that he replied that his wife was going to Portsmouth, on board the *Gladiator*, and that she would get it done. This witness further stated, that he afterwards met the prisoner, John Morris, who then told him that he had got the papers regularly signed by H. Taylor and the captain ; and that he was going to send his wife to Greenwich Hospital for the money. It was submitted that as Sarah Morris, in the part she took in this transaction, had clearly acted under the directions and coercion of her husband, she could not be found guilty ; (v) and that if she was innocent as a principal, the other prisoner could not be guilty as an accessory. And the jury having found both the prisoners guilty, on a case reserved, the twelve judges were unanimously of opinion that the prisoner, Sarah Morris, was guilty of uttering the forged instrument, knowing it to be forged ; and that the prisoner, John Morris, was guilty of the offence of an accessory before the fact at common law. (w)

The prisoners were charged with inciting an unknown person to forge a will ; another count charged two of them with uttering the will, and the three others as accessories before the fact to the uttering. The evidence did not shew any joint act done by the accessories, but only separate and independent acts done by each at separate and distinct times and places. After all the evidence had been given, one of the prisoners charged as an accessory pleaded guilty. It was objected that the others charged as accessories were entitled to be acquitted ; every act which made a person an accessory constituted a distinct felony, and it ought to be charged accordingly. Here the indictment charged a joint procuring, and there being no evidence of a joint procuring, only one prisoner could be convicted. But Williams, J., overruled the objection. (x)

It is said by Lord Coke, that to *cause* is to procure or counsel one to forge ; to *assent* is to give his assent or agreement afterwards to the procurement or counsel of another ; to *consent* is to agree at the time of the procurement or counsel, and he in law is a procurer. (y) But it is observed, that the *assent* here mentioned must be understood of an assent to the design of forging, before the fact of the forgery committed ; (z) since, according to Lord Hale, an assent after the fact committed makes not the party assenting guilty or principal in the forging ; but it must be a precedent or concomitant assent. (a)

The prisoner was indicted for forging a receipt for £5 in the name

(v) Vol. i. p. 146, *et seq.*

(w) *R. v. Morris*, 2 Leach, 1096. R. & R. 270. And see *R. v. Hughes*, vol. i. p. 153.

(x) *R. v. Barber*, 1 C. & K. 442. *R. v. Messingham*, 1 R. & M. 257, was cited in support of the objection. I have always been, and still am, clearly of opinion that this decision was wrong. Suppose the incitings had each been in a different county, it is quite clear that at common law (if triable at all) each could only have been tried in the county where it took place, and

this proves that they are separate and distinct felonies. And no rule is more clearly settled than on a joint charge you must prove a joint offence. C. S. G. See vol. i. p. 182, as to including several accessories in the same indictment.

(y) 3 Inst. 169. And in a strict sense he that causes a forgery to be done is a forger himself ; but then it ought to be so laid in the indictment. *Per Cur.* in *R. v. Stocker*, 5 Mod. 138.

(z) 2 East, P. C. c. 19, s. 52, p. 973.

(a) 1 Hale, 684.

of William Smart. Smart had gone to America ten years ago, and in June, 1844, £5 had been sent by his father, M. Smart, to him in America in consequence of a letter received from him. On the 2nd October, 1844, J. Bartlett, of Saddleworth, near Manchester, received a letter from the prisoner enclosing a letter to 'M. Smart, Beverstone, near Tetbury,' and requesting him to post that letter in the post-office, which he did. In consequence of this letter M. Smart sent a letter containing a post-office order, payable at the Manchester post-office, directed to W. Smart. This letter was opened by Bartlett, who wrote to the prisoner and informed him of the receipt of the post-office order. The prisoner wrote a letter in reply enclosing one purporting to come from W. Smart, desiring Bartlett to obtain payment of the post-office order, and saying that he was 'at liberty to sign his hand,' if necessary, to the post-office order. In consequence of this letter Bartlett signed the name 'William Smart' to the post-office order, went to the Manchester post-office, and received the money and transmitted the balance, after paying the expenses, £4 17s. 6d., to the prisoner by a post-office order payable at the Cheltenham post-office. Bartlett stated that he considered the letter gave him sufficient authority to sign the name 'William Smart,' which he wrote in his ordinary hand, without imitating any person's signature. It was urged that in order to constitute forgery the writing of the name by an innocent agent must be as if it were the act of the person whose name was written. Here the signing was as an agent, and the prisoner had only been guilty of giving an authority, which he had no right to give. Bartlett did not sign as W. Smart, but on the ground that he was authorised to sign W. Smart's name for him. Secondly, it was not sufficient to give an innocent agent 'liberty' or licence to do an act to make the party giving such licence a principal. A bare permission would not make a man a principal. (b) Platt, B., after consulting Pollock, C. B., 'We agree in thinking that as Bartlett was an innocent agent, the signing the name W. Smart by him is just the same as if it had been signed by the prisoner himself, and that it is therefore a forgery. We also think that the terms of the letter, which induced Bartlett to sign, are quite immaterial, as it was in consequence of that letter that the name was written.' (c)

By the general provisions of the 24 & 25 Vict. c. 94, s. 1, accessories before the fact may be tried as such, or for a substantive felony; and all accessories may be tried by any Court which has jurisdiction to try the principal felon, although the offence may have been committed on the seas or abroad; and in whatever places the offences have been committed, the accessories may be tried wherever they are apprehended or in custody.

(b) Maddock's case, 2 Russ. C. & M. 1  
Russ. C. & M. 57, 1 Hale, 616, were cited.

(c) R. v. Clifford, 2 C. & K. 202.

## SEC. V.

*Of the Indictment, Trial, Evidence, and Punishment.*

It now remains, in conclusion of this Chapter, to mention some of the points of general application concerning the indictment, trial, evidence, and punishment in cases of forgery.

It is usual to charge in the indictment that the party *falsely* forged and counterfeited, &c. : but it is said to be enough to allege only that he *forged and counterfeited* without adding *falsely*, which is sufficiently implied in either of those terms, particularly in the word to *forge*, which is always taken in an evil sense in our law. (e) It has been holden that an indictment is good, and not repugnant, although it state that the party *falsely* forged a *false* writing. (f)

Before certain enactments on this subject it was essentially necessary to an indictment for forgery, that the instrument alleged to be forged should be set forth in words and figures. (g) This was necessary in order that it might appear that the instrument was one which might be the subject of an indictment for forgery. (h)

By the 24 & 25 Vict. c. 98, s. 42, 'In any indictment for forging, *altering, offering, uttering, disposing or putting off* any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof.' (i)

It is sufficient to aver that the prisoner uttered 'a certain false and forged writing, as and for a copy of an entry in a certain register of marriages, kept by the vicar of the parish of Seighford, in the county of Stafford, of a matter relating to a marriage between T. Vaul and A. Poultney.' (j) So it is sufficient to describe a receipt as 'a certain receipt for money, that is to say, a receipt for the sum of £3 15s. 9d.' (k) So a request for the delivery of goods is well described as 'a certain request for the delivery of goods to one J. Robinson.' (l) So a count charging the forgery of a 'certain warrant and order for the delivery of goods' was held good after verdict under the 2 & 3 Will. 4, c. 123. (m) So under that statute it was held sufficient after verdict to describe a deed as a 'deed purporting to be

(e) 2 East, P. C. c. 19, s. 57, p. 985. Savage's case, Styles, 12. The Latin words were *fabricavit et contrafecit*. Mariot's case, 2 Lev. 221. Dawson's case, 1 Str. 19.

(f) R. v. Goate, 1 Lord Raym. 737.

(g) 2 East, P. C. c. 19, s. 3, p. 975. Mason's case, 2 East, P. C. ibid.

(h) Lyons' case, 2 Leach, 597, 608. R. v. Wilcox, R. & R. 50.

(i) This clause is taken from the 14 & 15 Vict. c. 100, s. 5. The words in italics were not in the former Act. By some accident the word 'of' has been omitted after 'disposing,' in the second line of the clause. See sec. 43, *post*, p. 682, as to description of

instruments in indictments for engraving, &c.

(j) R. v. Sharpe, 8 C. & P. 436. This and the cases referred to in the following notes to (l) inclusive, were decided under the former enactment, 2 & 3 Will. 4, c. 123, s. 3, by which it was sufficient to describe the instrument alleged to be forged in such manner as would sustain an indictment for stealing the same.

(k) R. v. Vaughan, 8 C. & P. 276. R. v. Martin, R. & M. 483, 7 C. & P. 549.

(l) R. v. Robson, 9 C. & P. 423, 2 M. C. C. R. 182.

(m) R. v. Smith, 2 Cox, C. C. 358. Coleridge, J.

an indenture, bearing date the 1st of November, 1839, between one R. H. of the first part, W. H. of the second part, and R. C. of the third part, and purporting to be made and executed by the said R. H. and W. H.' (n) So it is sufficient to describe a deed as 'a certain deed purporting to be made on the 1st day of March, 1837, between R. Williams of the one part, and D. Griffiths of the other part, and purporting to be an underlease by the said R. Williams to the said D. Griffiths of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of £8, payable on the 1st day of March, in every year, and purporting to contain a covenant by the said D. Griffiths, with the said R. Williams, for the payment by the said D. Griffiths to the said R. Williams of the yearly rent of eight pounds.' (o) So an order for the payment of money is sufficiently described as 'a certain order for the payment of money, to wit, for the payment of £60.' (p) So a warrant for the payment of money may be stated to be 'a certain warrant for the payment of money, to wit, for the payment of the sum of £4 10s.' (q) So, after verdict, under the 2 Will. 4, c. 123, a count has been held good which stated that the prisoner had in his possession two plates, upon which was engraved, in the Polish language, 'a certain promissory note for payment of five florins, purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicolas, then being king of a certain foreign country called Poland.' (r) So it is enough to describe a promissory note as 'a certain promissory note for the payment of £29,' without adding the date or giving any further description. (s) So a count charging the uttering of 'a certain promissory note, purporting to be a promissory note of A. B., for the payment of money, to wit, for the payment of £5,' has been holden good. (t)

A *bank post bill* cannot, in an indictment for forging or uttering, be described as a bill of exchange generally, but it may be described as 'a bank bill of exchange.' (u)

Where the prisoner had been convicted of uttering and publishing as true a forged promissory note, with intent to defraud one B. H., knowing, &c., against the statute, the indictment stated the instrument as follows, without any innuendo, explanation, or allegation respecting

(n) *R. v. Collins*, 2 M. & Rob. 461. Rolfe, B.

(o) *R. v. Davies*, 9 C. & P. 427, 2 M. C. C. R. 177.

(p) *R. v. Raake*, 2 M. C. C. R. 66. S. C. 8 C. & P. 626, and see 9 C. & P. 429, note (a). See *R. v. Atkinson*, C. & M. 325, *post*.

(q) *R. v. Rogers*, 9 C. & P. 41, Parke, B., and Bosanquet, J.

(r) *R. v. Warshauer*, R. & M. C. C. R. 466. There was at first a difference of opinion among the learned judges, whether the count ought not to have shewn what money florins were and their value; but at a subsequent meeting the defect was considered to be cured by the 7 Geo. 4, c. 64, s. 21, the offence being described in the words of the statute.

(s) *R. v. Burgiss*, 7 C. & P. 490. Little-

dale, J. S. P. *R. v. James*, 7 C. & P. 553, Patteson, J. Sanderson's case, 2 Lew. 187.

(t) Sanderson's case, 2 Lew. 187. Taunton, J.

(u) *R. v. Birkett*, R. & R. 251. The form of the instrument was, 'At seven days' sight I promise to pay this my *sole* bill of exchange,' which is properly only a promissory note; but the 15 Geo. 2, c. 13, mentioning 'bank notes, bank bills of exchange,' &c., seems to give these bank post bills that denomination of bank bills of exchange, as there are no other bank bills answering that description. In Moor's case, 1 Lewin, 90, Hullock, B., held that a bank post bill could not be described in an indictment for embezzlement as a bill of exchange.

it or its contents, further than denominating and describing it as 'a promissory note for the payment of money, which is as follows:'—

'Newport, Nov. 20, 1821.

'£28 15s. 0d.

'Two months after date pay Mr. B<sup>n</sup>. Hobday, or order, the sum of twenty-eight pounds fifteen shillings,

'Valued rec<sup>d</sup>,

'JOHN JONES.

'At Messrs. Spoon & Co.,

'Bankers, London.'

And an objection having been taken that the instrument so described was not in law a promissory note, the case was submitted to the judges, who held that the instrument was a bill of exchange, and not a promissory note. (*v*)

With respect to the word 'purport,' it should be well observed that it imports what appears on the face of the instrument, as a want of attention to this meaning of the word has been fatal to many indictments.

In a case where the instrument was laid in some counts of the indictment to be 'a paper writing purporting to be a bank note,' it was holden that as it did not purport on the face of it to be a bank note, the counts could not be supported. (*w*)

In another case the bill of exchange upon which the indictment proceeded was in the following form:—

'Bristol, Feb. 21st, 1792.

'Forty days after date pay to Mr. Jeremiah Reading, or order, the sum of £80, for value received, and place it to the account of

'JOHN WHITE.

'To JOHN RING, Esq.,

'Berkley-street, Portman-square, London.'

And the indictment charged that the prisoner, having such bill in his possession, 'purporting to be signed by one John White, and to be directed to one John King, by the name and description of one John Ring, Berkley-street, &c.,' forged an acceptance in writing '*purporting to be the acceptance of the said John King.*' The bill, when produced, appeared to be accepted on the back of it by John King; and it was proved that when the prisoner negotiated the bill, he stated that Mr. King was a gentleman, living in Berkley-street, Portman-square, and a man of opulence; but in fact there was no person of that name living there. The prisoner having been found guilty, the case was submitted to the consideration of the twelve judges, who determined that judgment ought to be arrested on the ground that the bill did not in fact purport to be directed to one John King, as stated in the indictment. Buller, J., in delivering the opinion of the judges, said, 'It is clear that where an instrument is to be set forth, the description that it purports a particular fact, necessarily means that

(*v*) R. v. Hunter, R. & R. 511.

(*w*) Jones's case, *ante*, p. 612.

what is stated as the purport of the instrument appears on the face of the instrument itself. On the face of the bill of exchange in the present case (and the face of the bill is the only thing to be considered) nothing more appears, when we examine the averment, than that it is a bill of exchange drawn by John White on John Ring; therefore, when the indictment says that it was drawn on John King, by the name and description of John Ring, it is absurd and repugnant to itself, for the name and description of one thing cannot purport to be another thing. The drawer of the indictment was led into this blunder by not considering what was the original state of the bill, and what was the appearance of it after the acceptance was put on it; it seems as if he did not recollect under what terms, or by whom, a bill of exchange may be accepted. Though the bill was drawn on John Ring, it might have been accepted by John King, for a bill may be accepted by other persons than those to whom it is directed, as when it is accepted for the honour of the drawer, or of any of the endorsers.' (x)

In a case which occurred shortly afterwards, the prisoner was indicted for forging 'a paper writing, purporting to be an order for payment of money, dated 11th September, 1794, with the name Thomas Exon thereunto subscribed, purporting to have been signed by Thos. Exon, clerk, and to be directed to George Lord Kinnaid, Wm. Moreland, and Thos. Hammersley, of, &c., bankers and partners, by the name and description of Messrs. Ransom, Moreland, and Hammersley, for the payment of the sum of £10, &c.;' 'the tenor of which said false writing, &c., is as follows, viz.:—

'Messrs. Ransom, Moreland, and Hammersley, please to pay to Mr. Brooks, or bearer, the sum of Ten Pounds, for

'THOS. EXON.

'Sept. 11th, 1794'—

with intent to defraud the said George Lord Kinnaid, &c.' There was a second count, for uttering it; and other counts, charging an intent to defraud other persons. An objection was made in arrest of judgment, that the direction of the bill was improperly described in the indictment; and ten of the judges, who met to consider the case, were unanimously of opinion that the judgment should be arrested, on the ground that the word 'purport' imports what appears on the face of the instrument, the apparent and not the legal import; and that the bill in question could not purport to be directed to Lord Kinnaid, because his name did not appear upon the face of it. Buller, J., in delivering their opinion, said, 'Old cases have given rise to much learning and argument on the words "purport" and "tenor," and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where written instruments are to be stated; but among the many cases upon this subject, I can

(x) Reading's case, 2 Leach, 590. 2 East, P. C. c. 19, s. 56, p. 981. Buller, J., also said, that as the opinion of the judges proceeded merely on the informality of the record, the prisoner might be again indicted

for this offence. But no other indictment was preferred; and after remaining in custody till March, 1794, he received a free pardon and was discharged, 2 Leach, 598.

find no judicial determination that *the purport* and *the tenor* should both be stated in any case whatever. Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it; tenor means an exact copy of it; and, therefore, where an instrument is stated according to its *tenor*, the *purport* of it must necessarily appear. The forms of indictments for forgery have varied, and been different from each other at different periods of time; and of late years they have been much more complicated than they were formerly; and, in my opinion, they have been, for that reason, much worse. I have seen the precedent of an indictment of forgery stating, "the prisoner to have forged a certain false paper writing, in the name of J. S. and others, bearing the form of a warrant of attorney, which said writing follows in these words; that is to say, &c.," setting it out *verbatim*; and if indictments for forgery were now merely to state that the prisoner "forged a paper writing to the tenor and effect following, &c.," and the instrument set out appeared on the face of it to be a bond or bill of exchange, or any other of the instruments described in the statute, I should, as at present advised, see no objection to such a form. (y) If, in the present case, the indictment had stated that the prisoner had forged a certain paper writing, in the name of T. Exon, (z) purporting to be a bill of exchange, and then set out the bill to the tenor and effect following, it would, I think, have been quite enough; for the words "purporting to be a bill of exchange," are only necessary to shew that the instrument supposed to be forged is one of the instruments mentioned in the statute; and, in order to shew that it is one of those instruments, it cannot be necessary under the word "purporting" to recite all the contents of the instrument; for an exact copy of the instrument itself being set forth, all its contents thereby appear; and the law requires an exact copy of the instrument to be inserted in the indictment, in order that the Court may see that the instrument is the subject of forgery within the meaning of the statute. The blunder in the present indictment seems to have arisen from the circumstance of *Lord Kinnaird* and *Messrs. Moreland* and *Hammersley* carrying on the banking business under the firm of *Messrs. Ransom, Moreland, and Hammersley*. The pleader who drew it, forgetting that it was wholly immaterial whether such a firm as *Ransom, Moreland, and Hammersley* ever existed, or who were the persons who constituted that firm, and conceiving it to be material that the names of the real partners interested in the business should be mentioned, has taken great pains to shew that a bill, drawn on "*Ransom, Moreland, and Hammersley*," was drawn on "*Lord Kinnaird, Moreland, and Hammersley*;" and in order to do that, he has averred in the indictment that the bill purports to be drawn on "*Lord Kinnaird, Moreland, and Hammersley*." But the *purport* of an instrument, as I have already observed, is that alone which appears on the face of it; and on the face of this bill, *Lord Kinnaird's* name does not appear, and therefore the averment is not true. (a)

(y) But see *R. v. Wilcox*, R. & R. 50.

(z) But it would not have been good to have averred that the paper writing *was signed* by T. Exon, such signature being a forgery, and the paper, therefore, not in fact

so signed. See *Carter's case*, 2 East, P. C. c. 19, s. 56, p. 985.

(a) *Gilchrist's case*, East. T. 1795. 2 Leach, 657. 2 East, P. C. c. 19, s. 56, p. 982.



This doctrine was again acted upon in a case where the indictment charged the prisoner with forging a certain paper writing, *purporting* to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, *Winchester, 14th Nov., 1796*, and to be directed to *Richard Down, Henry Thornton, John Freer, and John Cornwall, the younger*, bankers, London, by the name and description of Messrs. Down, Thornton, and Co., bankers, London, requiring them, ten days after date, to pay to Mr. Wm. Simmons or order £8 10s., &c., and then setting out the tenor, by which the bill appeared, as the fact really was, to be directed, '*Messrs. Down, Thornton, and Co.,*' bankers, London. (b)

In a case which occurred about the same time, the indictment, which was for forging a scrip receipt, charged that the prisoner forged it 'with the name C. Olier thereunto subscribed, *purporting* to have been signed by one Christopher Olier;' and it was objected that this must necessarily be bad, as C. Olier 'did not, on the face of it, purport to be Christopher Olier, but might be Charles, &c.;' but the Court thought that this case differed in some degree from the two cases cited in support of the objection, namely, *Jones's case*, (c) and *Gilchrist's case*; (d) inasmuch as the note in *Jones's case* did not purport to be a bank note, and, therefore, the indictment, charging that it did so purport, was bad; and in *Gilchrist's case*, as the name of Lord Kinnaird did not appear on the face of the bill, it could not purport to be directed to him; but that, in the present case, this scrip receipt being subscribed with the name C. Olier, and the indictment charging that it purported to be signed in the name of Christopher Olier, a cashier of the Bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself. (e)

As indictments sometimes contain counts, in which the instruments are set out, it may be useful to refer to the following decisions decided before the passing of the 24 & 25 Vict. c. 98; see sec. 42, *ante*, p. 642.

Where, upon an indictment for forging a receipt for money, it was objected, that in the receipt, as set forth, some of the sums were in figures, it was holden that the receipt must be pursued exactly, or it would be a variance. (f)

As the object of setting out the instrument is, that the Court may see, and be able to form an opinion whether it be that which it is alleged to be, and whether it falls within the Act or law on which the prosecution is founded, judgment was arrested upon an indictment for forging a Prussian treasury note, on the ground that the indictment did not contain any English translation of the note, which was in a foreign language. (g)

(b) *Edsall's case*, 2 East, P. C. c. 19, s. 56, p. 984. 2 Leach, 662, note (a). In *East*, P. C. *ibid.*, it is said that the judges held the indictment bad, upon the authority of *Gilchrist's case*, though Buller, J., disapproved much of that determination, which, however, he admitted could not be distinguished from the present case.

(c) *Ante*, p. 612.

(d) *Ante*, p. 646, note (a).

(e) *Reeve's case*, *cor.* Heath and Lawrence, JJ., and Thomson, B. 2 Leach, 808,

814. 2 East, P. C. c. 19, s. 56, p. 984. The point was saved for the consideration of the twelve judges; but it does not appear what their opinion was, there being other objections to the conviction of the prisoner, who was afterwards tried and capitally convicted on another indictment pending for the same offence.

(f) *Powell's case*, 2 East, P. C. c. 19, s. 53, p. 976.

(g) *R. v. Goldstein*, R. & R. 473.

The whole instrument must be correctly translated. — Where an indictment charged the prisoner with having in his possession plates upon which there was engraved a promissory note in the Polish language, which was set out, and which said note, being translated into the English language, is as follows : —

‘Cash note of the Kingdom of Poland.

‘To the bearer of which the Exchange Office will, in compliance with the royal decree of the 15th of April, 1823, pay the sum of five guilders (*h*) in the established currency.

‘This note will be received in all the government establishments.

‘Royal Commissary,  
‘Teofil Szymanowski.’

‘Royal Commissary,  
‘L. Plater.’

In the rim and margin of the plate of the note, in the Polish language, were certain words, which in English denoted ‘year,’ ‘1824,’ and ‘five florins,’ and none of these words were stated in the translation. The decree of 1823, mentioned in the note, ordered that the notes were to be marked of the year 1824, and directed that the year 1824 should be put upon them; and that ‘five florins’ should be put upon them; and the words ‘year,’ ‘1824,’ and ‘five florins’ were part of a genuine Polish note, and a note without these words would not be received at the government offices. It was objected that this translation was inaccurate and insufficient, and the point was reserved for the consideration of the judges, who expressed no opinion upon it, as they held the conviction right upon another count, but it is said that they were unanimously of opinion that the translation was imperfect. (*i*) It is said to have been the opinion of the majority of the judges in the same case that describing a foreign note wholly in the English language is not sufficient in an indictment for forgery, notwithstanding the 2 & 3 Will. 4, c. 123, s. 3; (*j*) but this objection, provided the description is in the words of the statute creating the offence, can only be taken advantage of by demurrer, and is cured, after verdict, by the 7 Geo. 4, c. 64, s. 21. (*k*)

Where an indictment charged the uttering of a bill of exchange, which was as follows : —

‘No. 6811.

§

Due 7th December.

‘St. Petersburg, le 4 Août, 1834. B. P. £500 stg. A quatre mois de date par cette lettre de change à l’ordre de nous-mêmes la somme de

(*h*) It is ‘guldens’ in the report in 7 C. & P. 424, and see 7 C. & P. 418, 419, which seems to shew that the word was ‘guldens,’ as it was objected that that was not an English word. C. S. G.

(*i*) R. v. Harris, R. v. Moses, R. v. Balls, 7 C. & P. 429, note (*a*). R. v. Warshaner, *alias* Moses, R. & M. C. C. R. 466.

(*j*) R. v. Harris, 7 C. & P. 429, and note (*a*). See *ante*, p. 642, note (*j*).

(*k*) *Ibid.*, and R. & M. 466, and see R. v.

Warshaner, *ante*, p. 643, where the description of the note is given; the objections taken were, that the note ought to be stated to be a note in the foreign language, and then the meaning of it in English; that it ought to be stated to be for the payment of foreign money, and that the value in English money should be stated, and that the 2 & 3 Will. 4, c. 123, s. 3, does not extend to such notes. See note (*a*), 7 C. & P. 431. C. S. G.

cinq cent livres sterling, value en moi-même, que passerez suivant l'avi de

'No. 7800.

'STIEGLITZ & Co.

497.

'Messrs. Brown, Dan, Hamming, Dublin.

'Payable, Londres.'

And which in English is as follows:—

'No. 6811.

§

Due 7th December.

'St. Petersburg, the 4th August, 1834. Good for £500 sterling. At four months date by this bill of exchange, to the order of ourselves, the sum of five hundred pounds sterling, value in myself, which you will pass according to the advice of

'No. 7800.

'STIEGLITZ & Co.

497.

'Messrs. Brown, Dan, Hamming, Dublin.

'Payable, London.'

It was objected that this was not a bill of exchange, for that it contained no order to pay, and that the word 'livres' did not mean pounds; but, upon a case reserved, the conviction was held right. (*l*)

The recital of the instrument is usually prefaced by the words, 'to the tenor following, that is to say,' &c., or, 'in the words and figures following,' which imports an exact copy. But where the indictment was for forging a certain receipt for money, 'as follows,' and then set forth the receipt in words and figures, all the judges held that the words, 'as follows,' were to be taken as the same as 'according to the tenor following,' or 'in the words and figures following;' and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance. (*m*) Therefore, though there be no technical form of words for expressing that the instrument is set forth in words and figures, it is clear that the prosecutor cannot, by varying the terms in which he introduces the instrument, relieve himself from any accuracy which is otherwise requisite. (*n*)

But in setting forth the tenor of the instrument, a mere literal variance will not vitiate the indictment. Thus where, upon an indictment which charged the prisoner with forging a bill of exchange, and contained, in the words set forth, the words 'value *received*,' and the bill produced in evidence, though otherwise corresponding with that set forth, was written, 'value *receivd*,' it was holden that the variance was not material, as it did not change the word. (*o*) So where the prisoner was indicted for uttering a bill of exchange, directed to Messrs. Masterman, Peters, and Co., with a forged endorsement thereon; and it was objected that there was a variance in the indictment, which imported to set out the bill according to its tenor, inasmuch

(*l*) *R. v. Szudurskie*, R. & M. 429.

(*m*) *Powell's case*, 2 Blac. R. 787. 1 Leach, 77. 2 East, P. C. c. 19, s. 53, p. 976, in which last book the learned writer says, that he cannot but question *Smith's case*, Salk. 342, where it is said in the report that

where a deed with the mark of I. S. was forged, the indictment need not set out the mark.

(*n*) 3 Chit. Crim. L. 1040.

(*o*) *Hart's case*, 1 Leach, 145. 2 East, P. C. c. 19, s. 54, p. 977.

as the letter *r* in Messrs. was omitted, and the abbreviation Mess<sup>s</sup>. might stand for words which Messrs. could not; the objection was overruled; and the judges, upon the point being referred to them, held that the indictment was sufficient. (*p*) So where the prisoner was charged with forging an order for the payment of money, which, as set out in the indictment, appeared to be signed by 'John McNicole and Co.,' with intent to defraud John McNicole, and the name was really McNicoll, it was held that this was no variance, as the substituting the letter *e* for *l* did not make it a different name. (*q*) But if, by addition, omission, or alteration, the word is so changed as to become another word, the variance will be fatal. (*r*)

In a case where the note charged to be forged set forth the *attestation* of the witness, and the words 'Mary Wallace, her mark;' and it appeared that when the prisoner subscribed the note those parts of it were not written; it was doubted whether the prisoner had not in fact forged a note differing in the tenor of it from that set forth in the indictment. But it was holden upon consultation that the indictment was in this respect well proved. (*s*)

It was sufficient, before the enactments above referred to, (except in the cases which will be presently mentioned) to charge that the defendant forged such an instrument, naming it, and setting forth the tenor; but the laying it to be a paper writing, &c., purporting to be such an instrument (as the statute on which the indictment is framed describes) was good; and it was said that in strictness of language there might be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument. (*t*) In a case where the prisoners had been convicted upon an indictment, charging them with publishing 'as a true will, a certain false, forged, and counterfeited paper writing, *purporting to be the last will* of Sir A. C., &c.,' and setting out the tenor of the will, it was objected that it ought to have been laid that they forged *a certain will*, and not a paper writing, *purporting to be the last will*, &c., as the words of the statute are 'shall forge a will.' But, after a variety of precedents being produced, all the judges held it to be good either way. And it was also holden, that as the will was set forth in *hæc verba*, and three names appeared as witnesses, it was sufficient, without stating that it purported to be attested by three witnesses. (*u*)

(*p*) Oldfield's case, *cor.* Bayley, J., Durham Sum. Ass. 1811, MS.

(*q*) *R. v. Wilson*, 1 Den. C. C. 284. 2 C. & K. 527. These are the very cases in which an amendment ought to be made under the 14 & 15 Vict. c. 100, s. 1. See vol. i. p. 54.

(*r*) *R. v. Bear*, Carth. 407. *R. v. Drake*, Salk. 661. 1 Stark. Crim. Plead. p. 255. 1 Chit. Crim. L. p. 294. And in *R. v. Beach*, Cowp. 229, where it was holden that in an indictment for forgery a variance in writing the word 'undertood' instead of 'understood' was not material, Lord Mansfield said, 'The true distinction seems to be taken in *R. v. Drake*, which is this, that where the omission or addition of a letter does not change the word as to make it another word, the variance is not material.' In *R. v. Robson*, 9 C. & P. 423, the first count had the

words 'guard curbs,' but the instrument 'guards curbs,' and the question whether this was a variance was reserved, but not decided by the judges, the conviction being held right on another count.

(*s*) Dunn's case, 2 East, P. C. c. 19, s. 53, p. 976. It appears that the Recorder at first entertained the doubt, which was removed on consultation with Perrott, B., and Aston, J.

(*t*) 2 East, P. C. c. 19, s. 56, p. 980.

(*u*) *R. v. Birch*, 2 Blac. R. 790. 1 Leach, 79. 2 East, P. C. c. 19, s. 56, p. 980. There was a third objection also that the indictment only averred, 'they knowing it to be forged, &c.,' whereas it should have been that 'they and each of them, knowing,' but it was overruled. The prisoners were executed.

In a case where the prisoner was indicted for forging and uttering a bill of exchange, which was described in the indictment to be 'a certain bill of exchange requiring certain persons by the name and description of Messrs. Down, &c., twenty days after date to pay to the order of R. Thomson the sum £315, value received, and signed by Henry Hutchinson, for T. G., T. and H. Hutchinson, which bill of exchange so falsely made and counterfeited, is as follows' (setting out the bill), &c., 'with intent to defraud G. Hutchinson,' &c.; and it appeared that the signature to the bill, 'Henry Hutchinson,' was a forgery; it was objected that the indictment averring it to have been signed by him (and not merely that it *purported* to have been signed by him), which was a substantial allegation, was disproved. And the judges on a case reserved, were of that opinion. (*v*)

The prisoner was indicted under the 9 & 10 Vict. c. 95, s. 57, for feloniously causing to be delivered to T. Clarke a certain paper falsely purporting to be a copy of a certain process of the county court of Leicestershire. The document was entitled in the court, and headed with the names of the plaintiff and defendant, and its body was, 'Take notice that you are required to produce at the above court, on the trial of this cause, on the 17th of September instant, the several accounts and memorandums given to you, or to your wife, by the above plaintiff at various times.' And, on a case reserved, it was held that this was a notice to a defendant to produce certain documents, and that, if the notice was not complied with, secondary evidence might be given: but it did not purport to be anything in the shape of process of the Court. (*w*)

Where the indictment charged the prisoner with forging a receipt to an assignment of a certain sum in a navy bill, and the tenor of the receipt as set forth merely consisted of the signature of the party, it was holden to be defective; on the ground that the mere signing of such name, unless connected with the previous matter, did not purport on the face of it to be a receipt, and that it ought to have been averred that such navy bill, &c., together with such signature, did purport to be, and was a receipt, &c., and that the prisoner feloniously forged the same. (*x*) But where a forged receipt, as set forth in the indictment, was in this form, '18th March, 1773. Received the contents above by me, Stephen Withers,' and it appeared in evidence that such receipt was forged at the bottom of a certain account; upon objection taken that the account itself should have been set forth in in order to make it appear that the receipt, as stated, was a receipt for money, all the judges held that the indictment was sufficient, and that the account was only evidence to make out the charge as stated in the indictment. (*y*) It is observed upon this case that by the very terms of the writing itself, it purported to be a receipt for something, though not specifically for money, as it was averred to be, in order to bring it within the 2 Geo. 2, c. 25. (*z*)

(*v*) Carter's case, 2 East, P. C. c. 19, s. 56, p. 985.

(*w*) R. v. Castle, D. & B. 363.

(*z*) Hunter's case, 2 Leach, 624. 2 East, P. C. c. 19, s. 36, p. 928, and s. 53, p. 977. See R. v. Barton, R. & M. 141, *post*. R. v. Martin, R. & M. 483, *post*.

(*y*) Testick's case, 2 East, P. C. c. 19, s. 36, p. 925. 1 East, R. 181, note (*a*).

(*z*) 2 East, P. C. c. 19, s. 53, p. 977. And the learned writer refers to Taylor's case, 1 Leach, 215. 2 East, P. C. c. 19, s. 47, p. 960, *ante*, p. 589, where the prisoner was indicted for forging a receipt for £20 due

The prisoner was indicted for forging and uttering 'a certain warrant for the payment of money, to wit, for the payment of the sum of £4 10s.' and there were no prefatory allegations or innuendoes. The prisoner was a chimney sweeper, and had on several occasions been employed to sweep the funnels of the steam vessel *Princess Victoria*, and the course of business was for the prisoner, when he had swept the funnels, to bring in his bill to J. Nicholson, the engineer of the vessel, who, upon that, gave him a certificate that the work had been done, and on his presenting that certificate at the counting-house of Messrs. Lightly and Simons, he was paid the amount. The prisoner presented the following forged document at their counting-house:—

'Oct. 11, 1839.

'This is to satisfy that R. Rogers has swept the flues, and cleaned the bilges, and repaired four bridges of the *Princess Victoria*.

'J. NICHOLSON.

'£4 10s.'

Parke, B., 'I think that the written evidence and the parol testimony taken together shew that the paper, if genuine, would have authorised the payment of the sum mentioned in it. Under the old law, averments would have been necessary, to shew that this was a warrant for the payment of money; but, as the law is at present, no such averments are necessary, if the indictment is framed on the 2 & 3 Will. 4, c. 123, s. 3. In the present case it appears, by the evidence which has been given, that this (if genuine) was a voucher for the payment of this money. If you describe the instrument in the indictment instead of setting it out, averments are, since the 2 & 3 Will. 4, c. 123, not necessary, as they were before that Act; and if the instrument be described under that statute it is matter of evidence whether the instrument comes within the description given of it by the indictment.' (a)

By 24 & 25 Vict. c. 98, s. 44, 'It shall be sufficient, in any indictment for forging, *altering*, uttering, offering, disposing of, or putting off any instrument whatsoever, *where it shall be necessary to allege an intent to defraud*, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.' (b)

We have already considered the purpose of fraud and deceit, to the prejudice of another's right, which makes a part of the definition of forgery. (c) Such purpose or intent to defraud must formerly have

upon a bill of exchange in these words, 'Received, W. Wilson; and the indictment set forth the bill for £20, and averred the forging of a receipt for the said sum of £20, but contained no averment that the writing forged, together with the bill, purported to be, or was a receipt; and he observes that here also the forged writing in itself purported to be a receipt for something.

(a) *R. v. Rogers*, 9 C. & P. 41, *cor.* Parke, B., and Bosanquet, J. See *R. v.*

*Rice*, 6 C. & P. 634, *post.* See *ante*, p. 642, note (j).

(b) This clause is taken from the 14 & 15 Vict. c. 100, s. 8.

The passage in italics was inserted to prevent its being supposed that this clause made it necessary to allege an intent to defraud in cases where the clause creating the offence did not make such an intent an ingredient in the offence. C. S. G.

(c) *Ante*, p. 624, *et seq.*

been stated in the indictment, and pointed at the particular person or persons against whom it was meditated. (*d*)

In stating this intent to defraud, it was, however, sufficient to describe the party intended to be defrauded with reasonable certainty. (*e*)

It was held not to be necessary to state in the indictment the manner in which the party was to have been defrauded. (*f*)

The following case relates to the property of the party against whom the intent to defraud is aimed, in the moneys, &c., sought to be obtained by the forgery.

Jones and Palmer were indicted for the forgery of an indenture of apprenticeship, and also of a receipt for money, with intent to defraud A. B., C. D., &c., the stewards of the Feast of the Sons of the Clergy. The charitable fund of the Sons of the Clergy was raised by voluntary contributions, and allotted by the secretary equally among all the stewards, to be disposed of by them to the widows and children of deceased clergymen, according to their discretion; the prisoner Jones was a clergyman's widow, and pretending, by means of the indentures in question, and the receipt endorsed thereon, that she had placed her son as an apprentice, she obtained, in concert with the other prisoner, an order from one of the stewards, on the treasurer of the society, for £20, as an apprentice-fee. The prisoners having been found guilty, it was submitted that the offence amounted only to a misdemeanor at common law, and that this was not such a species of property as fell within any of the Acts relating to forgery. But Eyre, B., said, that the several stewards were the absolute owners of their respective shares of the fund; that it was their money, put into their hands upon a trust; and if they had sunk it improperly, or paid it wrongfully, they would perhaps be answerable; and that unquestionably it was their money, as against all the world, except the subscribers. (*g*)

Where the prisoner was indicted for forging a receipt for county rate, which had been paid out of the poor rate of a parish, it was held that a count laying the intent to be to defraud one of the parishioners by name, 'and others,' was good. (*h*)

If the indictment proceeds upon a statute, the charge should, in general, be set forth (according to the established rule applicable as well to other cases as to forgery) in the very words of the statute describing the offence. (*i*)

But an indictment for forging a stamp on foreign muslins, which stated the duty to be chargeable 'for, on, and in respect of,' foreign muslin, was holden good; though the words of the statute in the clause imposing the duty were, 'for and upon;' in other clauses, 'for;' in others, 'on;' and in others, 'upon.' (*j*)

(*d*) 2 East, P. C. c. 19, s. 58, p. 988.

(*e*) Lovell's case, 1 Leach, 248. 2 East, P. C. c. 19, s. 60, p. 990.

(*f*) Powell's case, 2 East, P. C. c. 19, s. 59, p. 989. 1 Leach, 77. Elsworth's case, 2 East, P. C. c. 19, s. 59, p. 989, and s. 58, p. 986.

(*g*) R. v. Jones, 1 Leach, 366. 2 East, P. C. c. 19, s. 60, p. 991.

(*h*) R. v. Vaughan, 8 C. & P. 276, Gurney, B. See R. v. Cooke, 8 C. & P. 586.

(*i*) 2 East, P. C. c. 19, s. 58, p. 985.

(*j*) R. v. Hall, 2 East, P. C. c. 19, s. 19, p. 895, and s. 58, p. 988, *post*, chap. xxxviii. *Of Forging, &c., Stamps*; and an indictment at common law was holden bad for uncertainty, which stated that the defendant forged, or caused to be forged, a bill of lading. R. v. Stocker, 5 Mod. 137. 1 Salk. 342, 371; and see Walcot's case, Holt's R. 345

An indictment on the 2 Geo. 2, c. 25, which charged that the prisoner 'did feloniously *alter* and cause to be altered a certain bill of exchange, by *falsely making, forging, and adding* a cipher 0 to the letter and figure £8, &c.,' was holden good, though the words of the statute are 'if any person shall *falsely make, forge, or counterfeit*,' and the word *alter* is not used in the statute. (*k*)

In this case the judges held that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering, by falsely making and forging, or for feloniously making and forging by falsely altering, &c. (*l*) We have already seen that if any part of a true instrument be altered, the offence may be treated as a forgery of the whole instrument, and be so laid in the indictment. (*m*) But it appears to have been more usual to lay forgeries of this kind by stating the particular alteration, at least in one count. (*n*)

A superfluous description will not make an indictment bad. (*o*) Where, upon an indictment on the 2 Geo. 2, c. 25, for forging 'a bond and writing obligatory,' it was objected that, as the statute uses the term *bond* as well as the term *writing obligatory*, the indictment ought to have described the offence more particularly, either as a forgery of the one or the other; that it should have described the instrument in this case as a *writing obligatory*, as it had neither a defeasance nor penalty annexed to it; and that, although a bond were a writing obligatory, yet the converse did not hold; but by the opinion of the judges the indictment was holden good. (*p*) With respect to this case, a learned writer says that he is by no means satisfied that the term 'bond' is not properly applicable to an obligation without a condition, although for the sake of distinction, it is more usually called a single bill. (*q*)

Where an indictment charged the prisoner with having forged 'a certain warrant and order for the payment of money,' which was as follows:—

'Worcester Old Bank,

'Hanbury Hall, Nov. 28, 1828.

'Messrs. Berwick, Wall, Isaac, and Lechmere, pay to Mr. John Perkins or bearer twenty-five pounds ten shillings.

'£25 10s. 0d.

'JOHN PHILLIPS'—

it was held that the indictment was good, for the instrument was both a warrant and order; a warrant authorising the banker to pay, and an order upon him to do so. (*r*)

On an indictment for forging 'a certain warrant and order for the payment of money,' which was as follows:—

(*k*) Elsworth's case, York Lent Ass. 1780, and before all the judges, 12th April, 1780, 2 East, P. C. c. 19, s. 58, pp. 986, 988.

(*l*) Id. *ibid*.

(*m*) *Ante*, p. 619, *et seq*.

(*n*) 2 East, P. C. c. 19, s. 55, p. 980.

(*o*) 2 East, P. C. c. 19, s. 58, p. 985.

(*p*) Dunnett's case, 2 East, P. C. c. 19, s. 58, p. 985.

(*q*) 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 581. And he refers to 2 Blac. Com. 340.

(*r*) R. v. Crowther, 5 C. & P. 316, MS. C. S. G. Bosanquet, J. And see R. v. Gilchrist, C. & M. 224, *post*.



‘Messrs. Wilkins & Co., Bankers, Merthyr, please to advance the bearer, Samuel Richards, the sum of two hundred and fifty pounds, and place the same to my account.

‘MORGAN THOMAS,  
‘Cold Merchant, Uniscoy.’—

it appeared that M. Thomas had a deposit account with Messrs. Wilkins’ bank, but not a drawing account, and that the course of dealing was not to pay cheques, even if tendered by the depositor himself, unless the deposit receipt was produced; and in this case the deposit receipt was not produced by the prisoner, but the bankers cashed the instrument in order to accommodate M. Thomas, and because the prisoner was accompanied by a person well known to the bankers, who signed her name as guarantee on the instrument. Wightman, J., held that the instrument was a warrant, but not an order; because it appeared, from the nature of the contract between M. Thomas and the bankers, that the bankers were not bound to obey it, although, in point of fact, they did obey it, and, as it was described in the indictment as both a warrant and order, the variance was fatal. (t) So where an indictment charged the forgery of a warrant and order for the payment of money, which was as follows:—

‘August 16th, 1848.

‘Gentlemen,—I do hereby authorise the bearer of this note to draw the money that you now hold belonging to me.

‘WILLIAM STOKER.’

Alderson, B., after consulting Coleridge, J., held the indictment bad, because the instrument set out was a warrant and not an order. (u)

But where the indictment charged the prisoner in different counts with forging and uttering ‘a certain warrant, order, and request for the delivery of goods,’ which said forged warrant, order, and request is in the words, &c., following:—

‘Sidney-street, 22nd December, 1850.

‘MR. BEVAN,

‘S. Pleas to sen by bearer a quantity of basket nails a clasp for  
‘E. LLOYD.’

Lloyd was in the habit of buying ironmongery from Bevan, and had for some time employed the prisoner to sell goods for him on commission. The prisoner presented to Bevan a paper in the terms set out in the indictment, which was proved to be a forgery of Lloyd’s handwriting. It was objected that the document was neither a warrant nor an order, but only a request for goods; and that in order to satisfy the indictment it must be a warrant and order as well as a request, *R. v. Williams*. (v) The prisoner was convicted of uttering, and, on a case reserved, the judges held that as the instrument was set out *in hæc verba*, the conviction was right. (w)

(t) *R. v. Williams*, 2 C. & K. 51.  
(u) *R. v. Dixon*, 3 Cox, C. C. 289.

(v) *Supra*.  
(w) *R. v. Williams*, 2 Den. C. C. 61.

The insertion of superfluous words, which were not contained in the 1 Will. 4, c. 66, did not vitiate the indictment. (x)

Sewing to the parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, is not a sufficient setting out of the notes in the indictment. (y)

An indictment under the 1 Will. 4, c. 66, s. 30, for uttering a foreign promissory note, need not have alleged it to be payable out of England. (z)

On an indictment on the 1 Will. 4, c. 66, s. 19 (of which the 24 & 25 Vict. c. 98, s. 12, is a re-enactment), for engraving on a plate several parts of a foreign promissory note, it was held not to be necessary to set out the note itself of which they were alleged to be parts. (a)

By 24 & 25 Vict. c. 98, s. 41, a person indicted for forgery may be tried, &c., in the county or place where he is in custody, &c. (See *post*, p. 681.)

Where a prisoner was tried under the 1 Will. 4, c. 66, s. 24, for forgery in the county where he was in custody, there need not have been an averment in the indictment that the prisoner was in custody there. (b)

Upon an indictment for forgery at common law the prisoner was not shewn to have been in custody in the jurisdiction in which the bill of indictment was found until the time when the trial began. The jury found that he was guilty of forging, but that there was no evidence of its having been done within the jurisdiction of the Court; and, upon a case reserved, the judges held that the prisoner was liable to be tried in this Court under the 1 Will. 4, c. 66, s. 24. (c)

The fourth count of an indictment alleged that the prisoner having in his possession a certain bill of exchange, which was set out, with a certain forged acceptance on the said bill, which was also set out, afterwards did utter, &c. (then and there knowing the said acceptance to be forged), the said bill of exchange, with intent, &c. It was objected, that the count was bad for not averring that the prisoner uttered the forged acceptance; and, upon a case reserved, the judges, upon full and mature consideration, held that the count was bad, as it was possible the acceptance might have been taken off the bill before the prisoner uttered it. (d)

This case is stated from the indictment and case together. The judges sent for a copy of the indictment before deciding.

(x) *R. v. Brewer*, 6 C. & P. 363.

(y) *R. v. Warshaner*, R. & M. 466. S. C. 7 C. & P. 423, and 429. In note (b), *ibid.* p. 430, it is said that 'a considerable majority of the judges were of opinion that the sewing the papers to the indictment was of itself sufficient to vitiate those counts, but some did not seem so clearly of that opinion; and as the special counts were bad upon the other grounds (see *ante*, p. 643), it was not necessary to come to a decision as to the papers being sewed to the indictment.' As every indictment, being a record, must be upon parchment, Co. Litt. 260 *a*, it is difficult to see how an indictment, part of which is on paper, can be good. C. S. G.

(z) *R. v. Lee*, 2 M. & Rob. 231.

(a) *R. v. Faderman*, 4 Cox, C. C. 359. 1 Den. C. C. 565.

(b) *R. v. James*, 7 C. & P. 553. In *R. v. Smith*, Worc. Sum. Ass. 1844. MSS. C. S. G. Tindal, C. J., decided the same point in the same way, on the authority of the preceding case.

(c) *R. v. Smythies*, 1 Den. C. C. 498. 2 C. & K. 878. This case was determined on the authority of *R. v. Whitley*, wrongly reported, 2 M. C. C. R. 186, correctly 1 C. & K. 150. At the first meeting of the judges to consider that case the indictment *per se* was considered bad; but at the second meeting it was held that on the whole record, including the caption, plea, &c., the conviction was good. 1 Den. C. C. R. 498, note (a). See the present clause, *post*, p. 681.

(d) *R. v. Horwell*, R. & M. C. C. R. 405. S. C. 6 C. & P. 148, and MSS. C. S. G.

In a case where the prisoner was indicted for uttering a forged will, on his arraignment he pleaded *autrefois acquit*; upon which the plea was taken *ore tenus*, and recorded by the clerk of the arraigns, who replied to it on the part of the Crown, *nul tiel record*. In order to prove the plea, the record of a former acquittal of the prisoner was produced; but, on comparing it with the present indictment, it appeared that the prisoner had been acquitted of uttering a forged will, beginning '*I, James Gibson, do hereby,*' &c., but that he was now indicted for uttering a forged will, beginning '*James Gibson do hereby,*' &c. The question, therefore, was whether this record was legal evidence of the prisoner having been acquitted of the *same offence*? And, after argument by the prisoner's counsel, the Court rejected the proof as insufficient; the prisoner pleaded the general issue to the felony, and the jury found him guilty of the offence. (e)

The offence of forgery at common law cannot be tried at the quarter sessions, that Court having no jurisdiction over it; nor can they take cognisance of it as a cheat. (f) And the quarter sessions have no jurisdiction in cases of forgery upon the 5 Eliz. c. 14. (g)

The trial of forgery must formerly have been in the county where the offence was committed, as the indictment could only be preferred in that county. And as it seldom happened that direct proof could be given of the very act of forgery, difficulties sometimes occurred in cases where there had been no offence of uttering by the prisoner, as to what was sufficient evidence of the fact of forging within the county laid. But now, as already mentioned, by the 24 & 25 Vict. c. 98, s. 41, the offender is triable 'in any county or place in which he shall be apprehended or be in custody.'

Two prisoners were indicted, the one, Parkes, for forging, the other, Brown, for uttering a forged promissory note for five guineas. It appeared clearly that Parkes had forged the note; but the only evidence offered to shew that the forgery was committed in Middlesex, where the venue was laid, was that Brown, between whom and Parkes there was a great intimacy, had uttered it in Middlesex, in the absence of Parkes, who was not proved to have been cognisant of the fact, and that above forty of the same sort of five-guinea notes in blank, without any signature, were found upon Parkes, in the same county, together with a receipt, under cover, addressed to Brown, for £21, for four five-guinea bills. All the notes found upon Parkes, as well as that upon which the indictment proceeded, were dated 'Ring-

The ground of the decision was stated as in the text by Patteson, J., in delivering the opinion of the judges at Stafford Lent Assizes, 1834, MSS. C. S. G.

(e) Coogan's case, O. B. 1787, 1 Leach, 448. So in Reading's case, *ante*, p. 645, note (x), Buller, J., said that the judgment being arrested for the informality of the record, the prisoner might be again indicted for the offence. And in Gilchrist's case, *ante*, p. 646, as the objection taken went only to the form of the indictment, and not to the merits of the case, the prisoner was remanded to prison till the end of the sessions, that the prosecutor might be at liberty to prefer a better indictment against him if he thought

fit. In the above case of Coogan, the prisoner's counsel chiefly relied upon Lord Hale's construction of Vaux's case (2 Hale, 246), as reported by Lord Coke, 4 Co. 44. 3 Inst. 214.

(f) Yarrington's case, 1 Salk. 406. R. v. Gibbs, 1 East, R. 173. 2 East, P. C. c. 19, s. 7, p. 864. 2 Hawk. P. C. c. 8, s. 64.

(g) Smith's case, Cro. Eliz. 87. Wilson's case, Id. 601. Hunt's case, Id. 697. See the 5 & 6 Vict. c. 38. R. v. Higgins, 2 East, R. 18. If therefore an indictment for forgery be found at the Sessions, and transmitted to the Assizes, the judge will order it to be quashed. R. v. Rigby, 8 C. & P. 770. Erskine, J.

ton, Salop.' Both the prisoners having been convicted, the case was referred to the consideration of the twelve judges. Some of the judges were of opinion, that the fact of finding the forged instrument in the county, in which also it appeared that the forger himself was, was evidence, in the absence of other proof, of the fact of the forgery having been there committed. But the majority of them, though they agreed that it was a question of evidence for the jury, were of opinion that there was no proof to warrant the conclusion that the forgery was committed by Parkes in Middlesex, where it was laid; for they thought that the bare fact of the note being uttered in Middlesex by the other prisoner, taking him even to be an accomplice, was no evidence of the forgery itself having been committed in that county. (*h*)

In a more recent case it is reported, as the opinion of a majority of the judges, that the finding a forged instrument in the custody of a person is no evidence that it was forged in the county where it was found. (*i*)

Where an indictment stated the forgery to have been committed in the County of Nottingham, and it was proved to have been committed in the county of the town of Nottingham, it was holden that, although under the 38 Geo. 3, c. 52, it was triable in the county at large, the offence should have been laid in the county of the town. (*k*)

Where the prisoner had been convicted at the assizes for the borough of Leicester of forging a bill of exchange, a question was raised whether the evidence of forgery in Leicester was sufficient to sustain the verdict. The bill was dated at Leicester, June 1st, 1827, and purported to be drawn and endorsed by E. Addison, to his own order, on W. Rawson, for £40 at two months after date, and to be endorsed by Addison. Addison and Rawson both lived at Leicester, and Addison kept cash with Clark and Co., at that place. The bill was taken on the 5th of June by one Porter to the bank of Clark and Co., with a request that they would discount it; but, the forgery being discovered, Porter was detained, and tried, and convicted at the same assizes for uttering the bill. The whole of the bill — the date, body, signature, and endorsement — were in the handwriting of the prisoner. A witness proved that the father of the prisoner lived in Leicester, and that he believed the prisoner lived with him, having seen him there. Another witness saw the prisoner and Porter walking and talking together in a street in Leicester, about a week before the 5th of June. Another witness saw them pass her house together in another street in Leicester, in the course of a fortnight before the 5th of June. Another witness saw them walking and talking

(*h*) *R. v. Parkes*, 2 Leach, 775. 2 East, P. C. c. 19, s. 49, p. 963, and s. 61, p. 992. Although these cases may, perhaps, no longer be material, I have thought it safer to let them remain, as they may *possibly* be found useful. C. S. G.

(*i*) Crocker's case, 2 Leach, 987. 2 New Rep. 87. But *qu.* if the only point actually decided by the judges in this case, was not 'that an incompetent witness had been admitted!' See 6 Ev. Col. Stat. Pt. V. Cl. xii.

(*k*) *R. v. Mellor*, R. & R. 144. Where the indictment is preferred in the next adjoining county, under the 38 Geo. 3, c. 52, for an offence in an inferior county, though the indictment must state the offence to have been committed in the inferior county, it need not aver that the county in which the indictment is preferred is the next adjoining county. But it may be stated in the caption, when the record is regularly drawn up. *R. v. Goff*, R. & R. 179.

together in another street in Leicester, a very short time before the same 5th of June. But none of the witnesses could fix the precise days to which they spoke. Lord Tenterden doubted whether there was such evidence of the forgery in Leicester as would justify him in leaving that point to the jury; but he left it to them, and the prisoner being found guilty, the point was submitted to the judges, who held the conviction right. (*l*)

The evidence in forgery must support the material facts stated in the indictment: and it is necessary, that the proof should tally with the averment of the intent to defraud. (*m*) And we have seen, that the manner in which the fraud was carried or intended to be carried into effect is peculiarly matter of evidence. (*n*)

The party whose name is alleged to be forged is a competent witness. But before the 9 Geo. 4, c. 32, s. 1, this was otherwise. As to a person not being incompetent as a witness on the ground of interest, see Vol. III. 'Evidence.'

The testimony of the person whose name has been forged, when disinterested, is in general the most satisfactory of any on the question of his handwriting. (*o*)

In a case of a prosecution for the forgery of a bank note, it was ruled that the handwriting of the cashier of the bank might be disproved by any person who was acquainted with his handwriting. (*p*)

Upon an indictment for uttering a forged cheque purporting to be drawn by Mrs. Parish, evidence was given of various facts tending to shew that the prisoner uttered the cheque with a guilty knowledge that it was a forgery, and the handwriting of Mrs. Parish was disproved by the evidence; but she was not called, though alive and within the reach of a subpoena; it was contended that Mrs. Parish ought to have been called to negative having given the prisoner or some one else authority to subscribe the cheque in her name. Cresswell, J., 'Assuming the cheque to be forged, there is evidence, from the prisoner's conduct, to shew guilty knowledge; and it being proved not to be in Mrs. Parish's handwriting, the same facts may be used to shew that Mrs. Parish did not authorise the use of her name, and that the prisoner was aware of that fact.' (*q*)

Upon this subject an able writer upon the law of evidence observes, that the evidence of persons well acquainted with the character of the supposed writer of an instrument, for the purpose of proving or disproving the handwriting, is not in its nature inferior or secondary. (*r*)

As to proof of handwriting and as to comparing a disputed writing

(*l*) *R. v. Corah*, Leicester Sum. Ass. 1827. M. T. 1827. MS.

(*m*) *Ante*, p. 624. But by 24 & 25 Vict. c. 98, s. 44, it is not necessary to prove an intent to defraud any particular person; it is sufficient to prove that the party accused did the act charged with an intent to defraud.

(*n*) *Ante*, p. 625, *et seq.*

(*o*) 2 East, P. C. c. 19, s. 66, p. 999. Smith's case, *cor.* Gould and Yates, JJ., 2 East, P. C. c. 19, s. 67, p. 1000.

(*p*) Hughes's case, *cor.* Le Blanc, J., 2

East, P. C. c. 19, s. 68, p. 1002. And see Downes's case, *post*, p. 672, where a father was admitted to disprove the handwriting of his son, who was at Jamaica. And as to the Bank of England cases, it was holden, in a case reserved, that it is not necessary that the signing clerk should be produced, if witnesses acquainted with his handwriting state that the signature to the note is not his handwriting. R. & R. 378. M'Guire's case, 2 East, P. C. c. 19, s. 68, p. 1002.

(*q*) *R. v. Hurley*, 2 M. & Rob. 478.

(*r*) Phil. on Evid. 228, 7th edit.

with any writing proved to be genuine, see Vol. III. 'Evidence,' 28 & 29 Vict. c. 18, s. 8.

Where the question is, whether a seal has been forged, seal engravers may be called to shew a difference between a genuine impression and that supposed to be false. (s)

With respect to the admission of his own handwriting by a party accused, a case is reported where, upon an indictment against Richard Beatty and others, for a conspiracy to defraud, by means of a fraudulent acceptance of a bill of exchange, the indictment averred that Beatty, in pursuance of the conspiracy, did fraudulently, &c., write his acceptance to the bill; and no other evidence was given either of the fact of writing the acceptance, or of the handwriting of Beatty, than that of a witness, who proved that the bill, with the acceptance written upon it, was shewn to Beatty, who, being asked whether it was a good bill, answered that it was very good. The defendants were convicted, and a question reserved for the consideration of the judges, whether this evidence supported the allegation that Beatty wrote the acceptance: and all the judges were of opinion that it was proper evidence to be left to the jury, upon which they might found their verdict that Beatty wrote the acceptance. (t)

The prisoner was indicted for uttering a forged will, and it was stated in the opening that the supposed will, together with ten different pieces of paper used for the purpose of setting it up, had writing which was apparently written over pencil marks, which had been rubbed out. An engraver, called as a witness, stated that he was in the habit of looking at minute lines on paper, and had examined the papers, to see if there were marks of pencil, with a mirror, and had traced marks on the paper both of letters and words, and he had no doubt that the pencil had been rubbed. Upon being asked what he had observed, the counsel for the prisoner objected that the rule had been rather to narrow this sort of evidence than to extend it; the rule now acted on was, that witnesses shall not be called to state to the jury that which they, as intelligent persons, are capable of deciding for themselves: it would be dangerous to suffer a witness to be called to prove that he can see what the jury are unable to discover. It was answered that this was not a question of opinion: it was a matter of fact. The paper required minute inspection, by habit and practice to discover the marks upon it. The witness had examined the paper out of court, and could pledge his oath to the fact that the marks did exist; and if the words were pointed out to the jury they could see them. This was evidence of a fact, and the question was whether the jury were to be assisted in forming a conclusion as to that fact? Parke, B., after consulting Tindal, C. J., said that they were both of opinion that the evidence was admissible, but the weight of it would depend upon the way in which it would be confirmed. (u)

The prisoner was indicted, for that he, having in his possession a certain bill of exchange, forged the following acceptance on it:—

'Accepted, payable at Sir John Lubbock, Bart., and Co.'s, bankers, London.'

(s) By Lord Mansfield, C. J., in *Folkes v. Chad*, 1788, MS., cited in *Phil. on Evid.* 227.

(t) *R. v. Hevey*, 2 East, P. C. c. 19, s. 5, p. 858, note (a). 1 Leach, 232.

(u) *R. v. Williams*, 8 C. & P. 434. See vol. iii. *Evidence*.

The bill was drawn, endorsed, and accepted by the prisoner. On being taken into custody he did not deny or attempt to disguise the fact; neither did he personate, or in any manner shew an intention to personate any other person. The bill was paid away to one of the parties named in the indictment, as intended to be defrauded by it; but it was never presented for payment, and consequently not refused. No person was called to negative the authority of Sir John Lubbock to the prisoner to accept the bill for him or on his behalf; neither was there any other evidence given of an intent to defraud Sir John Lubbock, or any of the persons named in the other counts of the indictment. Littledale, J., thought the counsel for the prosecution had left the case short, in not proving an attempt to defraud Sir John Lubbock, or some one specifically mentioned in the indictment, and was further of opinion that the acceptance, being proved to be in the handwriting of the prisoner, was not in itself *prima facie* evidence of a forgery sufficient to put him on his defence. But, after some discussion, he allowed the case to go to the jury, intimating that he should reserve the point in the event of a conviction. He then told the jury that if they thought the prisoner, when he paid away the bill, intended that the party to whom he paid it should add his name, it was an incomplete acceptance. But that if they considered that he uttered it with a fraudulent intent, meaning that it should pass as the acceptance of the drawee, they would then find him guilty; and he would take the opinion of the judges as to whether it was an acceptance within the terms of the Act of Parliament. (v)

On an indictment for forging an endorsement on a bank post bill, it appeared that M. A. Clarke lost the bill, which was payable to herself and unendorsed. The prisoner went to a shop about six o'clock in the evening, and asked Mr. Down if it was a good bill, and he replied that no doubt it was good, but to be of use it must have the name of the party to whom it was payable. The prisoner left, and returned in about half an hour with the bill, and it then had the endorsement, 'Mary A. Clarke,' which was not her signature. It did not appear whether the prisoner could write or not. It was urged that there was no evidence of the forgery. Erle, J., 'I think if a man has an instrument in his possession without an endorsement, or other writing, the subject of the alleged forgery, and half an hour afterwards is found with the instrument endorsed, there is some evidence of forgery to go to the jury. Although the prisoner might not be able to write himself, yet if he got any one to write the name, he is as much guilty of forgery as if he wrote it himself.' (w)

On an indictment for forging and uttering requests or orders for the delivery of goods, it appeared that one forged order purporting to be signed by one Thomas, and dated Bromsgrove, was received by Messrs. Cook and Co., in London; and having a customer of the name of Thomas at Bromsgrove, they forwarded the goods by railway as directed. A witness stated his belief that this order was in the prisoner's writing. A similar forged order was received the same day by Messrs. Bradbury, who executed the order: but the witness declined to say that this was in the prisoner's writing. Both parcels arrived

(v) *Musgrave's case*, 1 Lew. 188. The prisoner was acquitted. (w) *R. v. James*, 4 Cox, C. C. 90.

on the evening of the same day at the Bromsgrove station, and the prisoner came and asked if there were some parcels for Mr. Thomas, and ultimately the goods were given up to him. On the back of a letter found on the prisoner were the names of Messrs. Bradbury. Wightman, J., 'If the evidence of the receipt of the goods was given as proof of the uttering, that is to say, to prove a guilty knowledge, I am of opinion it is no evidence in either case of the utterance by the prisoner; neither order has been traced to him beyond the proof of handwriting in the one case. If no proof of handwriting had been given, I should have rejected the evidence of the receipt of the goods altogether. As it is, I shall tell the jury that there is no evidence, not the slightest, of the uttering of either order. There is the evidence of forgery in the one case, but no evidence at all in the other.' (x)

The prisoner was indicted for uttering<sup>1</sup> a forged acceptance of a bill of exchange for £13 10s. An action had been brought against the prosecutor on a bill alleged to have been accepted by him for that amount in favour of the prisoner, and a verdict recovered against the prosecutor. About this time it came to the knowledge of the prosecutor that there were other acceptances of his in existence, which he declared to be forgeries, and it was discovered that during the years 1842 and 1843, the prisoner had been credited by the branch bank at Aylesbury of the London and County Joint Stock Bank (the chief office of which was at 71, Lombard-street) with eleven bills for various sums, all drawn by him, and purporting to be accepted by the prosecutor, and made payable at 71, Lombard-street, but on the subject of which he swore that he had never been applied to. Many of these bills were renewable, and had all been provided for by the prisoner, either by fresh bills, or by reference to his balance, at their maturity; and among them was that which was the subject of the indictment, and it fell due just about the time when he obtained a real bill for the same amount exactly. The manager of the branch bank could only prove that that bill, as well as all the others, had been paid in to the credit of the prisoner by some one or other, and at some time or other, but by whom, or when, he could not take on himself to swear. Whenever they fell due, however, intimation had always been given to the prisoner. The body of the bills was in the prisoner's handwriting as well as the endorsement. Maule, J., said, 'that in his opinion there was no evidence to go to the jury to shew that the prisoner had

(x) *R. v. Johnson*, 6 Cox, C. C. 18. This decision deserves reconsideration. By asking for the goods, as the prisoner did, he shewed that he knew both the parcels were ordered, and the time when they were ordered. Therefore, he must have known the contents of both orders. By claiming the goods and obtaining their delivery to himself he proved he was obtaining them for himself; and there was not even a suspicion

of any one else being engaged in the transaction; there was, therefore, on these facts alone, a strong presumption that he sent the orders, or at all events enough to call on him to shew who had done so. And when the proof of the handwriting to one of the orders is added to the other facts, the only rational conclusion is that the prisoner sent both orders. C. S. G.

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#### AMERICAN NOTE.

<sup>1</sup> In America, there are various statutes relating to the "uttering," "putting forth," or "passing," &c., of forged documents. See *Thurmond v. S.*, 25 Tex. App. 366.



uttered, disposed of, or put off the bills in the County of Bucks. In order to prove such a charge it was necessary to adduce evidence of some acts done in the county which, in the eye of the law, amounted to an uttering, disposing, or putting off; but nothing had been shewn beyond the forgery, which must be assumed for the purpose of this objection; and the fact that the bill so forged had found its way into the account of the prisoner (y) at the bank. It by no means, however, appeared by whom this and the other bills had been paid into the bank. That might have been by the prisoner (y) in ignorance that the bills were forged; if so, he was not guilty. If he knew that fact, the case was proved; but there was no proof that, even if he did know them to be forgeries, he paid them into the bank. That might have been done by a variety of ways, and unless the particular method was proved to the jury, how were they to say that the payment had been made in this or that way? But in order to arrive at a verdict of guilty, the jury were required to say what it was in the conduct of the prisoner which constituted the offence, an act of uttering, in the sense of this indictment. Under the circumstances, therefore, he would recommend the jury to say, not guilty.' (z)

On an indictment for uttering a forged acceptance of a bill of exchange, it appeared that a witness had received a letter in the prisoner's handwriting, enclosing the bill, and the day before the bill became due, the prisoner wrote a letter to the witness, admitting that the acceptance was a forgery. Wightman, J., told the jury that on the evidence as to the letter containing the bill, it would be for them to say whether they were satisfied that the prisoner did in fact utter the bill, and whether he was the person who sent, or caused to be sent, the letter in which the enclosure was. But it did not entirely rest there; for the day before the bill would become due, the prisoner wrote another letter, stating that the bill would be dishonoured, and admitting that the acceptance was a forgery. And on these facts it was for the jury to determine whether the prisoner uttered the bill. (a)

Giving a forged note to an innocent agent or an accomplice, in order that he may pass it, is a disposing of and putting it away. The first count charged the prisoner with disposing of and putting away a forged £5 bank note, and the second with offering to one Abraham Newton a forged £5 bank note. It appeared from the confession of the prisoner that he had on different occasions prior to the transaction in question purchased £5 and £10 forged bank notes of a person of the name of Trundell, which he had disposed of by an agent employed by him for that purpose. On the 27th of January he met Trundell by appointment at the New Inn, in the Old Bailey, and purchased of him six £5 forged bank notes. Shortly after receiving the same, the prisoner delivered one of them to Burr, who, at the prisoner's desire, disposed of it in part payment of a horse purchased by the prisoner in Smithfield market. The prisoner and Burr, before

(y) Erroneously 'prosecutor' in the report.

(z) *R. v. Lines*, 2 Cox, C. C. 56, and 1 Cox, C. C. 353. Maule, J., was so fully aware that the prisoner could be tried where

he was in custody, that he never could have intended to imply that an uttering in Bucks was essential. C. S. G.

(a) *R. v. McQuin*, 1 Cox, C. C. 34.

they parted, agreed to meet at Harlington on the following day, and to proceed from thence in company to Windsor. They met accordingly, and went together in the prisoner's one-horse chaise to Windsor, where the prisoner delivered into the hands of Burr one other of the £5 forged bank notes which he had received on the preceding day from Trundell, directing Burr to purchase for him some tea and sugar at a grocer's at Eton. Burr accordingly purchased the tea and sugar, for which he gave the £5 note given to him by the prisoner, and received the change in small notes and silver, which, together with the tea and sugar, Burr delivered to the prisoner. The prisoner and Burr then returned from Eton to Windsor, when the prisoner delivered to Burr another £5 bank note, which, it appeared from the prisoner's confession, was one of the six £5 bank notes purchased by the prisoner from Trundell. The last mentioned £5 note was the subject of the present indictment, which Burr, by the prisoner's desire, attempted to dispose of at three several shops in Windsor, but without success, the prisoner waiting at a short distance in the street and communicating with Burr after leaving each shop successively. The prisoner then directed Burr to endeavour to get the note changed at a butcher's, whose name was Newton, telling him that he must get change before he went home. Burr accordingly went into the shop of Newton, leaving the prisoner waiting near the top of the street. Burr purchased some meat, and offered in payment the said £5 forged bank note, so delivered to him by the prisoner. Newton took the note, and gave Burr the change, deducting the price of the meat which he delivered to Burr. When Burr offered the note to Newton, the latter asked him what name he should put upon the note, to which Burr answered, Giles of Heston, not far from Cranford Bridge, near Hatton. After receiving the change and the meat, and before Burr had quitted the shop, one Hewitt came in and made some communication privately to Newton, upon which he insisted on having the meat and the change returned to him, and which Burr complied with. Burr was then detained by Newton and Hewitt, on suspicion of having paid to the former the forged £5 bank note knowing it to be forged, when Burr stated that Giles, from whom he had received it, was in the street, and desired to be taken to him. Giles had in the meantime absented himself, and was afterwards apprehended in New Windsor. The counsel for the prosecution insisted that the offer of a £5 forged note by Burr to Newton, as the agent of the prisoner, was the act and offer of the prisoner. For the prisoner, it was contended that he, not having been present, ought to have been indicted as an accessory before the fact, and could not legally be convicted as a principal. Vaughan, B., told the jury that if they should be of opinion that Burr knew when he offered the note to Newton that it was a forged note, the prisoner could not be considered as a principal; but that if Burr was employed by the prisoner as an innocent instrument, being ignorant that the note was a forged one, it would then be the act of the prisoner, and he might properly be convicted. The learned judge added also that he thought the delivery of the prisoner to Burr of the note in question, if delivered with a knowledge of its being forged, and for the purpose of being uttered by Burr, was in itself a disposing of and putting away of the note in

question, within the 15 Geo. 2, c. 13, s. 11. The jury found the prisoner guilty, and added that Burr did not know that the note given to him by the prisoner, and by him offered in payment to Newton, was a forged note. And, upon a case reserved, the judges thought that Burr knew it was forged, but were of opinion that the giving the note to Burr that he might pass it was a disposing thereof to him, and that the conviction was right. (b)

The prisoner was indicted under the 1 Will. 4, c. 66, s. 20, for uttering a forged copy of the register of a marriage; and it appeared that H. B. had become pregnant by the prisoner, and, in order that her father might consent to her cohabiting with the prisoner, the latter procured the marriage lines of another person, printed a copy thereof, leaving certain blanks, and filled up these blanks with his own name and that of H. B., at the same time adding the name of the parish clergyman as having performed the ceremony, and that of the parish clerk as having been witness thereof. He then gave the document to H. B., in order that she might shew or give it to her father, and this H. B. accordingly did. Alderson, B., 'If you can shew no uttering except to H. B., who was herself a party to the transaction, I think you will fail to shew an uttering within the statute. It is like the case of one accomplice delivering a forged bill of exchange to another with a view to uttering it to the world.' The prisoner was accordingly acquitted. (c)

The prisoner was indicted for forging and uttering an endorsement on an instrument, which was in the form of a bill of exchange, in which one Aickman was the payee; the endorsement was 'received, R. Aickman;' it appeared that the prisoner took the instrument to the banking-house where it was payable and presented it for payment; but the clerk perceiving that the name of the payee in the instrument was spelt Aickman, with a c, but in the endorsement was spelt without any c, objected to pay it; upon which the prisoner altered the endorsement so as to make it stand, 'Received for R. Aickman, G. Arscott;' and it was objected that this did not constitute an uttering of the original endorsement, as the whole that took place, viz., the presenting of the bill, the objection by the clerk, and the alteration by the prisoner, formed but one transaction; but the Court seemed to be of opinion that the presenting of the bill to the clerk, previous to his objection, was a sufficient uttering. (d)

A conditional uttering of a forged instrument is a sufficient uttering. Upon an indictment for forging and uttering a forged acceptance of a bill of exchange, it appeared that the prisoner gave the bill to the manager of a bank to which he was indebted, saying he hoped the bill would satisfy the bank as a security for the debt he owed, and the

(b) *R. v. Giles*, R. & M. C. C. R. 166. See *R. v. Palmer*, *post*.

(c) *R. v. Heywood*, 2 C. & K. 352. It is clear that there was an uttering by H. B.; but as that was in the absence of the prisoner, the prisoner was only an accessory before the fact to that uttering. *R. v. Soares*, R. & R. 25. *R. v. Morris*, R. & R. 270. See *R. v. Giles*, *supra*, that the facts here stated would have proved a disposing and putting away of the document by the prisoner.

Under the 24 & 25 Vict. c. 94, s. 1, in a similar case the prisoner might now be convicted as an accessory before the fact. See vol. i. p. 180.

(d) *R. v. Arscott*, 6 C. & P. 408, Little-dale, J., Vaughan and Bolland, BB. The prisoner was acquitted on the ground that forging an endorsement on a warrant for the payment of money was not within the 1 Will. 4. c. 66. But see now the 24 & 25 Vict. c. 98, s. 12.

manager replied that that would depend on the result of his inquiries respecting the acceptors of the bill; and it was submitted that there was no sufficient uttering, as it was at most conditional; and was like the delivery of a deed as an escrow, as the bill was to be placed to the prisoner's credit or not according to circumstances; but it was held that the uttering was sufficient, for a conditional uttering of a forged instrument is as much a crime as any other uttering. (e)

Giving a party a forged instrument as a specimen of skill is not an uttering. The prisoner was indicted for uttering a Polish note. One Flaum stated that the prisoner shewed him a Polish note on one occasion, and told him that two thousand and a half of those notes had been lately made, and proposed to him to purchase some of them; the witness said he could not use them, and wished to have Austrian notes; the prisoner said nothing more then, but afterwards, when they became more acquainted, he gave him a Polish note (the one mentioned in the indictment), and said that they were good, and that they were well made; that he had a quantity of them, and wished the witness to buy some. It was submitted, that the giving of the note under these circumstances was not a putting in circulation with intent to defraud Nicolas, king of Poland. Littledale, J., said it was a question for the jury; and, in his summing up, said, 'If the prisoner meant it as a specimen, or that the witness might see whether the others were made according to the pattern, then, in my opinion, it would not be an uttering within the meaning of the Act. If you are satisfied that it was not uttered with intent to put it into circulation, but was to be kept as a pattern, and afterwards thrown away or put in the fire, then you may acquit the prisoner.' (f)

An indictment on the 13 Geo. 3, c. 79, s. 2, (g) stated that the prisoner unlawfully, &c., uttered and published a certain promissory note, containing the words 'five hundred,' expressing the sum of the said promissory note in white letters on a black ground, without being authorised, &c., by the Bank of England; the note was as follows:—

'Bank of England, 1811.

'No. 43106.

No. 43106.

'I promise to pay Mr. James Jones, or bearer, on demand, the sum of five hundred pens.

'June 11, London. 11 June, 1811.

'For the Governor and Company of the Bank of England.

'RD. DENTON.'

The defendant being convicted, the question was reserved whether there was a sufficient uttering and publishing of the note, answering in other respects the description of the Act, as having white letters on a black ground. The defendant, in order to persuade an innkeeper that he was a man of substance, one day after dinner, pulled out a pocket-book, and shewed the innkeeper a 500 and a 50 note of the

(e) *R. v. Cooke*, 8 C. & P. 582, Patterson, J.

(f) *R. v. Harris*, 7 C. & P. 428.

(g) This clause made any person, who shall utter, or publish any promissory note, &c., containing the words Bank of England

or bank post bill, or any word or words expressing the sum, or amount of such promissory note, &c., in white letters, on a black ground, punishable by six months' imprisonment.

above description, of which at the time he only saw the sums and general form. The defendant said he did not like to carry so much property about him, and desired the innkeeper to take care of them for him. The innkeeper took charge of them accordingly, and thought the defendant acted very prudently. They were put into a cover and sealed up by the defendant himself; the innkeeper received them from him in an envelope, which, after having kept for some time, upon some suspicions afterwards created by the conduct of the defendant, he broke open, and found it to contain the notes above mentioned. The judges held this conviction wrong, being of opinion this did not amount to an uttering. That in order to make it an uttering, they seemed to be of opinion that it should be parted with or tendered or offered, or used in some way to get money or credit upon it. (*h*)

Upon an indictment for uttering a forged receipt, it appeared that the prisoner had bought stone at a quarry managed by one Turner, to the amount of more than £5. He was repeatedly applied to for payment, and made repeated promises of payment, but at last he alleged that he had paid for the stone at the time, and that he had a receipt signed by Turner. On this Forster, who had succeeded Turner as manager, went to him, and the prisoner produced the receipt, and exhibited it to him to look at, but would not part with it out of his hand. A few days after Forster returned to him, taking Turner with him, and again called on him to produce the receipt, which he did produce, and held it up for him and Turner to look at, but refused to part with it out of his hand. Forster, however, got it from him. It was objected that this was not an uttering; but Gurney, B., was inclined to think that the exhibiting it to the person, with whom he was claiming credit for it, was an uttering and publishing, even though he had not parted with it out of his hand; the jury convicted; and, on a case reserved, the judges were of opinion that there was an uttering, and therefore the conviction was right. (*i*)

Upon an indictment for uttering, disposing of, and putting off a forged receipt with intent to defraud, it appeared that one Gillard applied to the prosecutor for a loan of money, and proposed the prisoner as a surety for the amount. The prosecutor went to the prisoner for the purpose of satisfying himself as to the prisoner's responsibility, and with this object required the production of the prisoner's receipts in respect of his house. The prisoner, with a view of causing the money to be advanced to Gillard (who was found to be a man of no responsibility) upon their joint security, produced to the prosecutor, and placed in his hands, but for the purpose of inspection only, three documents purporting to be receipts for poor rates in respect of

(*h*) *R. v. Shukard*, R. & R. 200. I have inserted a full statement of this case, because it appears to me to have been much misunderstood, and by no means to warrant the marginal note. 'Shewing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering or publishing within the 13 Geo. 3, c. 79.' It is manifest that the whole of the notes was not shewn, both from the statement and from the word 'pens,' and

that what the prisoner really did was to shew so much only of the notes as should lead to the supposition that they were bank notes, which they were not. The indictment was for the misdemeanor created by the 13 Geo. 3, c. 79, s. 2, and not for uttering a forged bank note. See note (*l*), *infra*. C. S. G.

(*i*) *R. v. Radford*, 1 Den. C. C. 59. 1 C. & K. 707. In the course of the argument, Coleridge, J., said, 'This was not a *tendering*, for there was no intention to give.'

the said house, one of which was the forged receipt in question. The prosecutor inspected these documents, the prisoner remaining present during such inspection; he then received back the documents from the prosecutor, and placed them on a bill file. It was objected that these facts did not amount to an uttering, disposing of, or putting off, sufficient to support the indictment; but the objection was overruled, and the jury found the prisoner guilty, and that he placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance the money to Gillard; and, upon a case reserved, after two arguments, Lord Campbell, C. J., delivered judgment. 'Upon consideration there clearly seems to have been an uttering of the forged receipt within the 1 Will. 4, c. 66, s. 10. If it had been used in the manner stated for the direct purpose of gaining credit for the payment, which it purports to vouch, there can be no doubt, since the case of *R. v. Radford*, (*j*) that there would have been a sufficient uttering. But the prisoner's counsel contended that there cannot be an uttering of a forged receipt unless it be used directly to gain credit upon it by its operating as a receipt; so that merely using this receipt for the purpose proved, to induce a belief that he had paid the money, and therefore was a man of substance, does not amount to an uttering within this Act of Parliament. *R. v. Shukard*, (*k*) which was mainly relied upon for this distinction, does not seem to us to support it. That case is entitled to the highest respect, and upon similar facts we should submit to its authority. But the learned judges there did not proceed upon the distinction that to make the using of a forged negotiable instrument a felonious uttering, the intention of the prisoner must be to gain credit upon it by making it operate as such. They appear to have thought that there the evidence was not sufficient to shew an intention in the prisoner to induce the innkeeper to advance any money or to give credit upon it to him. The doctrine supposed to be established by that decision is "that in order to make it an uttering it should be parted with or tendered, or used in some way to get money or credit upon it." The words "upon it" we consider equivalent to "by means of it," otherwise there could hardly be an uttering of court rolls and other instruments enumerated in the statute. In the present case it is expressly found "that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance money to Gillard." This was a using of the forged receipt to get money upon it, or by means of it, as much as if the prisoner himself had been the borrower of the money, and the receipt had purported that he had paid the rates, and the prosecutor had thereupon advanced him a sum of money, and had been cheated out of it by him. We therefore think that the conviction was according to decided cases and sound principles of law.' (*l*)

(*j*) *Supra*.

(*k*) *Supra*, note (*h*).

(*l*) *R. v. Ion*, 2 Den. C. C. 475. This appears to be one of the clearest cases when the words of the clause are considered; the 1 Will. 4, c. 66, enacted that if any person shall 'utter,' &c., 'knowing the same to be forged,' 'any receipt,' &c., 'with intent to

defraud any person whatsoever.' In order therefore to bring a case within this clause it is necessary to prove, first, that the receipt was forged; secondly, that the prisoner knew it to be so; thirdly, that he uttered it; and lastly, that the uttering was done with intent to defraud some person. Now in this case it is clear that the receipt was

Upon an indictment for uttering a forged accountable receipt for goods, it appeared that proceedings were taken against the prisoner, who was a pawnbroker, for not restoring certain goods that had been pledged with him, and on the hearing the prisoner was defended by an attorney, who in his presence produced the forged accountable receipt (*i. e.* a pawnbroker's ticket), and stated that it was the ticket the prisoner had given when the goods were pledged; the jury found that it was forged, and that the prisoner did, through the hand of his attorney, deliver to the justices, as being the genuine ticket, the said forged ticket, he knowing it to be forged; and, upon a case reserved, it was held that the ticket must, on this finding, be taken to have been produced by the attorney with the full sanction of the prisoner; and that such production was as much an uttering by him as if he had delivered it with his own hand. (*m*)

forged, and that the prisoner knew it was so. It is equally clear that the receipt was uttered; for there was an actual manual tradition out of the hands of the prisoner into the hands of the prosecutor; and whatever be the extent of the meaning of the term 'utter,' there can be no doubt that at all events it includes every case where the instrument passes out of the hands of one person into those of another. Lastly, the jury found that the act was done with intent to defraud: and there was abundant evidence of it. The confusion in the argument arose from confounding the uttering with the intent to defraud, instead of considering each separately. The fact of uttering being clear, the only remaining question was, did the intent to defraud 'any person whatsoever' exist? There is not an expression in the act that indicates that there must be a fraud committed; still less that such fraud must be committed by means of or upon the faith of the instrument. *R. v. Shukard* seems to have been entirely misunderstood in this case. In that case the prisoners shewed a five hundred and a fifty note of the description mentioned, but of which the innkeeper 'only saw the sums and general form.' The whole of the notes, therefore, never was in fact seen by the innkeeper, and it is equally clear was never intended to be seen by him, as the word 'pens' would at once have disclosed that the notes were not bank notes at all. 'The judges held the conviction wrong, being of opinion that this did not amount to an uttering,' and they were clearly right; for assuming that there may be an uttering by shewing an instrument, it is clear that that can only be where the whole of the instrument is exposed to view, or possibly where it is produced and an opportunity afforded of inspecting the whole of it. The report adds 'that in order to make it an uttering they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit upon it.' Now the words 'to get money or credit upon it,' obviously only apply to the words 'used in some way,' and

not to the previous words — and the judges, being clear that a parting with, tendering, or offering an instrument, would be an uttering, also thought that there might be a case where an instrument might be so used as to get money or credit upon it, though it was neither parted with, tendered, or offered, and that this would likewise be an uttering. Such is the case of *R. v. Radford*, where the instrument was shewn, but neither parted with, tendered, or offered. The words 'used to get money,' &c., mean 'with intent to get money, &c. ;' and are adopted to indicate that where there is not a parting with, tendering, or offering, the facts must shew such a user as denotes an intent to get money or credit. Where an instrument is parted with, tendered, or offered, the act done is an uttering; but where the act done does not amount to a parting with, tendering, or offering, it may well be that the object with which that act is done may be necessary in order to determine whether that act does amount to an uttering. During the argument, *Jervis, C. J.*, said, 'If in the case of justification of bail a person had produced some (forged) bank notes to shew that he was possessed of a sufficient amount of property, would not that amount to an uttering of the notes?' *Wightman, J.*, 'Suppose the proposed bail were asked in examination before the judge at chambers, "Have you paid all the rates due in respect of your house?" and he had said, "Yes, and I now produce the receipts," and he then produced for inspection, among others, one which was a forgery? or supposing a man proposes to borrow a sum of money, and, in order to satisfy the lender, who inquires, has he paid all his rates, he replies in the affirmative, and produces the receipts as proof of having paid them, what would you say to that case?' *Jervis, C. J.*, 'Take the case of justification of bail; a man produces a forged deed, or a forged lease, to prove that he is of sufficient property, would that be an uttering?' *C. S. G.*

(*m*) *R. v. Fitchie, D. & B. 175.*

A count alleged that the prisoner uttered a forged bill of exchange, setting it out with the acceptance upon it; the evidence was that the acceptance alone was forged, and known to be so by the prisoner; and it was objected that by the 1 Will. 4, c. 66, s. 3, the forging or uttering of an acceptance is made a distinct offence from the forging or uttering a bill of exchange, and, consequently, that the evidence did not support the count for uttering the bill, and it was held, upon a case reserved, that the objection was fatal. (*n*)

If a bill of exchange be forged abroad in a foreign country, the prisoner may be indicted here for the uttering if he caused it to be uttered in this country. If the prisoner knowing the bill to be forged gave the same to a banker abroad in order that it might be presented in this country, this would be evidence that he uttered the bill here. (*o*)

Upon an indictment for forging and uttering a forged bill of exchange, it appeared that the prisoner had procured the prosecutor to write his name and the word 'accepted' on a blank stamp, and afterwards produced the bill to one Edwards when perfectly blank with the exception of the acceptance; and it was submitted that, as the shewing the paper to Edwards might be considered as an uttering, the prosecutor should elect whether he would press this as the uttering, or state what uttering he intended to go upon, as every uttering was a distinct felony. For the prosecution, it was stated, that there were charges in the indictment for forging and uttering, and it was proposed to prove them by shewing a series of circumstances. Little-dale, J., 'It is not as if they proposed to give evidence of acts quite distinct from each other. I think we must hear all the facts, which form parts of one continued transaction, and we cannot put the prosecutor to any election till his case is concluded.' (*p*)

Questions have frequently arisen as to the necessary proof of the identity or non-existence of the person whose name is charged to be forged.

In a case in which it became necessary to shew that the payee of a bill of exchange, whose name was Wm. Pearce, and whose endorsement was alleged to be forged, was the identical Wm. Pearce to whom the bill was made payable, the drawer of the bill, whose testimony was considered as the best evidence of the fact, was not produced; and the question was then raised, whether a letter of advice which Pearce had received from the drawer, with whom he was intimate, signifying that such a bill had been remitted to him, and desiring him, as an act of friendship, to pay the produce to one Coles, in discharge of a debt which the drawer owed to Coles, was sufficient evidence. And Adair, Sergt. Recorder, held that it was not sufficient; and the testimony of Pearce, to shew the handwriting to be forged, was ultimately rejected, on the ground that though it might not be his handwriting, yet it might be the handwriting of another Wm. Pearce, to whom the bill might be payable. (*q*) But upon this case a doubt is suggested, whether the fact of Wm. Pearce being an inti-

(*n*) *R. v. Horwell*, R. & M. 405. 6 C. & P. 148. S. C. See *Butterwick's case*, Rosc. Cr. Ev. 465.

(*o*) *R. v. Taylor*, 4 F. & F. 511, Pig-gott, B.

(*p*) *R. v. Hart*, 7 C. & P. 652, Little-dale, J., and Bolland, B. See this case more fully stated, *ante*, p. 568.

(*q*) *Sponsonby's case*, 1 Leach, 332. 2 East, P. C. c. 19, s. 65, p. 996.



mate acquaintance and correspondent of the drawer, no evidence being given of the existence of any other Wm. Pearce to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee. (r)

A case has been already mentioned, where, upon an indictment for personating a proprietor of stock, such proprietor was examined as a witness, to shew the amount of the stock he had at the bank; and that the sum for which the prisoner had obtained the dividend warrant, was the exact sum due to him at the time; evidence which would have the effect of proving his identity. (s)

The prisoner, James Downes, was indicted for forging a bill of exchange purporting to have been drawn by one Andrew Holme, payable to the order of John Sowerby. From some letters, written by the prisoner after his apprehension, it clearly appeared that the name of the supposed drawer, Andrew Holme, who was the prisoner's uncle, was forged: and it also appeared from the same letters that the John Sowerby, whose endorsement was intended to be counterfeited by the prisoner, was the son of another person of the same name at Liverpool. A witness to whom the prisoner paid away the bill stated that he questioned the prisoner at the time, and that the account he gave was that the drawer of the bill, Andrew Holme, was a gentleman of credit at Liverpool, and the endorser a cheesemonger there, who had received the bill in payment for cheeses; and the prisoner further said, that he might depend on it, it was a good bill. Neither Andrew Holme nor John Sowerby the son were called as witnesses: but John Sowerby the father, was produced, and he swore that the endorsement was not in his handwriting; that he had lived thirty-six years in Liverpool, and knew no other person of the same name there, either a cheesemonger or otherwise, except his son, who had left him about four months before, and afterwards carried on the same business of a cheesemonger in Dean-street. That his son had failed, and was lately gone to Jamaica. That the endorsement was not at all like his son's handwriting; and he did not believe it to be his. That the prisoner and his son were acquainted, and the prisoner had bought corks of him. Another witness also proved that the endorsement was not like the handwriting of the son, and that he did not believe it to be his. An objection was taken on behalf of the prisoner, that Andrew Holme, the drawer of the bill, ought to have been called to prove what John Sowerby it was, in whose favour it was drawn; but the evidence was left to the jury, and the prisoner was found guilty. And the point being afterwards submitted to the consideration of the twelve judges, they were all of opinion that the conviction was proper. Buller, J., who afterwards passed sentence upon the prisoner, in adverting to the reasons upon which the opinion of the judges proceeded, said that the objection supposed that there was a genuine drawer of the bill; whereas it was apparent, from the prisoner's own acknowledgments in his letters, that the name of the drawer, as well as that of the endorser, was forged by the prisoner: and if no real drawer existed, and the objection were allowed, it would be to excuse one

(r) 2 East, P. C. c. 19, s. 65, p. 997.  
There seems to have been sufficient evidence  
of the identity.

(s) Parr's case, 1 Leach, 434.

forgery because another had been committed. He observed, in the second place, that the prisoner himself had ascertained who was intended by the John Sowerby whose endorsement was forged; for, when he negotiated the bill, he represented him to be a cheesemonger at Liverpool; and by another letter of the prisoner it was clear that he meant Sowerby the son; for thereby he requested his uncle to go to Sowerby's mother, and desire her to say nothing about it, whether he had any concern or not, or whether he endorsed it or not. And he concluded by saying that, it being proved that the endorsement was not the handwriting of Sowerby the son, the evidence of the forgery was full and complete, and the conviction right. (t)

Where a prisoner was indicted for forging and uttering a cheque purporting to be drawn by G. Andrewes on Messrs. Jones, Loyd, and Co., proof by a clerk of their house that no person of the initial and name of G. Andrewes kept any account there or had any right to draw cheques on their house, was held sufficient *prima facie* evidence to go to the jury that G. Andrewes was a fictitious person. (u) So where a prisoner was indicted for forging a bill purporting to have been accepted by 'Samuel Knight, Market-place, Birmingham,' and the prosecutor stated that he had been twice there to inquire after Knight, and had, on the second occasion, inquired at the bank there and at a place where the overseers of the poor met, and he had made inquiries at Nottingham, at which place the bill purported to be drawn for T. Webb the drawer, but was not able to hear anything of him; and he admitted that he was a stranger to both these places. It was submitted that the evidence was not sufficient, and that witnesses should have been called, who were acquainted with Birmingham and Nottingham respectively; but it was held that it was evidence to go to the jury. It was not certainly the most satisfactory evidence; nor was it the evidence that was usually given in such cases; but it was evidence, and it was for the jury to say whether it was sufficient, in the absence of any evidence on the part of the prisoner, who best knew the state of the matter. (v)

White and Davis were indicted for forging and uttering the following bill of exchange:—

'£23 3s. 0d.

'Nottingham, June 13th, 1860.

'Three months after date pay to our order the sum of *twenty-three pounds three shillings*, value received.

'White Brothers.

'Mr. George Smith, Draper,  
Birmingham'—

across the face of which was written—

'Accepted, payable at Messrs. Barclay and Co., Bankers, London.  
'George Smith.'

(t) Downes's case, 2 East, P. C. c. 19, s. 655, p. 997.

(u) R. v. Backler, 5 C. & P. 118. Parke and Gaselee, JJ.

(v) R. v. King, 5 C. & P. 123. J. A. Park and Parke, JJ., and Bolland, B. The prisoner was acquitted.

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The parts in italics, except 'George Smith' at the end of the acceptance, were in the handwriting of White; but there was no proof of who wrote 'George Smith.' The rest was printed. White Brothers were lace manufacturers, and Davis was their traveller. In a letter to Davis, White wrote, 'You could do us a great service if you could get us a lot of blank 3*d.* and 6*d.* bill stamps signed, so that we could pay them away occasionally. We could fill up the amounts to suit us. Now such men as which your samples about town would do it, or any friend, because we never let them go back. Our name need never be mentioned.' In another letter White wrote, 'Let me have the enclosed done the first opportunity. You only need let them sign their names across; I can make them payable myself.' In another letter White said, 'We will advise you for Birmingham next Monday. The bills came safe. I have enclosed you a lot. When you get hold of a party, let him endorse about six with his name, and another six, and so on.' White had endorsed the bill in question to Mr. Whaley, and Davis being charged with forging it admitted that he had got it signed by a stranger, and produced the above letters to prove his innocence. George Smith, a draper at Birmingham, proved that the words 'George Smith' in the acceptance were not his handwriting, and that he had made inquiries personally, and could not discover any other George Smith, a draper, in Birmingham, and had searched the directory, and there did not appear to be any other George Smith, a draper, in Birmingham. It was objected that there was no proof that the name was not written by some other George Smith, or that the George Smith was not an existing person; and that there was no sufficient evidence that the acceptance was not the acceptance of another George Smith, at Birmingham. Cockburn, C. J., 'I think there is a case to go to the jury. There is some evidence that the George Smith who has been called is the only draper of that name living at Birmingham. If there is another George Smith, a draper, there, he might have been called as a witness for the prisoner. I am also of opinion that there is some evidence that the name "George Smith" is fictitious, and that the acceptance was not the acceptance of a man of straw signing his real name.' (w)

Where the prisoner was indicted for forging and uttering a cheque for £10 drawn in the name of John Weston, on Messrs. Cox and Greenwood, and a clerk from their establishment stated that they were bankers and army agents, and that there was not any person of the name of John Weston having any account there, and that the cheque was presented to him and payment refused on that ground, and added that he was a clerk in the army agent department; and he could not swear he knew the names of all the customers in the house, but he did not know any one of the name of J. Weston in his department, and that he had inquired of the other clerks, and was informed by them that there was no such person in the banking department;

(w) *R. v. White*, 2 F. & F. 554. The jury found that the prisoners got the acceptance signed in the name of George Smith by a person not of the name of George Smith, and this prevented the question being reserved whether, if Davis got the genuine acceptance of a George Smith, and the prisoners converted it into the simulated

acceptance of another George Smith, a draper at Birmingham, with the fraudulent intention of inducing those to whom the bill was endorsed to suppose that it was the genuine acceptance of that G. Smith, the prisoners were guilty of forgery—a point clearly settled by the cases, *ante*, p. 577, *et seq.*

it was objected that the evidence was not sufficient, as it was partly hearsay: but it was held that it was *prima facie* evidence, and was sufficient to call upon the prisoner to shew that in fact there was a J. Weston having an account at Messrs. Cox and Greenwood's. (x) So where the prisoner was indicted for forging and uttering a cheque dated at Knighton, and purporting to be drawn on Messrs. Paget's bank at Leicester by John Hust, a clerk from that bank proved that the bank had no customer of the name of John Hust, and that he knew the village of Knighton, which was about a mile from Leicester, and that there was no John Hust living there who would be likely to have an account with a banker; Bramwell, B., held that there was some evidence to go to the jury that John Hust was a fictitious person. (y)

Proof that the prisoner, on uttering a note, represented the maker as living at a particular place and in a particular line of business, with evidence that it is not that person's note, is sufficient to prove it a forgery, if the prisoner be the payee of the note; and proof that there is another person of that name in a different line of business will not make it necessary to prove that it was not that person's note. The prisoner was indicted for forging and uttering a promissory note purporting to be drawn by W. Holland, payable to the prisoner or his order. The prisoner told the person, to whom he uttered the note, that it was drawn by W. Holland, who kept the Bull's Head at Tipton, who was a respectable man. The note was dishonoured; and the prisoner, on being informed by the prosecutor that Holland said he knew nothing of the note, said, 'Does not he? I will let him see that.' Holland proved that he kept the Bull's Head at Tipton; that the note was not made by him, or by his order, or with his knowledge, and there was no other publican of his name at Tipton; but there was a gentleman of the same name living there on his means, who for distinction was called gentleman Holland. Upon this evidence it was objected, 1st. That there was no evidence of the note being forged; the description of the maker applied as exactly to the second as to the first W. Holland. 2nd. No evidence that at the time of the uttering the prisoner knew Holland of the Bull's Head not to be the maker of the note. 3rd. Supposing him to have had such knowledge, verbal misrepresentation did not amount to forgery. 4th. Supposing such misrepresentation could amount to forgery, that was not the offence of which he was convicted, (z) but of uttering the note knowing it to be forged, which implied a previous act of forgery. If, therefore, the forgery was not consummated until the representation was made, the offence of uttering, which must be subsequent, was never committed. The jury found the prisoner guilty of uttering the note knowing it to be forged, and said they were satisfied that when the prisoner represented it to be the note of Holland of the Bull's Head, he knew it was not his note. And, upon a case reserved, the judges held that, as the prisoner had stated that W. Holland of the Bull's Head was the maker, and from being payee of the note he must have known the particulars, it was sufficient for the prosecutor to shew it was not the note of that W. Holland; and it lay on the prisoner to prove it the genuine note of another W. Holland, if it were so. (a)

(x) *R. v. Brannan*, 6 C. & P. 326, J. A. Park and Patteson, JJ., and Gurney, B.

(y) *R. v. Ashby*, 2 F. & F. 560.

(z) This seems a mistake, the objection being taken before verdict.

(a) *R. v. Hampton*, R. & M. 255.

It has been already observed, that the publication of the forged instrument, with knowledge of the fact, is made a substantive offence, by most of the statutes which relate to forgery; (b) and in cases of this kind the knowledge of the fact, or, as it is frequently termed, the *guilty knowledge*, becomes a material part of the evidence.

Upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his knowledge of the forgery. (c) As to this, see Vol. III. Evidence.

So in a case where the prisoner was indicted for forging and for uttering with guilty knowledge a bill of exchange, purporting to be drawn upon a certain banking-house, it was held that other forged bills upon the same house, which were found upon the prisoner at the time of his apprehension, were admissible as evidence of guilty knowledge. (d)

In a subsequent case, the prisoner was also indicted for disposing of and putting away a forged bank note, which purported to be a promissory note of the Governor and Company of the Bank of England, knowing the same to be forged. Clear proof was adduced, that the note in question was forged, and that it had been uttered by the prisoner at Eastbourne, on the 17th of June, 1807, so that the only remaining question was, as to his guilty knowledge of the forgery. To establish this, evidence was admitted, that on the 20th of March preceding, he had passed off a £10 Bank of England note likewise forged, and of the same manufacture, and that there had been paid into the Bank of England various forged notes, dated between December, 1806, and March, 1807, all of the same manufacture, and having different endorsements upon them, in the handwriting of the prisoner. It likewise appeared, that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind as those produced. The prisoner was found guilty, but sentence was respited for the purpose of taking the opinion of the twelve judges, as to the admissibility of this evidence. They were of opinion that it was admissible, to prove the knowledge of the prisoner that the note was forged, and that everything which he said or did was proper to be admitted to shew his knowledge of the forgery. (e)

In another case, where the prisoner was indicted for forging a promissory note (not a note of the Bank of England), and also for uttering it, evidence was given that, in the same pocket-book belonging to the prisoner in which the forged note was found, on which the indictment proceeded, there was also found another promissory note for £100, payable to the prisoner or order, appearing to be signed by one Wm. Gapper, which Wm. Gapper proved not to be his handwriting, and that he never owed the prisoner £100. This evidence of Gapper's note was objected to by the prisoner's counsel, but the judge received the evidence. (f)

(b) *Ante*, p. 564.

(c) *R. v. Wylie, or Whiley*, 1 New R. 92; 2 Leach, 983, vol. i. p. 241.

(d) *R. v. Hough*, R. & R. 120.

(e) *R. v. Ball*, 1 Campb. 324. R. & R. 132. See also *R. v. Colclough*, 15 Cox, C. C. 92.

(f) *R. v. Crocker, cor. Le Blanc, J.*, Salisbury Sum. Ass. 1805. 2 New R. 87, 88, *ante*, p. 658. The prisoner was convicted, and the case was submitted to the consideration of the twelve judges; but their opinion upon this point does not appear. The prisoner was in fact pardoned.

Where, in order to shew guilty knowledge the prosecutor wished to prove the uttering of another forged note five weeks after the uttering, which was the subject of the indictment, and it was objected that only previous acts could shew *quo animo* the thing was done, it was held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or it could be shewn that the notes were of the same manufacture. (*g*) But in a more recent case of uttering a forged acceptance, where for the purpose of proving guilty knowledge it was proposed to give in evidence other forged bills, precisely similar, with the same drawers' and acceptors' names, &c., passed a month after the uttering in question: Gaselee, J., after consulting Alexander, C. B., was disposed to allow the evidence to be received and reserve the point, when the counsel for the prosecution declined to press the evidence. (*h*)

Upon indictments for uttering forged notes, other forged notes of other and different banks, either found upon the prisoner or uttered by him, have been held admissible to prove guilty knowledge. Thus on an indictment for uttering a forged Rochdale Bank note, two forged £5 Bank of England notes have been admitted (*i*) So on an indictment for uttering a forged £5 note of the Bank of Ireland, two forged notes of Messrs. Ball and Co., bankers, Dublin, have been held admissible. (*j*)

Where the uttering charged was of a warrant or shop-ticket for the delivery of goods, Rolfe, B., received evidence of an uttering of a similar order three days previously to the one charged in the indictment. (*k*) But where the order or request was for twelve quarts of ale purporting to be issued by a sub-contractor on a railway in favour of the prisoners, who were working on the line, and it was proposed to give in evidence a similar order uttered the day before; Platt, B., refused to admit the evidence, observing that there was a wide distinction between this case and that of forged notes and coin. (*l*) Where, however, the prisoner was indicted for uttering a forged acquittance for money, and it appeared that the prosecutor had employed the prisoner to drive cattle for him, and had paid him the expenses, the prisoner producing vouchers for the payments, and the prisoner produced the acquittance in question for hay for some cattle at the Swan Inn, at North Kilworth, where in fact he had never been; and the uttering of another similar forged acquittance two months previously for money alleged to have been paid at the Chandos Arms, at Knighton, was proposed to be proved; it was urged that the case was different from the uttering of notes and coin, and the preceding case was cited; and that the two utterings were in no way connected; and that the

and discharged; but there were several objections to the conviction. It is, however, understood that the judges were of opinion that the witness was incompetent. See *ante*, p. 658, and R. & R. 97.

(*g*) R. v. Taverner, Carr. v. Supp. 195. 4 C. & P. 413, note (*a*).

(*h*) R. v. Smith, 4 C. & P. 411. The date of the bill on which the indictment was founded was the 1st March, 1830, and it had been uttered on the 15th of

May, 1830; the other bills were passed in June, 1830, but their dates are not mentioned. See vol. i. p. 242.

(*i*) Sunderland's case, 1 Lew. 102.

(*j*) Kirkwood's case, 1 Lew. 103. Little-dale, J. Martin's case, 1 Lew. 104. R. v. Green, 3 C. & K. 209. Crosswell, J., R. v. Oddy, 2 Den. C. C. R. 264.

(*k*) R. v. Edwards, 3 Cox, C. C. 89 (*b*).

(*l*) R. v. Jackson, 3 Cox, C. C. 89 (*a*).

interval of two months had occurred between them: but Rolfe, B., was clearly of opinion that the evidence was admissible; and having consulted Platt, B., Rolfe, B., added, 'I find that my Brother Platt's opinion is still the same as expressed at Stafford. I shall therefore receive the evidence, but reserve the question for the judges. I yield to the authority, and not to the reasoning. My opinion is that the evidence is receivable.' (m) As to the distance of time, Rolfe, B., said, 'Even in the case of an interval of twenty years between the utterings, the evidence would be receivable in principle; but I should in that case direct the jury to pay no attention to it.' (n)

So where the prisoner was indicted for forging and uttering a bill for £40, and it was proposed to prove guilty knowledge by shewing that the prisoner had, at different times, uttered other forged bills drawn on different persons; it was objected that the uttering of a forged bill on one person was not admissible on a charge of uttering a forged bill on another; and that the uttering of any other forged bills must be of recent occurrence. Williams, J., was clearly of opinion that he was bound to receive the evidence. Bayley, J., in the fourth edition of his book on Bills of Exchange, expressed great doubts whether the uttering of other forged bills, drawn on different persons, could be given in evidence in proof of guilty knowledge; but these doubts had since been put at rest by authority. Upon the question of time more doubt existed. The evidence must not be illusory; but the judge reposes confidence in counsel that they will not give in evidence what has no tendency to prove guilty knowledge, but only to prejudice the prisoner. (o)

So on an indictment for engraving and uttering notes of a foreign prince, evidence of a recent engraving or uttering notes of another foreign prince is admissible to prove guilty knowledge. The prisoner was indicted for forging and uttering a Polish note. In support of the *scienter* as to this note, the prosecutor gave in evidence what took place at a meeting on the 24th August, 1835, between the prisoner Balls, Harris, and a person called Turner, at which Balls agreed with Flaum to make him one thousand Austrian notes for fifty florins each, at the price of three shillings for each note: £30 was paid by Flaum to Balls in advance, and the £30 was to be reckoned in account. Harris told Flaum that the notes should be ready in six weeks; Flaum was to have security for the money, and a bill of exchange was drawn by Balls upon Turner, which Turner accepted, and Balls signed and endorsed the bill, and Harris also endorsed it; this evidence was objected to by the counsel for the prisoner, as it was a transaction relative to Austrian notes, which were of quite a different description from Polish notes, and besides which no Austrian notes were in fact made, and the transaction took place a week before the 1st September. The learned judge admitted the evidence. The prosecutor had begun his case by proving that in September, 1834, the prisoner had brought to an engraver a front plate already engraved,

(m) *R. v. Phillips*, 3 Cox, C. C. 88. The counsel for the Crown, however, did not give the evidence.

(n) *Ibid.*

(o) *R. v. Salt*, 3 F. & F. 834. Not a

single date is given of any bill in this report. See *Roupell v. Haws*, 3 F. & F. 784, where sundry forged deeds and wills were omitted in evidence.

and a back plate; the back plate was not found to answer, and the engraver got another back plate, which the prisoner directed the engraver to engrave; the prisoner, who as well as the engraver was ignorant of the Polish language, said it was for a mining ticket; the engraver completed the back plate, and took off 500 impressions from the front plate, and 500 impressions from the back plate, and for which Balls paid him; and the engraver stated that the plates had been a great deal used since the engraver used them. This evidence was objected to, but the learned judge admitted it, as there were counts in the indictment for forging the note as well as for uttering; and the learned judge did not then know whether the note in the indictment might or might not turn out to be taken from those plates; at the close of the case, however, it appeared that these plates were calculated to make impressions of Polish cash notes, and that they could not have produced the note in the indictment. That put an end to the counts for forging the notes, and the learned judge thought there might be a question, as the note was not taken from these plates, whether the evidence ought to have been retained as admissible, so as to submit it to the jury in support of the *scienter* on the remaining counts. The prisoner was found guilty, and, upon a case reserved, the judges determined that the evidence was admissible, and the conviction was affirmed. (*p*)

Where the prisoner was indicted for uttering a forged £5 note of the Bank of Ireland, and two forged notes of the bank of Messrs. Ball and Co., bankers, Dublin, were tendered in evidence, and it was objected that these notes being the subject matter of another indictment, were inadmissible; Littledale, J., without hesitation, overruled the objection. (*q*) And in another case the same learned judge held that forged notes, the subject of other indictments, were admissible, although the names of the witnesses who were called to prove them forged, and to connect the prisoners with them, were not upon the back of the bill. (*r*) So on an indictment for uttering a forged Bank of England note, Alderson, B., admitted another forged Bank of England note in evidence, although the subject of another indictment. (*s*) And in a later case Lord Denman, C. J., said, that 'he could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge;' and offered to admit the evidence. (*t*)

But if the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments are forged, and proof that the prisoner returned the money on any such instrument and received the instrument back again, is not sufficient without producing the instrument, or duly accounting for its non-production. (*u*)

Upon an indictment for uttering a £5 note, it appeared that on a former occasion the prisoner had paid away a £1 note, that the

(*p*) *R. v. Balls, R. & M.* 470. S. C. 7 C. & P. 426, 429.

(*q*) *Kirkwood's case*, 1 Lew. 103, 1830.

(*r*) *Martin's case*, 1 Lew. 104, Littledale, J.

(*s*) *R. v. Josiah Aston*, Worcester Spr. Ass. 1838, MS. C. S. G.

(*t*) *R. v. Lewis*, Arch. Cr. P. 365, 8th edit. But see *contra*, *Hodgson's case*, 1 Lew. 103. *Hullock, B.*, 1827. *R. v. Smith*, 2 C. & P. 633, Vaughan, B., 1827.

(*u*) *R. v. Millard, R. & R.* 245. See *R. v. Moore*, 1 F. & F. 73.



woman to whom he paid it, on finding it to be bad, sent word of it to the barracks, whereupon the prisoner, accompanied by one of the sergeants of the regiment, came to the woman's house to ask for the note, and to give good money in exchange for it. They found, however, that the woman had given the note to the constable, whom they immediately sent for; the constable, however, did not come to them, and the sergeant and the prisoner were obliged to return to the barracks without seeing him. But before they went away, they left two half sovereigns to make good the debt. Soon after they were gone, the constable came in, and finding that the woman was satisfied as to her money, he put the note into the fire. When the facts relating to the uttering the £5 note had been gone through, the counsel for the prosecution was about to prove these facts respecting the £1 note. But Bayley, J., interposed, and expressed a strong doubt whether they were admissible, no evidence having been given of the note being a forged note, and the note itself not being produced; he, however, consented to receive the evidence, stating that, if the prisoner should be convicted, he would reserve the point for the opinion of the judges. (*v*)

It has been held on the trial of an indictment for forging a bill of exchange, that evidence of what the prisoner said respecting other bills of exchange which are not in evidence, is not admissible. (*w*) And although a letter written by the prisoner to a third person, stating that that person's name is on another bill, and desiring him not to say that that bill is a forgery, is receivable in evidence, yet the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced, and the forgery of it proved in the regular way. Upon an indictment for forging and uttering an acceptance of W. Prosser to a bill of exchange, a letter written by the prisoner to one Lawrence, in which he stated that a £20 bill was the last one of Prosser's with Lawrence's name upon it, and requested Lawrence on no account to say it was a forged bill, and to be careful of speaking to Prosser, was tendered in evidence, and objected to, as it related to another bill, and, at all events, that the bill to which it referred ought to be put in; Coleridge, J., held the letter receivable, and in summing up said, 'With respect to the letter that has been read, I think that you ought not to take it as proof that the bill

(*v*) Phillips' case, 1 Lew. 105. The result of the case is not stated, but it is said that the learned judge subsequently expressed the following opinion: 'That the prosecutor could not give in evidence anything that was said by the prisoner at a time collateral to a former uttering, in order to shew that what he said at the time of such former uttering was false, because the prisoner could not be prepared to answer or explain evidence of that description. That the prisoner is called upon to answer all the circumstances of a case under consideration, but not the circumstances of a case which is not under consideration; that the prosecutor is at liberty to shew other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them. But that what he said or did at an-

other time, collateral to such other utterings, could not be given in evidence, as it was impossible that the prisoner could be prepared to combat it.'

(*w*) R. v. Cooke, 8 C. & P. 586. Patteson, J. But where on an indictment for forging and uttering a bank note, evidence of statements made by the prisoner as to other bank notes, supposed to have been the subject of a guilty uttering by him, was tendered, and this case was cited, Crompton, J., said, 'I confess that I entertain doubts upon the subject; but I think you had better not offer the evidence in question. I do not see the force of the reasoning upon which Cooke's case was decided; but I am not at present prepared to overrule it.' R. v. Brown, 2 F. & F. 559.

mentioned in it is forged. Bills which are not the subject of indictment are often given in evidence to shew guilty knowledge, but there is in such cases strict proof that those bills are forged. No such evidence is given here, nor is the bill even produced. It therefore may be, that the bill alluded to in the letter is in some respects irregular, but still it may not be a forgery.' (x)

Sullivan was indicted for uttering a forged order upon Messrs. Coutts, and Pearce as an accessory before the fact, for having incited Sullivan so to do. Several other orders of the same character had previously been presented to, and paid by, Messrs. Coutts. They and the one mentioned in the indictment were in Pearce's handwriting, but there was no evidence to shew by whom they were uttered. It was objected that these other orders were not admissible against Sullivan; for she was in no way connected with them; and they were not evidence against Pearce, who was not charged with uttering; and the evidence was rejected. (y)

The punishment of forgery at common law is, as for a misdemeanor, by fine, imprisonment, and such other corporal punishment as the Court, in their discretion, shall award. (z) The punishments ordained for the offence by the statute law will be mentioned, with the other enactments of the different statutes, in the succeeding chapters.

See 24 & 25 Vict. c. 98, s. 47, and following sections.

## SEC. VI.

### *Enactments as to Forgery Generally.*<sup>1</sup>

The principal statutes relating to the crime of forgery having been consolidated by the 24 & 25 Vict. c. 98, which contains general provisions applicable to all the offences affected by that Act, it is thought expedient to introduce those provisions in this place, in order that they may be more readily referred to in the subsequent chapters.

Sec. 38, as to demanding property upon forged instruments, will be found noticed *post*, Chap. XLI.

Sec. 39, as to forging and uttering of instruments designated in former Acts will be found noticed *post*.

By the 24 & 25 Vict. c. 98, s. 40, 'where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this Act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter,

(x) *R. v. Forbes*, 7 C. & P. 224. See Com. 247. Bac. Ab. *Forgery*. 2 East, P. C. c. 19, s. 69, p. 1003. The punishment of the pillory cannot now be inflicted;

(y) *R. v. Sullivan*, 2 Cox, C. C. 80. Pollock, C. B., after consulting Erle, J.

56 Geo. 3, c. 138. 1 Vict. c. 23.

(z) 1 Hawk. P. C. c. 70, s. 1. 4 Blac.

## AMERICAN NOTE.

<sup>1</sup> The statutes relating to forgery in America are very numerous, and when they make the offence a felony they supersede the common law. It is impossible in the

present work to give any account of the special meanings given to particular words in these statutes.

dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England and Ireland, whether under the dominion of Her Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any endorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, *authority or request for the payment of money, or for the delivery or transfer of any goods or security*, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), *or any endorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory*, in whatsoever place or country out of England and Ireland, whether under the dominion of Her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, *authority, request, deed, bond, or writing obligatory* may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, *authority or request* be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland.' (a)

Sec. 41. 'If any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any Act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in cus-

(a) This clause is taken from the 1 Will. 4, c. 66, s. 30, and extended to Ireland. The words in italics are introduced to make this clause correspond with the other parts of the Act. It was held in

Ireland that forging an endorsement in Ireland on a bill drawn in America on a person in Ireland, and payable in Ireland, was within the Irish Act, 39 Geo. 3, c. 63. *R. v. Roberts*, 7 Cox, C. C. 422.

today, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place.' (b)

Sec. 42, noticed *ante*, p. 642, provides for the description in the indictment of the instrument alleged to have been forged.

Sec. 43. 'In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful *custody or possession* of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or facsimile of the whole or any part of such instrument, matter, or thing.' (c)

Sec. 44, by which an intent to defraud particular persons need not be alleged or proved, will be found *ante*, p. 652.

Sec. 45. 'Where the having any matter in the custody or possession of any person is in this Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, *or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person*, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act.' (d)

Sec. 46. 'If it shall be made to appear, by information on oath or affirmation before a justice of the peace, that there is reasonable cause to believe that any person has in his custody or possession, without lawful authority or excuse, any note or bill of the Governor and Company of the Bank of England or Ireland, or of any body corporate, company, or person carrying on the business of bankers, or any frame, mould, or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone,

(b) This clause is taken from the 1 Will. 4, c. 66, s. 24, and extended to Ireland.

The former clause provided that the offence might 'be laid and charged to have been committed' in any county or place where the offender was apprehended or in custody. This provision was rendered useless by the 14 & 15 Vict. c. 100, s. 23; which renders it unnecessary to state any venue in the body of any indictment which does not relate to a local offence.

The former clause made the accessories, aiders, and abettors, triable in any place where the principal was triable; but cases

of forgery might occur where the principal had not been apprehended, and where no proof could be given of any place where he would be triable, and therefore the latter part of the clause was assimilated to the former part by substituting the words 'in which he shall be apprehended or be in custody.'

(c) This clause is taken from the 14 & 15 Vict. c. 100, s. 6.

(d) This clause is taken from the 1 Will. 4, c. 66, s. 28, and extended to Ireland.

As to the clause in *italics*, see vol. i. p. 209.

or other material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of any such note or bill, or any part thereof, or any tool, implement, or material used or employed or intended to be used or employed in or about any of the operations aforesaid, or any forged security, document, or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper, or other matter or thing used or employed or intended to be used or employed in the forgery of any security, document, or instrument whatsoever such justice may, if he think fit, grant a warrant to search for the same; and if the same shall be found upon such search, it shall be lawful to seize and carry the same before some justice of the county or place, to be by him disposed of according to law; and all such matters and things so seized as aforesaid shall by order of the Court where any such offender shall be tried, or, in case there shall be no such trial, then by order of some justice of the peace, be defaced and destroyed or otherwise disposed of as such Court or justice shall direct.' (e)

(e) This clause is new in England; but by the 38 Geo. 3, c. 53, s. 6 (1), and 39 Geo. 3, c. 63, s. 6 (1), power was given in Ireland to search for forged bills and notes of the Banks of England and Ireland, and for frames, moulds, &c., for making such bills or notes. This clause is partly framed on these enactments, and partly on the similar clause in the Coin Act, 2 Will. 4, c. 34, s. 14, with great additions.

Wherever information on oath is made before a justice that there is reasonable cause to believe that any person has in his custody or possession without lawful authority or excuse any of the things mentioned in the clause, the justice may issue a search warrant under which it may be seized and secured to be used as evidence or otherwise dealt with according to law.

The cases embraced by this clause are: 1. Where any person has in his possession, without lawful authority or excuse, any note or bill of the Bank of England or Ireland, or of any other bank. This provision is intended to reach any case where any bills or notes of any of these banks may have been unlawfully taken away before they were regularly issued. It is true that in such a case the bills or notes are not forged, but they have been unlawfully taken out of the bank, and ought not to be circulated, and the case is at least as strong as that of coining tools conveyed out of any of Her Majesty's mints without lawful authority or excuse, which may be seized under a search warrant. See the Coin Act, secs. 25, 27, *ante*, vol. i. pp. 219, 227.

2. Where any person has in his possession without lawful authority or excuse, any frame, &c., for making paper in imitation of any of the paper used for such notes or bills,—or any such paper, or any plate, wood, &c., having thereon any words, devices, &c., capable of producing the impression of any such note or bill,—or any

tool, &c., used about any of those operations.

3. Where any person has in his possession, without lawful authority or excuse, any forged security, document, or instrument whatsoever. This is a new provision and a very important amendment of the law; for it will tend to facilitate prosecutions for forgery in many cases. Hitherto it has frequently happened that forgers have escaped with impunity for want of such a power as is here conferred. This clause includes every forged instrument whatsoever, and it authorises the search for such an instrument in every case at the instance of the Crown or a private prosecutor. It is clear that a search may be made under it wherever there is reasonable cause to believe that the instrument is in the possession of the forger, for he can have no lawful authority or excuse for its possession; just as clearly is that the case where it is in the possession of any agent of the forger, for he can have no more authority or excuse for its possession than the forger. But perhaps it may be said that where a forged instrument is delivered to an attorney under such circumstance that, if it were a genuine instrument, he would be privileged from producing it, the attorney has a lawful authority or excuse for keeping possession of it; but this clearly is not so; the words, 'without lawful authority or excuse,' are introduced in this clause for the like purpose as in the other sections of this Act (secs. 9, 10, 11, 13, 14, 16, 17, 18, 19), and in the similar sections of the Coin Act (secs. 6, 7, 8), viz., to protect persons who are lawfully in possession, &c., of the things specified, and their agents, and are inapplicable to persons who are unlawfully in possession of the things, or their agents, whether attorneys or not. Consequently all such questions as arose in *R. v. Smith*, 1 Phil. Ev. 171; *R. v. Avery*,

Sec. 47. 'Whosoever shall, after the commencement of this Act, be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the Act passed in the fifth year of the reign of Queen Elizabeth, intituled "An Act against Forgers of False Deeds and Writings," for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, [at the discretion of the Court,] (f) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](g)

Sec. 48. 'Where by any Act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the Act of 1 Will. 4, c. 66, have been liable to suffer death as a felon; or where by any Act now in force any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of the first year of King William the Fourth have been liable to suffer death as a felon; or where by any Act now in force any person making or using, or knowingly having in his custody or posses-

8 C. & P. 596; *R. v. Hayward*, 2 C. & K. 234; S. C. as *R. v. Jones*, 1 Den. C. C. 166; *R. v. Farley*, 2 C. & K. 313; 1 Den. C. C. 197; and *R. v. Tuffa*, 1 Den. C. C. 319, may be avoided in future by seizing the forged instrument under a search warrant issued in pursuance of this clause. Nor is there any reason why this should not be done; for it is perfectly clear that a stolen deed, bill, or note, delivered by a client to his attorney, may be seized under a search warrant issued under sec. 103 of the Larceny Act; so that this construction places the search for forged and stolen instruments on precisely the same footing.

Lastly, where any person has in his possession, without lawful authority or excuse, any machinery used in the forgery of any security, document, or instrument whatsoever. C. S. G.

(f) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(g) This clause is taken from the 1 Will. 4, c. 66, s. 23, and extended to Ireland to meet any cases, if such there be, to which its provisions may apply.

sion, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of the first of King William the Fourth have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall after the commencement of this Act be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this Act, every such person shall be liable, [at the discretion of the Court,] (*h*) to be kept in penal servitude for life [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.] (*i*)

Sec. 54. 'The Court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.'

(*h*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*i*) This clause is taken from the 1 Will. 4, c. 66, s. 1, and extended to Ireland, to meet any case, if such there be, to which its provisions may apply.

## CHAPTER THE THIRTY-FOURTH.

### OF THE FORGING, &C., OF RECORDS, JUDICIAL PROCESS, AND EVIDENCE.

It is clear that, by the common law, a person may be guilty of forgery by falsely and fraudulently making or altering any matter of record: for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (a) If, therefore, a man should insert in an indictment the names of those against whom in truth it was not found, it would be forgery. (b)

Even if the offence should not constitute a forgery, yet in no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to encroach upon the judicial power. (c) The defacing or rasure of any record, without due authority, is an offence at common law, highly punishable by fine and imprisonment. (d) And it has been holden that any person making or knowingly using a false affidavit, taken abroad (though a forging could not be assignable on it here), in order to mislead our own Courts, and to prevent public justice, is punishable by indictment for a misdemeanor. (e)

Judges are highly punishable at common law for offences of this kind. (f) And the statute 8 Rich. 2, c. 4, applies expressly to judges as well as to clerks.

The 8 Rich. 2, c. 4, enacts, that 'if any judge or clerk' offend by the false entering of pleas, rasing of rolls, or changing of verdicts, to the disherison of any one, he shall be punished by paying a fine to the King, and making satisfaction to the party.

By the 24 & 25 Vict. c. 98, s. 1, 'Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited,

(a) 1 Hawk. P. C. c. 70, s. 1, 8. Bac. Ab. *Forgery* (B). Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178.

(b) *R. v. Marsh*, 3 Mod. 66. 1 Hawk. P. C. c. 70, s. 2.

(c) 2 East, P. C. c. 19, s. 9, p. 866.

(d) 3 Inst. 71, 72. 1 Hale, 646. 1 Hawk. P. C. c. 47, s. 1.

(e) *Omealy v. Newell*, 8 East, 864. And see *Fawcett's case*, 2 East, P. C. c. 19, s. 7, p. 862. *Ante*, p. 620.

(f) 3 Inst. 72. 1 Hale, 646. In 3 Inst. 72, the case of Justice Ingham (or Hengham, or, as Hawkins says, Ingram), who was a judge in the reign of Edward I., is mentioned thus: He paid 'eight hundred marks for a

fine, for that a poor man being fined in an action of debt at thirteen shillings fourpence, the said justice, moved with pity, caused the roll to be rased, and made it six shillings eightpence. This case Southcot, J., remembered when Catlyn, C. J., of the Queen's Bench, in the reign of Queen Elizabeth, would have ordered a rasure of a roll in the like case, which Southcot, one of the judges of that court, utterly denied to assent unto, and said openly, that he meant not to build a clock-house; for (said he) with the fine that Ingham paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day.'



the Great Seal of the United Kingdom, Her Majesty's Privy Seal, any Privy Signet of Her Majesty, Her Majesty's Royal Sign Manual, any of Her Majesty's seals appointed by the twenty-fourth Article of the Union between England and Scotland to be kept, used, and continued in Scotland, the Great Seal of Ireland, or the Privy Seal of Ireland, *or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (g) to be kept in penal servitude for life [or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].*' (h)

By the 1 & 2 Vict. c. 94, (i) s. 1, the records in the Tower of London, Chapter House of Westminster, Roll's Chapel, Petty Bag Office, offices in the custody of the Queen's Remembrancer of the Exchequer, or of any other officer of the Exchequer, Augmentation Office, First Fruits and Tenths' Office, office of the Land Revenue and Enrolments, of the late auditor of the land revenues of England and Wales, and the records lately deposited in the office of the Pells of the Exchequer, and now in the custody of Her Majesty's Comptroller of the Exchequer, the records belonging to the Courts of Chancery, Exchequer, and Admiralty, Queen's Bench, Common Pleas, and Marshalsea, the records of the lately abolished Courts of Wales and of Chester, Durham, and of the Isle of Ely, are placed under the charge of the Master of the Rolls. (j) And by sec. 8 a public record office is to be established, and by sec. 12 the Master of the Rolls may allow a copy to be made of any of the said records, which is to be 'certified as a true and

(g) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(h) This clause is taken from the 1 Will. 4, c. 66, s. 2; 2 & 3 Will. 4, c. 123; and 1 Vict. c. 84, ss. 2, 3; and is new in Ireland.

Under the 1 Will. 4, c. 66, s. 2, the offences mentioned in the earlier part of this clause were treason; but as the capital punishment had been abolished, it was thought proper to reduce them to felonies.

The part in *italics* is new, and provides for offences much more likely to be committed than the forgery of the seals themselves. These offences are: 1, The forging the impression of any of the said seals; 2, The uttering any document having the impression of any such forged seal on it, knowing it to be forged; 3, The uttering any forged impression intended to resemble the impression of any of the said seals, knowing

the same to be forged; 4, Forging or uttering, knowing the same to be forged, any document having any of the said impressions thereon. By the Great Seal Act, 1884 (47 & 48 Vict. c. 30) s. 2, (3), Any person making or preparing any warrant for passing any instrument under the Great Seal of the United Kingdom, or procuring any instrument to be passed under that seal otherwise than as provided in the Act or the Crown Office Act, 1877, 40 & 41 Vict. c. 41, shall be guilty of a misdemeanor.

(i) By 37 & 38 Vict. c. 96, this Act is repealed in part — namely, sec. 1, from 'and until' to end of that section; sec. 8, from 'as soon' to 'provisions of this Act'; sec. 9, from 'and in' to 'subsist'; secs. 10, 18, and 21.

(j) By sec. 2, the Queen in Council may order records in other offices to be included in the Act.

authentic copy by the deputy-keeper of the records, or one of the assistant record keepers,' and to 'be sealed or stamped with the seal of the record office;' and by sec. 13 such copies are made evidence.

Sec. 19. 'Every person belonging to or employed in the said public record office, who shall certify any writing as a true and authentic copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part, and every person who shall counterfeit the signature of an assistant record keeper for the purpose of counterfeiting a certified copy of a record, or shall forge or counterfeit the seal of the public record office, shall be guilty of felony, and being duly convicted thereof shall be liable at the discretion of the Court to be transported (*k*) beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.'

Sec. 20. 'The word "records" means all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature belonging to Her Majesty, or now deposited in any of the offices or places of custody before mentioned' (*l*)

By the 24 & 25 Vict. c. 98, s. 27, 'Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognisance, cognovit actionem, or warrant of attorney, or any original document whatsoever of or belonging to any Court of Record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any Court of Equity or Court of Admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*m*) to be kept in penal servitude for any term not exceeding seven years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'] (*n*)

Sec. 28. 'Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, utter, dispose of, or put off any

(*k*) Penal servitude for life, or for any term not less than three years. See vol. i. p. 73.

(*l*) The Act contains no provision as to principals in the second degree or accessories. But the principals in the second degree are punishable as principals in the first degree, according to the general rule 4 Blac. Com. 39, and the accessories under the 24 & 25 Vict. c. 94.

(*m*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See ante, p. 50, note (*o*).

(*n*) This clause is new. It provides for the forging and uttering of any proceedings in any Court of Record, in any Court of Equity, and in any Court of Admiralty, and also of any document, &c., used, or intended to be used, as evidence in any of these courts.

copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any Court of Record, or shall forge or fraudulently alter any process of any court (o) other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any Court of Law or Equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 27. (p)

On an indictment under the 9 & 10 Vict. c. 95, s. 57, for acting under false colour of the process of a county court, it appeared that J. Roberts was indebted to the prisoner in the sum of ten shillings, and that the prisoner, for the purpose of obtaining payment of such debt, sent to J. Roberts the following document:—



*'Welchpool, October 17th, 1836.*

*'To Mr. John Roberts,*

*'Sir,*

*'I hereby give you notice that unless the amount of your account, £0 10s. 0d., which is due to me, is paid on or before the 23rd instant to me at the quarry, proceedings will be taken to obtain the same in pursuance with the provisions of the statute 9th and 10th of*

(o) It seems that an indictment for forgery under this part of the section must allege an intent to defraud. *R. v. Powner*, 12 Cox, C. C. 235, per Quain, J.

(p) This clause is new as a general provision, but is framed from the 7 & 8 Geo. 4, c. 28, s. 11, and 9 Geo. 4, c. 54, s. 21 (1) (which relate to certificates of previous convictions of felony); 2 Will. 4, c. 34, s. 9 (which relates to copies of previous convictions in coining cases); and the 9 & 10 Vict. c. 95, s. 57 (which relates to the forgery, &c., of proceedings in the county courts).

In *R. v. Evans*, D. & B. 236, and *R. v. Richmond*, Bell, C. C. 142, Bramwell, B., differing from the other judges, thought that the words in the 9 & 10 Vict. c. 95, s. 57, 'who shall act or profess to act under any false colour or pretence of the process of the court,' implied an acting under genuine process by false colour or pretence; and, in order to prevent any such doubt, the words 'any such false pretence' are substituted in this clause. The 2 Will. 4, c. 34, is the only one of the statutes mentioned in this note,

which is repealed, but this section seems to include all the cases within the other clauses.

The provisions of this clause are, — 1, against any clerk, officer, or deputy, uttering any false copy or certificate of any record knowing it to be false; 2, against any person other than such clerk, &c., signing or certifying any such copy or certificate as such clerk, &c.; 3, against forging or uttering, knowing it to be forged, any such copy or certificate, or any such copy or certificate with a forged signature, knowing it to be forged; 4, against forging the seal of any Court of Record, or forging the process of any court other than the courts mentioned in the preceding section; 5, against serving or enforcing any forged process of any court whatsoever, knowing it to be forged; 6, against delivering any paper falsely purporting to be any such process, or a copy thereof, or any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing it to be false; 7, against acting, or professing to act, under any such false process, knowing it to be false.

*Victoria*, cap. 25th of the new County Court Act, for the more easy recovery of small debts, &c.

‘Yours, &c.,  
*‘Frederick Mugliston, Clerk to Court,  
 Instructed by John Evans.’*

The whole except the parts in italics was in print. After the letter had been received, the wife of Roberts went to the prisoner and asked if he had sent the letter; he replied that he had ordered the court to send it; and on being so informed she paid the prisoner the ten shillings demanded in the letter. Whilst the money was lying on the table, the prisoner asked her for fifteen pence for County Court expenses, as he wanted to put the full amount in the receipt, which he was then writing. She said she had no more money. He said he would take sixpence, and that he had done the same with Mr. Evans, who had paid him fifteen pence for County Court expenses. She said she had not any more money, and no money was paid for costs, and a receipt for ten shillings alone was given. And, on a case reserved, it was held that the case fell within the words every person ‘who shall act or profess to act under any false colour or pretence of the process of the said court.’ This branch of the clause applied to a person pretending to act under process of the court when there is in fact no process, and therefore applied to the present case. The mere sending of the letter by the prisoner would not alone have been sufficient; but he afterwards pretended that fifteen pence was due for County Court expenses; and, there could be no doubt, intended the woman to believe that he had process which entitled him to receive that sum; and that he had incurred costs in respect of proceedings in the County Court. (*q*)

And where on a similar indictment on the same clause it appeared that the prisoner had obtained blank forms for the plaintiff’s instructions to issue a County Court summons, one of which he filled up, and without any authority signed it ‘William Giles, Registrar of the Taunton Court,’ and wrote on the back, ‘Unless the whole amount claimed by A. Richmond, draper, of Taunton, is paid on Saturday, an execution warrant will be immediately issued against you. Witness my signature, William Giles.’ Giles was the registrar, but the signatures on the face and back were forgeries. The prisoner sent this document to T. Snooks, the person named in it as defendant, who owed the prisoner the sum mentioned in it. The document was sent to Snooks in order to obtain payment of the said sum. On a case reserved, in consequence of the observation in the preceding case that the mere sending the letter would not have been acting under colour of process, it was held that the offence proved was certainly a professing to act under a colourable process of the court. (*r*)

But where on a similar indictment it appeared that Kingstone had

(*q*) *R. v. Evans*, D. & B. 236. 26 L. J. M. C. 92. The words of the 9 & 10 Vict. c. 95, s. 57, are, ‘every person who shall forge the seal or any process of the court, and who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to

any person, any paper purporting to be a copy of any summons or process of the said court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said court.’

(*r*) *R. v. Richmond*, Bell, C. C. 142.

brought an action against Wainwright in a County Court to recover £1 7s. for goods sold, and the summons, dated the 7th of May, called on the defendant to appear on the 7th of June, which he did not do, and on the 30th of June the prisoner called at the defendant's house, and said he was authorised by the Court to receive the debt and costs, and if the amount was not paid on that day, or before ten o'clock the next morning, he should bring an execution and take the goods. The prisoner asked £1 6s. 9d. for the debt; the defendant shewed him the summons claimed £1 7s. The prisoner said there was a mistake, and if the defendant paid him £1 8s. 9d. it would cover all expenses; and the defendant paid the money. Crompton, J., stopped the case, saying that the charge was not made out, as he thought the Act applied to false instruments, and not to mere false representations as to the authority or employment of the prisoner. There was no acting or professing to act under the process of the County Court. (s)

We have seen that where an indictment alleged that the prisoner delivered a certain paper falsely purporting to be a certain process of a County Court, and the document in question was a mere notice to produce, it was held that the prisoner ought not to have been convicted. (t)

By the 24 & 25 Vict. c. 98, s. 29, 'Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act passed or to be passed, and for which offence no punishment is herein provided, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (u) to be kept in penal servitude for any term not exceeding seven years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (v)

The 7 & 8 Geo. 4, c. 28, s. 11, after reciting the expediency of providing for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, and enacting such punishment, regulates the form of indictment for the subsequent felony, and then enacts, that 'a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity

(s) *R. v. Moyatt*, 6 Cox, C. C. 406. In *R. v. Evans*, *supra*, Lord Campbell, C. J., during the argument said, 'Suppose there had been no letter, and money had been demanded for County Court expenses, the defendant saying, "I have sued out a summons, and so much is due for expenses," would not that be acting under pretence of the process of the court?'

(t) *R. v. Castle*, D. & B. 363; 27 L. J. M. C. 70; *ante*, p. 661.

(u) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note c.

(v) This clause is new; it embraces the forging or uttering, knowing it to be forged, of every document made evidence by any statute already passed or hereafter to be passed, and for which no other provision is made in this Act.

of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter a false certificate of any indictment and conviction for a previous felony, or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, (*w*) or to be imprisoned for any term not exceeding two years.' (*x*)

By 24 & 25 Vict. c. 98, s. 32, 'Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognisance purporting to have been entered into before any justice of the peace, or other officer authorised to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*y*) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.']

By the Commissioners for Oaths Act, 1889 (52 Vict. c. 10), sec. 8, 'Whoever forges, counterfeits, or fraudulently alters the seal or signature of any person authorised by or under this Act, to administer an oath, or tenders in evidence or otherwise uses any affidavit, having any seal or signature so forged or counterfeited, or fraudulently altered, knowing the same to be forged, counterfeited, or fraudulently altered, shall be guilty of felony and liable on conviction to penal servitude for any term not exceeding seven years, and not less than five years, (*a*) or to imprisonment with or without hard labour, for any term not exceeding two years.'

By sec. 9, 'Any offence against this Act, whether committed within or without Her Majesty's dominions, may be tried in any county in the United Kingdom in which the person charged was apprehended or is in custody.'

By the Lunacy Act, 1890 (53 Vict. c. 5), sec. 147, 'If any person forges the signature of a Master [in lunacy], or forges or counterfeits the seal of the Master's office, or knowingly concurs in using any such forged or counterfeited signature or seal, or tenders in evidence any document with a false or counterfeit signature of a Master, or with a false or counterfeit seal, knowing the same signature or seal to

(*w*) Now penal servitude for any term not exceeding seven and not less than three years.

(*x*) The section provided for a sentence of whipping, but this was repealed by 51 & 52 Vict. c. 57. As to hard labour and solitary confinement, see the 7 & 8 Geo. 4, c. 28, s. 9, and 1 Vict. c. 90, s. 5. The 7 & 8 Geo. 4, c. 28, contains no provisions for the punishment of principals in the second degree

and accessories; the principals in the second degree are therefore punishable in the same way as the principals in the first degree, and the accessories under the 24 & 25 Vict. c. 94.

(*y*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*e*).

(*a*) Now three years.

be false or counterfeit, every such person shall be guilty of felony and shall, upon conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding three years, with or without hard labour.'

By the 31 & 32 Vict. c. 37 (the Documentary Evidence Act, 1868), s. 4, if any person commits any of the offences following, that is to say,—

- (1) Prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the government printer, or to be printed under the authority of the legislature of any British colony or possession, or tenders in evidence any copy of any proclamation, order or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or,
- (2) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorised to be annexed to a copy of or extract from any proclamation, order, or regulation,

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude for such term as is prescribed by The Penal Servitude Act, 1864, as the least term to which an offender can be sentenced to penal servitude, (b) or to be imprisoned for any term not exceeding two years, with or without hard labour.

By 45 Vict. c. 9, s. 3, 'If any person prints any copy of any Act, proclamation, order, royal warrant, circular, Act, gazette or document which falsely purports to have been printed under the superintendence or authority of H. M. stationery office, or tenders in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, he shall be guilty of felony and shall, on conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding two years, with or without hard labour.'

By the Municipal Corporations Act, 1882 (c), sec. 235, 'If any person forges the seal or signature affixed or subscribed to a bye-law made under this Act, or the signature subscribed to any minute of proceedings of the Council, or tenders in evidence any such document, with a false or counterfeit seal or signature, knowing it to be false or counterfeit, he shall be liable to imprisonment with hard labour for any term not exceeding two years.'

There are many Acts which contain enactments relating to the forgery of seals and process of courts and instruments of evidence. Some of these will be found in Vol. III. Evidence.

The 8 & 9 Vict. c. 113, s. 4, 'An Act to facilitate the admission in evidence of certain official and other documents,' makes it a felony to forge the seal, stamp, or signature to the documents therein mentioned, or to utter such forged documents, &c.

The County Courts Act, 9 & 10 Vict. c. 95, s. 57, contained a similar clause as to the seals and process of County Courts.

The 11 & 12 Vict. c. 78, which creates the Court for Crown Cases reserved, by sec. 6, makes it a felony to forge or utter the documents therein mentioned.

(b) See vol. i. p. 73 *et seq.*

(c) 45 & 46 Vict. c. 50.

The 14 & 15 Vict. c. 99 (an Act to amend the Law of Evidence), s. 17, makes it a felony to forge the seal or the documents therein mentioned, or to tender in evidence any such documents with a forged seal thereto.

The 17 & 18 Vict. c. 78 (Admiralty Court Act, 1854), s. 10, makes it a felony to forge the signature or seal of any commissioner, judge, &c., or to tender in evidence documents with such forged signature or seal.

The general provisions of the 24 & 25 Vict. c. 98, include the greater part at least of the offences in these statutes, and to have inserted their penal provisions at length would have been attended with no commensurate advantage; for, wherever a prosecution takes place under any of these Acts, it will be necessary to refer to many other provisions in the Act, in order to ascertain what the offences created by the penal clause really are.

Upon the trial of any indictment for any offence in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.



## CHAPTER THE THIRTY-FIFTH.

### OF FORGERIES RELATING TO THE PUBLIC FUNDS, AND THE STOCKS OF PUBLIC COMPANIES.

By the 24 & 25 Vict. c. 98, s. 2, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or of or in the capital stock of any body corporate, (a) company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court], (b) to be kept in penal servitude for life, [or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](c)

Sec. 3. 'Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, *under or by virtue of any Act of Parliament*, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour

(a) By 32 & 33 Vict. c. 102, s. 19, for the purposes of the Act 24 & 25 Vict. c. 98, all consolidated stock created by the Metropolitan Board of Works shall be deemed to be capital stock of a body corporate within the meaning of that Act.

(b) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (a).

(c) This clause is framed from the 1 Will.

4, c. 66, s. 6; 2 & 3 Will. 4, c. 123; 1 Vict. c. 84, ss. 1, 2, 3; and 37 Geo. 3, c. 54, ss. 12, 15 (1).

The words 'offer, dispose of, or put off,' are introduced to render this clause consistent with the subsequent clauses in this Act.

The words 'under or by virtue of' are introduced to include any company established *under the provisions* of any Act; though not established *by* the Act itself.

to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 3. (*d*)

Sec. 4. 'Whosoever shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any *such* forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (*e*) to be kept in penal servitude for any term not exceeding seven years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'] (*f*)

Sec. 5. 'Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent in any of the cases aforesaid to defraud; or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 2. (*g*)

Sec. 6. 'Whosoever, being a clerk, officer, or servant of or other person employed or entrusted by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, or warrant for payment of any annuity, interest, or money payable at the Bank of England or Ireland, for a greater or less amount than the

(*d*) This clause is framed from the 1 Will. 4, c. 66, s. 7, and the latter part of sec. 6; but there were similar provisions in the 37 Geo. 3, c. 54, s. 12 (1), relating to the Bank of Ireland.

As to the words in italics, see the last note.

(*e*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*f*) This clause is taken from the 1 Will. 4, c. 66, s. 8, and is new in Ireland.

The words of that section were 'forge the name or handwriting of any person as or purporting to be a witness,' and the terms in this clause were substituted in order to prevent a doubt in case the name of a non-existing person were used in the attestation of a power of attorney.

(*g*) This clause is taken from the 1 Will. 4, c. 66, s. 5, but there were similar provisions in the 37 Geo. 3, c. 54, ss. 14, 16 (1), relating to the Bank of Ireland.

person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 4. (*h*)

By 32 & 33 Vict. c. 102, s. 20, any person who, with intent to defraud, makes any false entry in or alters any word or figure in any of the said books for transfers [of consolidated stock created by the Metropolitan Board of Works], or in any manner falsifies any of the said books, or makes any transfer of any consolidated stock [created by the Metropolitan Board of Works], in the name of any person who is not the true owner thereof, shall be guilty of felony, and on conviction shall be liable to penal servitude for any term not exceeding fourteen years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

By sec. 21, any person who, being a clerk, officer, or servant of, or employed by the board [*i.e.*, the Metropolitan Board of Works], or the persons or body corporate, who keep the book for transfer of consolidated stock [created by the Metropolitan Board of Works], does, with intent to defraud, make out or deliver any stock certificate, dividend warrant, or document for the payment of money in relation to any consolidated stock [created by the Metropolitan Board of Works], for a greater or less amount than the person on whose behalf such certificate, warrant, or document is made out is entitled to, shall be guilty of felony, and shall be liable on conviction, to be kept in penal servitude for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

By the 26 & 27 Vict. c. 28, 'An Act to give further facilities to the holders of the public stocks,' sec. 3, 'every person inscribed in the books of the Bank of England or of the Bank of Ireland as proprietor of a share in the public stocks, may obtain a certificate or certificates of title to the said share, or to any part thereof, having annexed coupons entitling the bearer to the dividends payable in respect of that share or part of a share;' and by sec. 14, 'whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon issued in pursuance of this Act, or shall demand or endeavour to obtain or receive any share or interest of or in the public stocks, or to receive any dividends or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*i*) to be kept in penal servitude for life [or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.']

(*h*) This clause is taken from the 1 Will. 4, c. 86, s. 9, except the words, 'warrant for payment of any annuity, interest, or money,' which are taken from the similar clause in the 37 Geo. 3, c. 54, s. 17 (1), relating to the Bank of Ireland.

(*i*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

Sec. 15. 'Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any of the public stocks, or of any stock certificate or coupon issued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 14.

Sec. 16. 'Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall engrave or make upon any plate, wood, stone, or other material, any stock certificate or coupon purporting to be a stock certificate or coupon issued or made under and in pursuance of this Act, or to be a blank stock certificate or coupon issued or made as aforesaid, or to be a part of such a stock certificate or coupon, or shall use any such plate, wood, stone, or other material for the making or printing any such stock certificate or coupon, or any such blank stock certificate or coupon, or any part thereof respectively, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any such blank stock certificate or coupon, or part of any such stock certificate or coupon, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*j*) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.']

By 33 & 34 Vict. c. 58 (The Forgery Act, 1870), s. 2, 'This Act shall have effect as one Act with 24 & 25 Vict. c. 98, but shall extend to the United Kingdom.'

Sec. 3. 'If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon, issued in pursuance of Part V. of The National Debt Act, 1870, or of any former Act, or demands or endeavours to obtain or receive any share or interest of or in any stock as defined in The National Debt Act, 1870, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*j*) to be kept in penal servitude for life [or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.']

Sec. 4. 'If any person falsely and deceitfully personates any owner of any share or interest of or in any such stock as aforesaid, or of any such stock certificate or coupon as aforesaid, and thereby obtains or endeavours to obtain any such stock certificate or coupon,

(*j*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

—or receives or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner,—he shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 3.

Sec. 5. 'If any person without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves or makes on any plate, wood, stone, or other material any stock certificate or coupon purporting to be such a stock certificate or coupon as aforesaid, or to be such a stock certificate or coupon as aforesaid in blank, or to be a part of such a stock certificate or coupon as aforesaid, — or uses any such plate, wood, stone, or other material for the making or printing of any such stock certificate or coupon, or blank stock certificate or coupon as aforesaid, or any part thereof respectively, — or knowingly has in his custody or possession any such plate, wood, stone, or other material, — or knowingly offers, utters, disposes of, or puts off, or has in his custody or possession, any paper on which any such blank stock certificate or coupon as aforesaid, or part of any such stock certificate or coupon as aforesaid, is made or printed, — he shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*k*) to be kept in penal servitude for any term not exceeding fourteen years [and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].'

Sec. 6. 'If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate or duplicate certificate required by Part VI. of The National Debt Act, 1870, or by any former like enactment, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 3.

In the Acts by which different *loans* have been raised, common clauses have usually been inserted, in substance nearly the same, by which it is made a felony to forge certificates, debentures, receipts, &c., mentioned in the Acts.

The 29 & 30 Vict. c. 25, consolidates the laws regulating the preparation, issue, and payment of exchequer bills and bonds.

By sec. 2 in this Act 'the Treasury' shall mean the Commissioners of Her Majesty's Treasury for the time being, or any two or more of them; and 'the Bank of England' shall mean the Governor and Company of the Bank of England.

By sec. 15, (*l*) 'If any person or persons shall forge or counterfeit any such exchequer bill or coupon for interest, or any endorsement or writing thereupon, or therein, or tender in payment any such forged or counterfeited bill or any exchequer bill with such counterfeit endorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit endorsement or writing thereupon or therein exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies

(*k*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*l*) By 36 & 37 Vict. c. 54 (The Exche-

quer Bonds Act, 1873), this section 'shall apply to all Exchequer Bonds issued in pursuance of this Act in like manner as if it were herein enacted with the substitution of Exchequer Bond for Exchequer Bill.'

politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the endorsement or writing thereupon or therein, to be forged or counterfeited, and with intent to defraud Her Majesty, her heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate who shall contract or circulate or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate, then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer accordingly.'

By sec. 20, 'Every person who shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his possession, not being legally authorised by the Treasury, and without lawful excuse (the proof whereof shall lie on the person accused), any instrument having therein any distinguishing marks peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or any machinery for working such distinguishing marks into the substance of any paper, and intended to imitate such distinguishing marks, or any plate peculiarly employed for printing exchequer bills, or any die peculiarly used for preparing any such plate, or for sealing such exchequer bills, or any plate or die intended to imitate such plates or dies respectively; and also every person, except as before excepted, who shall make or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any distinguishing marks peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or any part of such distinguishing marks, and intended to imitate the same; and also every person, except as before excepted, who shall knowingly have in his possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever, in the substance whereof shall appear any such distinguishing marks, or any part of such distinguishing marks, and intended to imitate the same; and also every person, except as before excepted, who shall cause or assist in causing any such distinguishing marks or any part of such distinguishing marks, and intended to imitate the same, to appear in the substance of any paper whatever, or who shall take or assist in taking any impression of any such plate or die as aforesaid, shall be guilty of felony.'

By sec. 21, 'Every person not lawfully authorised and without lawful excuse (the proof whereof shall lie on the person accused), who shall purchase, or receive, or take, and have in his custody any paper manufactured and provided by or under the directions of the Treasury, for the purpose of being used as exchequer bills, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate or die as aforesaid, shall for every such offence be guilty of a misdemeanor, and, being convicted thereof, shall, at the discretion of the Court before whom he shall be tried, be imprisoned for any period not more than three years nor less than six calendar months.'

By sec. 25, 'All the provisions and penalties of this Act contained

in sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, shall be applied and extended to such exchequer bills made out and issued in pursuance of any former Act or Acts as shall remain outstanding after the commencement of this Act.'

By sec. 26, 'The several sections 3, 4, 5, 6, 14, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of this Act, applicable to exchequer bills, shall apply and be construed to and in relation to all exchequer bonds to be made out and issued from and after the commencement of this Act under the authority of any Act or Acts of Parliament, as well as to such exchequer bonds made out and issued in pursuance of any former Act or Acts, as shall remain outstanding after the commencement of this Act, so far as the same are applicable, in like manner and as fully and effectually to all intents and purposes as if such several sections had been particularly repeated and enacted in this Act in relation to such exchequer bonds: provided always that such exchequer bonds may be made out and issued from and after the commencement of this Act, with coupons for the interest becoming due thereon from time to time for any term not exceeding six years from the date thereof.'

The 5 Vict. c. 8, entitled, 'An Act for Funding Exchequer Bills,' by sec. 26, enacts, that 'if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any receipt or receipts for the whole or any part or parts of the said subscription towards the said sum of five millions, either with or without the name or names of any person or persons being inserted therein as the subscriber or subscribers thereto, or payer or payers thereof, or of any part or parts thereof, or shall alter any number, figure, or word therein, or utter or publish as true any such false, forged, counterfeited, or altered receipt or receipts, with intent to defraud the governor and company of the Bank of England, or any body politic or corporate, or any person or persons whatsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and liable to be transported beyond the seas for life or for any term not less than seven years, (*m*) or to be imprisoned for any term not exceeding four years nor less than two years, under the provisions of the 1 Vict. c. 84.'

The 5 Geo. 4, c. 53, entitled, 'An Act to permit the Mutual Transfer of Capital in certain Public Stocks or Funds transferable at the Banks of England and Ireland respectively,' by sec. 22, enacts that 'if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any certificate or duplicate certificate required by this Act, or shall alter any number, figure, or word therein, or shall alter [*sic*] or publish as true any such false, forged, counterfeited, or altered certificate, with intent to defraud the governor and company of the Bank of England, or the governor and company of the

(*m*) Penal servitude for life or for any term not less than three years. See vol. i. p. 73 *et seq.*

Bank of Ireland, or any body politic or corporate, or any person or persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or published [*sic*] as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.'(n)

An indictment on the 33 Geo. 3, c. 30, s. 2, charged that W. Harrison was entitled to £50 interest or share in the Consolidated three per cent. Annuities; and that whilst W. H. was so entitled to the said £50, &c., the prisoner falsely made, forged, and counterfeited a transfer of the said £50 interest or share, with the name of the said W. H. thereto subscribed, purporting to have been signed by the said W. H., and to be a transfer of the said £50, &c., from the said W. H. unto one W. W., the tenor of which was, &c. (setting it out); with intent to defraud the governor and company of the Bank of England, contrary to the form of the statute, &c. In other counts the intent was laid to be to defraud W. H. and W. W., and in others the prisoner was charged with publishing the transfer, knowing it to be forged, with the same intent. There were also further counts, charging the prisoner generally with forging a certain transfer, to wit, a transfer of an interest and share, viz., £50 interest and share of and in certain annuities transferable at the Bank of England, commonly called Consolidated three per cent. Annuities, without stating to whom the stock belonged, or reciting the statutes relating thereto, in fraud of the said several persons. The prisoner and H. Harland were executors of J. Howard, who had by his will given the £50 in the three per cent. consols to his grandson, W. Harrison, and on the 11th of January, 1796, they transferred the same into the name of W. Harrison; but the transfer never was accepted by W. Harrison. Afterwards, on the 14th of January, the prisoner brought his own son with him to the bank, and represented him to be W. Harrison; and, by the intervention of a broker, it was agreed that the stock should be sold to W. West. The prisoner's son, in his presence, signed the transfer, which was properly filled up; but from the circumstance of his writing the name with a double *ss* (Harrisson) he was required to bring an affidavit that he was the person described in the books of the bank by the name of Harrison with a single *s*; and in consequence the broker did not pay over the money he had received from West for the stock, and the transfer was not witnessed. It appeared that according to the printed form of transfers used at the bank they ought to be witnessed; and also that there were positive orders at the bank not to transfer any stock till it had been accepted. But this last rule was frequently departed from in transfers made with the stockjobbers; and it was allowed by the rules that dividends should be received on stock before it was accepted. On behalf of the prisoner the 33 Geo. 3, c. 28, was cited, which required that books should be kept at the bank for the entering of all transfers, which should be conceived in proper words for that purpose, and signed by the parties

(n) This provision was not expressly repealed by the 1 Will. 4, c. 66, but the punishment of death was abolished by the first

section of that statute, and the present punishment is under the 24 & 25 Vict. c. 98, s. 48, *ante*, p. 684.



making such transfers, and that the several persons to whom such transfers should be made should underwrite their acceptance thereof; and that no other method of transferring or assigning the said annuities should be good or available in law. And it was objected that the evidence did not support the indictment; first, for want of Harrison's acceptance of the transfer made to him by the executors of Howard; which it was contended was necessary to make the transfer complete, and give Harrison possession of the £50 stock; secondly, because no transfer at all could be made until the stock was accepted; and thirdly, that the transfer in the name of W. Harrison was not witnessed, and therefore not available in law, and in fact no transfer; the witnessing being part of the words in which transfers were conceived. (o) The jury having found the prisoner guilty, the case was argued before the judges at some length, the counsel for the prosecution relying upon 33 Geo. 3, c. 30, s. 2; and ultimately the objections were all overruled, and the offence was holden to be complete. It is stated that Buller, J. in delivering the opinion of the judges, observed as to the two first objections that two answers had been given, first, that the stock vested in W. H. by the mere act of transferring it into his name, and that if he had died before he had accepted it, yet it would have gone to his executors as part of his personal estate; and secondly, that the nature of the offence would not have been altered if W. H. had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred; that neither the forgery nor the fraud would have been less complete if Harrison had really had no stock. And as to the third objection, he said that the judges were all of opinion that the entry and signatures, as stated in the indictment, were a complete transfer without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection *ex abundanti cautella*. (p)

A case also has occurred in which the endeavouring to receive, &c., the money of a proprietor of stock, within the 31 Geo. 2, c. 22, s. 37, came under consideration. The prisoner, Francis Parr, applied to the clerk whose business it was to issue the dividend warrants upon the 3 per cent. consols stock, in the name of Isaac Hart, for a warrant for half-a-year's dividend; using the words, 'Isaac Hart, £3900.' He also signed the book, 'Isaac Hart;' and being asked of what place? he said Windsor; which agreeing with the description in the book, a warrant was made out for £58 10s., to which he again signed 'Isaac Hart.' The warrant was then delivered to him. A few minutes afterwards he was apprehended; and it did not appear that in the mean time he had made any application at the pay-office, or had even gone towards it, or taken any other step towards obtaining the actual payment of the money. It was objected by his counsel that some such proceeding was necessary to the completion of the offence; but after his conviction, the point being submitted to the consideration of the twelve judges, they all held the conviction right; and Gould, J.,

(o) The want of witnessing was compared to the omissions in the bill of exchange in Moffat's case, *ante*, p. 614.

(p) Gade's case, 2 East, P. C. c. 19, s. 9, p. 874. 2 Leach, 732.

in delivering their opinion, said, that the fact shewed that the prisoner, by personating the proprietor, and by obtaining and endorsing the warrant as such, thereby made an endeavour as far as it went, towards receiving the dividend. (*q*)

It was held that a power of attorney to transfer government stock signed, sealed, and delivered, was a deed within the 2 Geo. 2, c. 25, s. 1 (now repealed). (*r*)

Upon the trial of any indictment for any offence in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(*q*) Parr's case, 1 Leach, 434. 2 East, P. C. c. 20, s. 2, p. 1005. In this case, J. Hart, the proprietor of the stock, was examined as a witness to prove the identity of the person intended to be defrauded.

(*r*) *R. v. Fauntleroy*, R. & M. 52. S. C.

2 Bing. R. 413. See this case more fully stated, *post*. As the forging such a power of attorney is made an offence expressly by the 24 & 25 Vict. c. 98, s. 2, *ante*, p. 695, it would now be the proper course to proceed upon that section.

## CHAPTER THE THIRTY-SIXTH.

### OF FORGING THE SECURITIES OF THE BANK OF ENGLAND OR IRELAND OR OTHER BANKS. (a)

SOON after the establishment of the Bank of England, it was thought necessary to make especial provision against the offence of forging its securities. The former statutes relating to this subject are repealed.

But by the 24 & 25 Vict. c. 98, s. 12, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, *or of any other body corporate, company, or person carrying on the business of bankers*, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any endorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, (b) shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (c) to be kept in penal servitude for life [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.] (d)

Sec. 13. 'Whosoever, without lawful authority *or* excuse (the proof whereof shall lie on the party accused), shall purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (c) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.] (e)

(a) Some decisions on repealed statutes will be found in Appendix H at the end of this volume.

(b) See sec. 44, *ante*, p. 652.

(c) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(d) This clause is taken from the 1 Will. 4, c. 66, s. 3. There were similar clauses in the 21 & 22 Geo. 3, c. 16, s. 15 (1), 33 Geo. 3, c. 58, s. 2 (1), and 9 Geo. 3, c. 63, s. 2 (1), relating to the forgery in Ireland of bank notes of the banks of England and Ireland.

The words in italics are new, and although most of the notes of common bankers fell within the former enactments relating to the forgery of promissory notes, yet the new words will include cases that were not formerly provided for. Thus the note of a country bank promising 'to pay the bearer one guinea on demand in cash or Bank of England note,' was held not to be a promissory note for the payment of money within the 2 Geo. 2, c. 25. Wilcock's case, 2 Russ. C. & M. But such a case would clearly fall within the new words of this clause.

(e) This clause is taken from the 1 Will.

Sec. 14. 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use, or knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words "Bank of England" or "Bank of Ireland" or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper [or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively], or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever with the words "Bank of England" or "Bank of Ireland," or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper [or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively], or shall by any art or contrivance cause the words "Bank of England" or "Bank of Ireland," or any part of such words intended to resemble and pass for the same [or any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively], to appear visible in the substance of any paper, or shall cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 13. (f)

Sec. 15. 'Nothing in the last preceding section contained shall prevent any person from issuing any bill of exchange or promissory

4, c. 66, s. 12. There was a similar clause in the 49 Geo. 3, c. 13, s. 2 (1), relating to bank notes, &c., of the Bank of Ireland.

A question may be raised whether this clause includes the notes of common bankers. Neither of the old enactments did; but placed as this enactment is, immediately after the one including such notes, which describes them as commonly called by the very terms used in this section, there can be no doubt that they would be held to be within it.

The words 'without lawful authority,' &c., are made uniform throughout this Act.

(f) This clause is framed from the 1 Will. 4, c. 66, s. 13; 38 Geo. 3, c. 53, s. 3 (1); and 39 Geo. 3, c. 63, s. 3 (1).

The parts between brackets are taken from the two latter Acts; those Acts had the words 'or the greater part of such words' for which the Select Committee of the Commons substituted 'any part of such words intended to resemble and pass for the same,' as the greater part of the words 'Bank of Ireland' or 'Bank of England' might be visible in paper, and yet might neither resemble nor be intended to resemble either of those expressions.

note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the governor and company of the Banks of England and Ireland respectively.' (g)

Sec. 16. 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other (h) body corporate, company, or person carrying on the business of bankers, or to be a blank bank note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part of a bank note, promissory note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid' or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, or by any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as

(g) This clause is taken from the 1 Will. 4, c. 66, s. 14, and is new in Ireland.

(h) To engrave upon a plate part of a note purporting to be a note of a Scotch banking company, is an offence within this section, and that effect of the section is not prevented by sec. 55, which provides that nothing in the Act contained shall extend

to Scotland. *R. v. Brackenridge*, 37 L. J. M. C. 86. See 24 & 25 Vict. c. 98, s. 40, *ante*, p. 680. See *Dick's case*, 1 Leach, 68, 2 East, P. C. c. 19, s. 35, p. 925; *M'Kay's case*, R. & R. 71, cases decided on 2 Geo. 2, c. 25; *R. v. Kirkwood*, R. & M. C. C. R. 130, decided upon 1 Will. 4, c. 66.

aforesaid, or part of a bank note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (*j*) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.] (*k*)

Sec. 17. 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any word, number, figure, *device*, character, or ornament, the impression taken from which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or shall use, or knowingly have in his custody or possession, any such plate, wood, stone, or other material, or any other instrument or device for the impressing or making upon any paper or other material any word, number, figure, character, or ornament which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 16. (*l*)

Upon the trial of an indictment for any offence in this chapter, the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(*j*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*k*) This clause is framed from the 1 Will. 4, c. 66, ss. 15, 18. There were similar clauses in the 38 Geo. 3, c. 53, s. 4 (1); 39

Geo. 3, c. 63, s. 4 (1); 41 Geo. 3, c. 57, ss. 2, 3; and 1 Geo. 4, c. 92, s. 1.

(*l*) This clause is taken from the 1 Will. 4, c. 66, s. 16, and extended to Ireland; there was a similar clause as to the notes, &c., of the Bank of England in the 1 Geo. 4, c. 92, s. 2.

The clause is extended to common bankers.

## CHAPTER THE THIRTY-SEVENTH.

### OF FORGING EAST INDIA SECURITIES, DEBENTURES, &c.

By the 24 & 25 Vict. c. 98, s. 7, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India bond, *or any bond, debenture, or security issued or made under the authority of any Act passed or to be passed relating to the East Indies*, or any endorsement on or assignment of any such bond, *debenture, or security*, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for life [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](b)

Sec. 26. 'Whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under *any lawful authority whatsoever, either within Her Majesty's dominions or elsewhere*, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](c)

The 25 & 26 Vict. c. 7, provides for the transfer of India stock; and by sec. 14, 'If any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any certificate or duplicate certificate required by this Act, or shall alter any number, figure, or word therein, or shall utter or publish as true any such false, forged, counterfeited, or altered certificate with intent to defraud the governor and company of the Bank of England or the governor and company of the Bank of Ireland, or any body politic or corporate, or any person or

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from part of the 1 Will. 4, c. 66, s. 3, with the addition of the words in italics, which are introduced to include bonds, debentures, and securities issued or made under any recent or future Act relating to the East Indies. See the 21 & 22 Vict. c. 3, s. 10; 21 & 22 Vict. c. 106, s. 50; 22 & 23 Vict. c. 11, s. 10; 22 & 23 Vict. c. 39, s. 13; 23 & 24 Vict. c. 130, s. 13; 24 & 25 Vict. c. 25, s. 13; and 24 & 25 Vict. c. 118, s. 13.

(c) This clause is framed from the 37 Geo. 3, c. 54, s. 11 (I), which related to debentures of the Bank of Ireland, and extends to any debenture issued under any lawful authority whatsoever, whether within the Queen's dominions or without.

The words of this clause originally were 'forge or alter;' but as the clause contained no intent to defraud, the Select Committee of the Commons thought 'fraudulently' ought to be prefixed to 'alter;' but by some mistake it is placed before 'forge.' It is correctly placed elsewhere in the Act.

persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being convicted thereof in due form of law, shall be adjudged guilty of felony.' (d)

The 26 & 27 Vict. c. 73, gives further facilities to the holders of India stock; and by sec. 13, 'Whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any India stock certificate or coupon, or any document, purporting to be any India stock certificate or coupon, issued in pursuance of this Act or shall demand or endeavour to obtain or receive any share or interest of or in India stock, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (e) to be kept in penal servitude for life, [or for any not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.']

Sec. 14. 'Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in India stock, or of any India stock certificate or coupon issued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such India stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 13.

Sec. 15. 'Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall engrave or make upon any plate, wood, stone, or other material, any India stock certificate or coupon purporting to be an India stock certificate or coupon issued or made under and in pursuance of this Act, or to be a blank India stock certificate or coupon issued or made as aforesaid, or to be a part of such a stock certificate or coupon, or shall use any such plate, wood, stone, or other material for the making or printing any such India stock certificate or coupon, or any such blank India stock certificate or coupon, or any part thereof respectively, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any such blank India stock certificate or coupon, or part of any such India stock certificate or coupon, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (e) to be kept in penal servitude for any term not exceeding fourteen years, [and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.']

(d) As this is a felony for which no punishment is expressly provided, the principals in the first and second degree are punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9, and 1 Vict. c. 90, s. 5.

(e) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).



Especial provisions have also been made respecting forgeries affecting some companies, not requiring particular notice in this work ; and which indeed may be considered as having been rendered of less importance by the general statutes applying to forgeries committed with the intention of defrauding any corporation whatsoever. (*f*)

(*f*) *Post*, Chap. xl. *Of the Forgery of Private Papers, &c.*

## CHAPTER THE THIRTY-EIGHTH.

### OF FORGING AND TRANSPOSING STAMPS.

By the Stamp Duties Management Act, 1891, (54 & 55 Vict. c. 38) (a) sec. 13, 'Every person who does, or causes or procures to be done, or knowingly aids, abets, or assists in doing, any of the acts following; that is to say, (b)

- (1) Forges a die or stamp;
- (2) Prints or makes an impression upon any material with a forged die;
- (3) Fraudulently prints or makes an impression upon any material from a genuine die;
- (4) Fraudulently cuts, tears, or in any way removes from any material any stamp, with intent that any use should be made of such stamp or of any part thereof;
- (5) Fraudulently mutilates any stamp, with intent that any use should be made of any part of such stamp;
- (6) Fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp;
- (7) Fraudulently erases or otherwise either really or apparently removes from any stamped material any name, sum, date, or other

(a) By 43 & 44 Vict. c. 33, s. 4 (1). The enactments providing for the punishment of offences relating to stamp duties shall apply in like manner as if the poundage under this Act [on postal orders] were a stamp duty.

(b) By 54 & 55 Vict. c. 38, s. 27, 'In this Act, unless the context otherwise requires, —

The expression 'Commissioners' means Commissioners of Inland Revenue :

The expression 'officer' means officer of Inland Revenue :

The expression 'chief office' means chief office of Inland Revenue :

The expression 'head offices' means the head offices of Inland Revenue in Edinburgh and Dublin :

The expression 'duty' means any stamp duty for the time being chargeable by law :

The expression 'material' includes every sort of material upon which words or figures can be expressed :

The expression 'instrument' includes every written document :

The expression 'die' includes any plate,

type, tool, or implement whatever used under the direction of the Commissioners for expressing or denoting any duty, or rate of duty, or the fact that any duty or rate of duty or penalty has been paid, or that an instrument is duly stamped, or is not chargeable with any duty or for denoting any fee, and also any part of any such plate, type, tool, or implement :

The expressions 'forge' and 'forged' include counterfeit and counterfeited :

The expression 'stamp' means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee :

The expression 'stamped' is applicable as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto :

The expression 'executed' and 'execution,' with reference to instruments not under seal, mean signed and signature :

The expression 'justice' means justice of the peace.

matter or thing whatsoever thereon written, with the intent that any use should be made of the stamp upon such material ;

(8) Knowingly sells or exposes for sale or utters or uses any forged stamp, or any stamp which has been fraudulently printed or impressed from a genuine die ;

(9) Knowingly, and without lawful excuse (the proof whereof shall lie on the person accused) has in his possession any forged die or stamp or any stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed,

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding fourteen years, or to be imprisoned with or without hard labour for any term not exceeding two years.'

**Making paper in imitation of paper used for stamp duties.** — Sec. 14. 'Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused) —

(a) Makes or causes or procures to be made, or aids or assists in making, or knowingly has in his custody or possession, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or used by or under the direction of the Commissioners for receiving the impression of any die, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same ; or

(b) Causes or assists in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices and intended to imitate or pass for the same, to appear in the substance of any paper whatever, shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.'

Sec. 15. 'Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused) purchases or receives or knowingly has in his custody or possession —

(a) Any paper manufactured and provided by or under the direction of the Commissioners, for the purpose of being used for receiving the impression of any die before such paper shall have been duly stamped and issued for public use ; or

(b) Any plate, die, dandy-roller, mould, or other implement peculiarly used in the manufacture of any such paper, shall be guilty of a misdemeanor, and shall on conviction be liable to be imprisoned with or without hard labour for any term not exceeding two years.'

Sec. 16. 'On information given before a justice upon oath that there

is just cause to suspect any person of being guilty of any of the offences aforesaid, such justice may, by a warrant under his hand, cause every house, room, shop, building, or place belonging to or occupied by the suspected person, or where he is suspected of being or having been in any way engaged or concerned in the commission of any such offence, or of secreting any machinery, implements, or utensils applicable to the commission of any such offence, to be searched, and if upon such search any of the said several matters and things are found, the same may be seized and carried away, and shall afterwards be delivered over to the Commissioners.'

Sec. 17. — '(1) Any justice having jurisdiction in the place where any stamps are known or supposed to be concealed or deposited, may, upon reasonable suspicion that the same have been stolen or fraudulently obtained, issue his warrant for the seizure thereof, and for apprehending and bringing before himself or any other justice within the same jurisdiction the person in whose possession or custody the stamps may be found, to be dealt with according to law.

(2) If the person does not satisfactorily account for the possession of the stamps or it does not appear that the same were purchased by him at the chief office or at one of the head offices, or from some person duly appointed to sell and distribute stamps or duly licensed to deal in stamps, the stamps shall be forfeited, and shall be delivered over to the Commissioners.

(3) Provided that if at any time within six months after the delivery any person makes out to the satisfaction of the Commissioners that any stamps so forfeited were stolen or otherwise fraudulently obtained from him, and that the same were purchased by him at the chief office or one of the head offices, or from some person duly appointed to sell and distribute stamps, or duly licensed to deal in stamps, such stamps may be delivered up to him.'

Sec. 18. — '(1) If any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to the punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps knowing the same to be forged.

(2) If the Commissioners have cause to suspect any such person of having in his possession any forged stamps, they may by warrant under their hands authorise any person to enter between the hours of nine in the morning and seven in the evening into any house, room, shop, or building of or belonging to the suspected person, and if on demand of admittance, and notice of the warrant, the door of the house, room, shop, or building, or any inner door thereof, is not opened, the authorised person may break open the same and search for and seize any stamps that may be found therein or in the custody or possession of the suspected person.

(3) All officers of the peace are hereby required, upon request by any person so authorised, to aid and assist in the execution of the warrant.

(4) Any person who —

(a) Refuses to permit any such search or seizure to be made as aforesaid; or

(b) Assaults, opposes, molests, or obstructs any person so authorised in the due execution of the powers conferred by this section or any person acting in his aid or assistance, and any officer of the peace who upon any such request as aforesaid, refuses or neglects to aid and assist any person so authorised in the due execution of his powers shall incur a fine of fifty pounds.'

Sec. 19. 'Where stamps are seized under a warrant, the person authorised by the warrant shall, if required, give to the person in whose custody or possession the stamps are found an acknowledgment of the number, particulars, and amount of the stamps, and permit the stamps to be marked before the removal thereof.'

Sec. 20. 'Every person who by any writing in any manner defaces any adhesive stamp before it is used shall incur a fine of five pounds: Provided that any person may with the express sanction of the Commissioners, and in conformity with the conditions which they may prescribe, write upon or otherwise appropriate an adhesive stamp before it is used for the purpose of identification thereof.'

Sec. 21. 'Any person who practises or is concerned in any fraudulent act, contrivance, or device, not specially provided for by law, with intent to defraud Her Majesty of any duty shall incur a fine of £50.'

The 55 Geo. 3, c. 185, (c) entitled 'An Act for repealing the stamp-office duties on advertisements, almanacks, newspapers, gold and silver plate, stage-coaches, and licences for keeping stage-coaches, now payable in great Britain; and for granting new duties in lieu thereof,' enacts that the powers, &c., pains and penalties contained in and imposed by the Acts relating to the duties by this Act repealed, and to any prior duties of the same kind or description, shall be of full force and effect, with respect to the duties by this Act granted, as far as the same shall be applicable, &c. (d) The seventh section enacts, 'If any person shall forge or counterfeit, or cause or procure to be forged or counterfeited any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any former Act relating to any duties on gold or silver plate made or wrought in Great Britain, for the purpose of marking or stamping any such gold or silver plate, in the manner directed by any such Act, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression of any such mark, stamp, or die, upon any such gold or silver plate, with intent to defraud His Majesty, his heirs or successors, or if any person shall mark or stamp, or cause or procure to be marked or stamped, any such gold or silver plate, or any vessel or ware of base metal, with any such forged or counterfeited mark, stamp, or die as aforesaid, or [shall transpose or remove, or cause or procure to be transposed or removed from one piece of gold or silver plate to another, or to any vessel or ware of base metal, any impression made with any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any

(c) This Act, except so far as it relates to the duties on plate, is repealed by 33 & 34 Vict. c. 99. See also 36 & 37 Vict. c. 91, by which the whole Act is repealed ex-

cept secs. 2, 4, and the schedule, so far as such sections and schedule relate to the duties on plate, and except sec. 7.

(d) Sec. 4.

former Act, for the purpose of marking or stamping of any such gold or silver plate as aforesaid; or if any person shall sell, exchange, or expose to sale, or export out of Great Britain, any such gold or silver plate, or any vessel or ware of base metal, having thereupon] the impression of any such forged or counterfeited mark, stamp, or die as aforesaid, or any forged, counterfeited, or resembled impression of any mark, stamp, or die so provided, made, or used as aforesaid, or [any impression of any such mark, stamp, or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be] forged or counterfeited, or [transposed or removed as aforesaid]; or if any person shall wilfully, and without lawful excuse (the proof whereof shall lie on the person accused), have or be possessed of any such forged or counterfeited mark, stamp, or die as aforesaid, or shall privately and secretly use any mark, stamp, or die so provided, made, or used as aforesaid, with intent to defraud His Majesty, his heirs or successors, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid, (e) shall be adjudged guilty of felony without benefit of clergy.' (f)

The 2 & 3 Will. 4, c. 120, entitled 'An Act to repeal the duties under the management of the commissioners of stamps on stage-carriages, and on horses let for hire in Great Britain, and to grant other duties in lieu thereof,' repeals so much of the 55 Geo. 3, c. 185, 'as relates to the duties on coaches, and on licences for keeping stage-coaches, and as relates to the offences in the said Act mentioned respecting such duties and licences;' and by sec. 32 enacts, 'that if any person shall forge or counterfeit, or shall cause or procure to be forged, counterfeited, or resembled, any numbered plate directed to be provided, or which shall have been provided, made, or used, in pursuance of this Act, or of any former Act relating to the duties payable in respect of stage-carriages, or shall wilfully fix or place, or shall cause or permit, or suffer to be fixed or placed, upon any stage-carriage or other carriage, any such forged or counterfeited plate, or if any person shall sell or exchange, or expose to sale, or utter any such forged or counterfeited plate, or if any person shall knowingly, and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited plate, knowing such plate to be forged or counterfeited, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence as afore-

(e) The 4 & 5 Vict. c. 56, s. 1, recites so much of this section as is included within the brackets, and enacts that after the 1st October, 1871, 'if any person shall be convicted of any of the offences hereinbefore specified, such person shall not be subject to any sentence, judgment, or punishment of death, but shall 'be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years [now penal servitude for life, or not less than three years], or to

be imprisoned for any term not exceeding three years; and by sec. 4, such imprisonment may be with or without solitary confinement and hard labour. With regard to the other offences contained in this section, as they are neither expressly repealed nor made capital by the 1 Will. 4, c. 66, they are punishable under the 24 & 25 Vict. c. 98, s. 48, *ante*, p. 684.

(f) See 5 Geo. 4, c. 52 (local and personal), s. 22, as to plate wrought or made within the town of Birmingham, and within thirty miles thereof.

said, shall be adjudged guilty of a misdemeanor, and being thereof convicted, shall be liable to be punished by fine or imprisonment, or by both, such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the Court shall think fit.

The 9 Geo. 4, c. 18, entitled 'An Act to repeal the stamp duties on cards and dice,' &c., enacts, by sec. 35, that 'if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited any type, die, seal, stamp, mark, plate, or device, or any part of any type, die, seal, stamp, mark, plate, or device, which shall be at any time provided, made, or used by or under the authority of the commissioners of stamps in pursuance of this Act, or shall counterfeit, or shall cause or procure to be counterfeited or resembled the impression of any such type, die, seal, stamp, mark, plate, or device, or any part thereof, upon any playing card or dice, or upon any label, thread, or paper; or shall forge or counterfeit the name, handwriting, or signature of any sealing officer or other officer of stamps, to or upon any wrapper, paper, or material in which any dice shall be actually enclosed; or shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, any mark or name, or any part of any mark or name, directed to be used by the commissioners of stamps (*g*) in pursuance of this Act, in order to distinguish the maker of any such cards or dice respectively, and printed or marked on, or affixed to, or making part of the wrapper, label, or paper in which any playing cards or dice shall be actually enclosed, with intent to defraud His Majesty, his heirs or successors, of any of the duties at any time by law payable upon cards or dice; or shall utter, or sell, or expose to sale, or part with for use in play, any card, die, ace of spades, label, wrapper, or jew whatsoever, with such counterfeit seal, stamp, mark, device, impression, name, or signature, knowing the same to be counterfeit, or shall privately or fraudulently use any seal, stamp, mark, plate, device, or label at any time provided, made, or used by or under the authority of the commissioners of stamps in pursuance of this Act, with intent to defraud His Majesty, his heirs and successors, of any of the duties at any time by law payable upon cards or dice; every person convicted of any such offence, in due form of law, shall be adjudged a felon, and shall suffer death.' (*h*)

Besides the statutes which relate to the forging, &c., the stamps and marks on *plate*, by which the *duty* payable to the Crown is denoted, there are others which relate to the offences of forging, &c., the *assay* marks, or stamps required to be affixed to gold and silver manufactures in order to denote their standard value. But the former Acts on this subject are repealed.

By the 7 & 8 Vict. c. 22, s. 2, 'Every person, who shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, any die or other instrument, or any part of any die or other instrument, provided or used or to be provided or used by the company of goldsmiths in London, or by any of the several companies of

(*g*) Now 'the commissioners of stamps and taxes,' by the 4 & 5 Will. 4, c. 60, s. 8.

(*h*) This section being neither expressly repealed by the 1 Will. 4, c. 66, nor

the offences contained in it rendered capital by that statute, such offences are now punishable under the 24 & 25 Vict. c. 98, s. 43, *ante*, p. 684.

goldsmiths in the cities of York, Exeter, Bristol, Chester, or Norwich, or the town of Newcastle-upon-Tyne, or by the companies of guardians of the standard of wrought plate in the towns of Sheffield or Birmingham respectively, for the marking or stamping of any gold or silver wares; and every person who shall mark with any such forged or counterfeit die or other instrument, or with any part of such forged or counterfeit die or other instrument as aforesaid, any ware of gold or silver, or any ware of base metal, or shall utter any such ware of gold or silver, or any such ware of base metal so marked as aforesaid, knowing the same to be so marked as aforesaid; and every person who shall forge or counterfeit, or by any means whatever produce an imitation of, or shall utter, knowing the same to be forged or counterfeit or an imitation, any mark or part of any mark of any die or other instrument provided or used or to be provided or used as aforesaid upon any ware of gold or silver, or any ware of base metal; and every person who shall transpose or remove, or shall utter, knowing the same to be transposed or removed, any mark of any die or other instrument provided or used or to be provided or used as aforesaid, from any ware of gold or silver to any other ware of gold or silver, or to any ware of base metal; and every person who shall without lawful excuse (the proof whereof shall lie on the party accused) have in his possession any such forged or counterfeit die or other instrument as aforesaid, or any ware of gold or silver, or any ware of base metal, having thereupon the mark of any such forged or counterfeit die or other instrument as aforesaid, or having thereupon any such forged or counterfeit mark or imitation of a mark as aforesaid, or any mark which shall have been so transposed or removed as aforesaid, knowing the same respectively to have been forged, counterfeited, imitated, marked, transposed, or removed; and every person who shall cut or sever from any ware of gold or silver any mark or any part of any mark of any die or other instrument provided or used or to be provided or used as aforesaid, with intent that such mark or such part of a mark shall or may be placed upon or joined or affixed to any other ware of gold or silver, or to any ware of base metal; and every person who shall place upon or join or affix to any ware of gold or silver or any ware of base metal any mark of any die or other instrument provided or used or to be provided or used as aforesaid, which shall have been cut or severed from any ware of gold or silver; and every person who shall, with intent to defraud Her Majesty, or any of the said several companies of goldsmiths and guardians respectively, or any person whatever, use any genuine die or other instrument provided or used or to be provided or used as aforesaid, and every person counselling, aiding, or abetting any such offender, shall be guilty of felony, and shall, at the discretion of the Court, either be transported (i) beyond the seas for any term not exceeding fourteen years nor less than seven years, or be imprisoned with or without hard labour for any term not exceeding three years. (j)

(i) Penal servitude for any term not exceeding fourteen and not less than three years.

(j) Sec. 3 imposes a pecuniary penalty on every dealer in gold or silver wares, having in his possession wares with forged

marks on them. See sec. 14 for the meaning of the terms used in the Act. And see the 17 & 18 Vict. c. 96, an Act for allowing gold wares to be manufactured at a lower standard than was previously allowed.



The prisoner was indicted under the 13 Geo. 3, c. 59, s. 14, and the 38 Geo. 3, c. 69, s. 7, for unlawfully transposing the lion passant from one gold ring to another; and it was clearly proved that he had transposed the mark, but there was no proof that the ring, to which it was transposed, was not genuine gold; and the jury found the prisoner guilty of transporting the hall-mark from one genuine ring to another genuine ring, but without any fraudulent intent; it was held, however, that as there were no words in the statutes referring to any fraudulent intent, that finding amounted to a verdict of guilty. (*k*) The prisoner was, however, afterwards pardoned.

An indictment, under the repealed Act, 12 Geo. 3, c. 48, stated that the defendant did feloniously write the word 'six,' being a certain part of a licence to let horses on hire, in respect whereof a certain duty was then payable, on a certain piece of paper whereon had been before written a licence to let horses for hire, which said paper had been before duly stamped, and it appeared that the defendant was the father of the farmer of the post-horse duty of a district, and was in the habit of acting for his son in the duties of this situation, and that in 1833 one Hinckley took out a licence to let post horses, which was granted by the defendant, and bore a 7s. 6d. stamp. Another licence was granted in 1834, and on an application for a third licence in 1835, the defendant, instead of granting a new licence, as he ought to have done, altered the date of the old licence from 1833 to 1835, and the time of its expiration from 1834 to 1836, and received 7s. 6d. from Hinckley. Lord Abinger, C. B., 'I consider that no fraud is proved. To come within the mere words of the Act, it is not necessary that it should have been done fraudulently; still I am of opinion, that if a person innocently, and without any intent to defraud, wrote anything on this paper, it would not be an offence. Whether fraud was intended is a question for the jury.' 'Suppose a person had made a perfect deed, which was executed, and afterwards it was found necessary to alter the date and some of the terms, and the parties altered the original deed, intending to send it to the stamp-office to have new stamps put upon it, would they be liable to be transported? The enactment on which this case is founded is general, and makes it a felony to write upon any stamped document anything which makes it liable to a new stamp before such new stamp is put upon it.' For the Crown it was submitted that, by the terms of the Act, any person thus writing upon a stamped document was within its provisions, even if he had no intent to defraud. Lord Abinger, C. B. (in summing up), 'The Act of Parliament does not say that an intent to deceive or defraud is essential to constitute this offence, but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty, is liable to be transported. I am of opinion, and I hope I shall not be found to be wrong, that to constitute this offence there must be a guilty mind. It is a maxim, older than the law of England, that a man is not guilty unless his mind be guilty. If a person through mistake thought he could alter this licence, and send the 7s. 6d. to Somerset House, that would be no

(*k*) *R. v. Ogden*, 6 C. & P. 631. *J. A. Park, J.*, and *Bolland, B.* See *R. v. Allday*, *post*, p. 720.

felony in law, any more than it would be in reason, justice, or common sense. If the defendant meant to defraud the government of 7s. 6d., he is guilty; but as it could have been easily proved, if the duty had not been paid on Mr. Hinckley's licence, and no such evidence has been given, I think you should presume in favour of innocence. You will say whether you think that the defendant intended to commit any fraud. You may find that he made the alterations in the licence, but that he did so without any fraudulent intent, and I can put the matter in a train of investigation; or you may (and you have a right, if you think proper to do so) find a verdict of not guilty.' (l)

A question was made upon that part of the repealed Act 12 Geo. 3, c. 48, which relates to the offence of fraudulently getting off a stamp from parchment or paper, with intent to use the same for any other writing, &c., whether a person taking a stamp from a writ, fixing it to another writ of the same kind, and then selling it to a law stationer to be disposed of in his business, and used by any person who might purchase it of him, was a sufficient using of it within the words of the statute. It was contended that as the statute was silent as to uttering, vending, or exposing to sale, it would violate the known rules of construction to say, in so penal a case, that the sale to the law stationer was made with an intent to use the stamp in the manner described by the Act. No opinion of the judges upon this point appears to have been delivered; but the prisoner, after lying a long time in gaol, was ultimately discharged. (m)

One who innocently cut off the stamp and part of the parchment, &c., from an instrument was guilty of an offence under the 55 Geo. 3, c. 184, s. 7, (now repealed) if he afterwards got off such stamp from such part of the parchment with intent to use it again. And it was equally an offence, whether the impression was made before or after the 55 Geo. 3, c. 184. (n)

The following case arose upon the 23 Geo. 3, c. 49, s. 20, by which it was enacted that if any person should forge, &c., any stamp or mark directed or allowed to be used by the Act for the purpose of denoting the duties therein mentioned, or should fraudulently use any of the said stamps or marks, or should 'utter, vend, sell, or expose to sale any paper liable to the said duties, with any counterfeit mark or impression thereon,' knowing the same to be counterfeited, such person should be guilty of felony. The first count, after stating that a certain stamp was provided by the statute for stamping every piece of paper upon which any receipt, &c., upon the payment of money amounting to £2, &c., was written, with a stamp duty of 2d., &c., stated that the prisoner, intending to defraud the King of the duty on, &c., 'unlawfully, fraudulently, and feloniously did utter and ex-

(l) *R. v. Allday*, 8 C. & P. 136. The jury found a general verdict of 'not guilty.' It was objected in this case that the indictment was bad; first, because the writing the word should have been charged to have been fraudulently done; second, that the instrument ought to have been set out; third, that these alterations were not within the meaning of the statute, which referred to some independent writing of some new instrument, and not to the mere altering of

a word or figure in an old one; but no opinion was expressed on any of these objections. *R. v. Page*, 8 C. & P. 122, was cited for the prisoner. See *A. G. v. Shillibeer*, 3 Exch. R. 71, which, though decided only on the construction of the 2 & 3 Will. 4, c. 120, s. 81, contains observations strongly confirmatory of Lord Abinger's opinion.

(m) *Field's case*, 1 Leach, 383.

(n) *R. v. Smith*, R. & M. C. C. R. 314, 5 C. & P. 107.

pose for sale to one Hannah Gabriel, 1,000 pieces of paper liable to the said duty of twopence, with a counterfeit impression upon each and every one of the said pieces of paper resembling the impression of the said stamp then and there used, according to the form of the statute, &c., he, the defendant, at the said time of uttering, &c., well knowing the said impression on the said pieces of paper so by him uttered, &c., to be counterfeited; against the form of the statute, &c.' The second count was the same as the first, except in this respect, that the words, 'liable to the said duty of twopence' were omitted. An objection was taken on behalf of the prisoner, on the ground that the words 'papers liable to the said duties' were entirely void of the precise sense and definition to which they were applied; and also that the indictment had not sufficiently stated the offence according to the words of the statute. The prisoner having been found guilty, the question was reserved for the consideration of the judges; ten of whom (Skynner, C. B., and Hotham, B., being absent from indisposition) were unanimous that the conviction was right; and their opinion was afterwards delivered by Gould, J., to the following effect: 'The objection arises upon a supposed inaccuracy of the words in the statute, "paper liable to the said duties," in the plural number; which words the present indictment has properly pursued and necessarily applied to the particular duty in question, viz., the duty of twopence on receipts; and the judges are of opinion that the indictment is properly drawn, although a duty of one description only is mentioned. The material question is, what the legislature meant by the words "paper liable to the said duties"? And it was said that as one particular piece of paper cannot be liable to any of the duties more than another, it would follow that all the writing paper in the world might be considered as "paper liable to duties," and every utterer or seller of paper of any description might be indicted for a capital offence, in having exposed to sale "paper liable to the said duties." But the judges are of opinion that, upon a due attention to the present statute, and the 24 Geo. 3, c. 7, upon the same subject, it will appear that the words "paper liable to the said duties" are capable of a clear and unequivocal meaning. The rules by which the expressions of the legislature are to be interpreted are, first, that if any part of a statute is penned obscurely, and other passages in the same statute will elucidate that obscurity, recourse ought to be had to such context for that purpose; and secondly, that if there are several statutes upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. By adopting these rules in the present case, it will appear that the words "paper liable to the said duties" are not to be taken in the large and absurd sense which was attempted to be imposed upon them, namely, as applying to every species of paper on which receipts might probably be written, but are to be taken as applying distinctly to such pieces of paper only as are destined or prepared for the uses mentioned in the statute. The paper which is destined and prepared for the use of writing receipts thereon is the paper meant by the words "paper liable to the duties;" and therefore all paper upon the face of which a mark appears resembling the mark which the Act requires, is evidently "paper liable to the duties," because the prepa-

ration of thus marking it discovers the purpose for which it is designed. Upon the papers mentioned in the indictment there appears a false stamp or impression resembling the true stamp which the law requires for receipts : this discovers the use for which they were destined and prepared, and brings them within the general words of the Act, "paper liable to the said duties." The judges are, therefore, unanimously of opinion that the prisoner was properly convicted ; and that the words "paper liable to the said duties" are to be applied, according to the subject matter, to such paper, which, from the counterfeit mark upon it, appears to be prepared to be used, as if the mark were genuine, for a receipt.' (o)

It appears also that some of the judges were of opinion that the second count, which omits the words 'liable to the said duties,' was sufficient ; for it was a charge of fraudulently uttering, &c., paper with a counterfeit impression, resembling the said stamps used in pursuance of the said statute, knowing, &c. ; and this in substance was a charge of its being paper denoted by the said impression to be destined for writing receipts, and, as such, being paper liable to that duty. (p)

A question was made in the following case, as to a distinction between the words 'duties of excise' and 'duties under the management of the commissioners of excise.' The prisoners were indicted for forging a stamp on foreign muslins, printed, &c., here, with intent to defraud the King of the duty ; and one of them having been convicted, an objection was taken by his counsel on these grounds. That the offence was originally created by the 25 Geo. 3, c. 72, s. 17, by which the duties, for securing of which the stamps were provided, were imposed. That by 27 Geo. 3, c. 13, s. 35, all the former duties are repealed, except duties due, and penalties and forfeitures incurred at the time of passing that Act ; and therefore it was argued that all penalties were annihilated unless re-enacted. That this as well as all preceding statutes, took a distinction between *duties of excise* and *duties under the management of the commissioners of excise* ; according to what was observed by Ashurst, J., in *R. v. The Justices of Surrey*. (q) That sec. 38 of the latter statute states that 'all pains, penalties, fines, and forfeitures of any nature or kind whatsoever, as well pains of death as others, for any offence in force before the 10th of May, 1787, made for securing the revenue of excise, or other duties under the management of the commissioners of excise, &c., shall extend to and be applied for and in respect of the several *duties of excise*, and allowances, bounties, and drawbacks of duties of excise thereby charged and allowed, &c.' That therefore those penalties and pains of death, being re-enacted only so far as they relate to *duties of excise*, and not to duties or sums *under the management of commissioners of excise* (which was the case with respect to the duty in question), they could not be revived by construction ; but being so highly penal, must be specially re-enacted. Another objection was that the indictment did not pursue the words of the statute ; as it stated the duty to be chargeable *for, on, and in respect of* foreign muslin, &c., whereas the words

(o) Palmer's case, 1 Leach, 352. 2 East, P. C. c. 19, s. 19, p. 893.

(p) 2 East, P. C. c. 19, s. 19, p. 895.  
(q) 2 T. R. 504.

of the statutes imposing the duty were 'for and upon' in some of the clauses, 'on' in others, 'upon' in others, and 'for' in the schedule; but this objection was afterwards thought not worth urging. Upon the principal objection ten of the judges (all who were present at the conference) held that the conviction was right. Eyre, C. J., thought that the naming of *duties of excise* and *duties under the management of the commissioners of excise* was tautology. But all held it clear that the expressions were used as synonymous in this Act; adverting to schedule F, in which the duties on muslins are denominated 'duties of excise.' (r)

On an indictment on the 12 Geo. 2, c. 26, s. 8, 31 Geo. 2, c. 32, s. 14, and 24 Geo. 3, c. 53, s. 16, for removing from one silver kneebuckle to another silver kneebuckle certain stamps, marks, and impressions, to wit, the King's head and the lion rampant, with intent to defraud the King, against the statute, &c.; on producing the silver kneebuckle in evidence, it appeared that the mark was a lion passant, instead of a lion rampant; and the Court held the variance fatal. (s)

The indictment was framed on the 44 Geo. 3, c. 98 (t) for forging and uttering medicine stamps. The first count charged that the prisoner feloniously did forge and counterfeit, &c., *a certain mark* provided and used in pursuance of a certain Act of Parliament, entitled, &c. The second count charged that he did feloniously utter *a certain paper* with a forged and counterfeit mark, which mark was forged and counterfeited to resemble a certain mark provided and used in pursuance of the said Act, he well knowing the said mark to be forged. The third count was for knowingly vending and selling a certain paper with a forged mark, &c. The four remaining counts were the same as the former, except that they described it as *a stamp* instead of *a mark*; and all the counts laid the intention to be to defraud His Majesty of the duties charged and imposed by the said Act. The prisoner was a vendor of patent medicines, and sold certain boxes of Dr. Jebb's pills, with the counterfeit label on them. Many of these counterfeit labels were found in his possession entire. They were of an oblong form, coloured with red ink, similarly to the stamps for patent medicines issued by government; and having like them, at one end, the word 'stamp,' and at the other end the word 'office,' printed transversely, and on a blank on the first-mentioned end, printed longitudinally, the words 'value above 1s.,' and on a blank on the other end, also printed longitudinally, the words 'not exceeding 2s. 6d.,' as the legal stamps also have; and having in the centre a white circle, which in the counterfeit was all blank, except that it bore the words '*Jones, Bristol*,' printed thereon; whereas in the legal stamp that circular space was circumscribed with a red ring, and inscribed with another smaller red ring, and in the circular space between the two rings were printed the words 'duty, threepence;' and on the space within the inner red ring on the legal stamp was impressed in red ink the figure of a crown. When the prisoner used these stamps, he cut out the circular space bearing the words '*Jones*,

(r) R. v. Hall, 2 East, P. C. c. 19, s. 19, p. 895.

(s) Lee's case, 1 Leach, 416.

(t) This Act is repealed except so far as

it relates to the duties on medicines, and on licences for vending the same, 33 & 34 Vict. c. 99.

Bristol,' and pasted on the packets of medicine the two ends of the label without the middle part, and concealed the deficiency of that part by a waxen seal extending over it. Stamps were uttered in this state by the prisoner affixed to the pills which he sold. Upon these facts the jury found the prisoner guilty; but two objections were taken in his behalf: first, that the forged stamp was not a sufficiently near resemblance of the genuine stamp to constitute forgery; secondly, that the indictment was deficient for not setting out or describing what the stamp was that was forged. The objections were referred to the consideration of the twelve judges, ten of whom (Lawrence and Bayley, JJ., being absent) were of opinion that the objections were unfounded, and the conviction right. Grose, J., in delivering their opinion, said: 'As to the first point, it was proved that this stamp had, in every respect, and in all its parts, a perfect resemblance to a genuine stamp, excepting only that the centre part in a genuine stamp, which specifies and denotes the duty, was in the forged stamp cut out; and a paper with the words "Jones, Bristol" on it pasted over the vacancy. It was also proved that those parts which still remained were a perfect resemblance of the same parts on the genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer. An exact resemblance, or *facsimile*, is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. In this case the jury, by their verdict, have found that this stamp had a sufficient likeness to give it an aptitude to deceive, which is all the law requires. As to the second point, the indictment charges the prisoner with having forged a certain *mark*, and with having uttered a certain paper with a forged and counterfeited *mark*, resembling a mark provided and used in pursuance of the Act; and the other counts describe it to be a *stamp*. The statute makes the forging and uttering of such a *mark* or *stamp*, as is thereby directed to be affixed to these articles, a capital offence. The indictment contains all the words that the Act requires to constitute the offence.' (u)

Upon the trial of any indictment for any offence mentioned in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for such attempt.

(u) Collicott's case, 2 Leach, 1048. 4 Taunt. 300. R. & R. 212, 229.

## CHAPTER THE THIRTY-NINTH.

### OF THE FORGERY OF OFFICIAL PAPERS, SECURITIES, AND DOCUMENTS.

FORGERIES of official papers, securities, and documents have been made in many instances the subject of especial legislative enactments.

The 52 Geo. 3, c. 143, s. 6, (a) enacts, 'that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract, assignment, certificate, receipt, or attested copy of any certificate made out or purporting to be made out by any person or persons authorised to make out the same by any Act of Parliament touching the redemption or sale of the land tax, or of any part thereof; or if any person shall wilfully utter any such forged, counterfeited, or altered contract, assignment, certificate, receipt, or attested copy of certificate, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or other person or persons : ' every person so offending shall be adjudged guilty of felony without benefit of clergy. (b)

The 23 Geo. 3, c. 70, s. 9, made the forgery of *excise permits*, &c., a capital felony: and a clause nearly similar was contained in the 52 Geo. 3, c. 143, s. 9; and the 2 Will. 4, c. 16, which was passed to consolidate the laws regulating the granting of permits under the excise laws, by sec. 3 enacts, that 'every person who shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his, her, or their custody or possession, not being authorised by the said commissioners, and without lawful excuse (the proof whereof shall lie on the person accused), any mould or frame, or other instrument having therein the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the said commissioners for permits, or with any or part of such words, figures, marks, or devices, or any of them, intended to imitate or pass for the same; and every person, except as before excepted, who shall make, or cause or procure to be made, or aid or assist in the making, any paper in the

(a) The whole of this Act, except this section, is repealed by the 36 & 37 Vict. c. 91. The 42 Geo. 3, c. 116, s. 194, is repealed by 35 & 36 Vict. c. 63.

(b) The 52 Geo. 3, c. 143, s. 6, appears to be superseded by the 24 & 25 Vict. c. 98, s. 23 (*post*, next chapter), as far as relates to the forging of any receipt. With

respect to the other instruments above mentioned, the forgery of them not having been made punishable with death by the 1 Will. 4, c. 66, and that Act not having repealed the 52 Geo. 3, c. 143, s. 6, persons convicted of such offences are punishable under the 24 & 25 Vict. c. 98, s. 48, *ante*, p. 737.

substance of which the words "excise office," or any other words, figures, marks, or devices peculiar to or appearing in the substance of the paper used by the commissioners of excise for permits or any part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall knowingly have in his, her, or their custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever in the substance of which the words "excise office," or any other words, figures, marks, or devices, peculiar to and appearing in the substance of paper used by the commissioners of excise for permits, or any part of such words, figures, marks, or devices, or of any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall by any art, mystery, or contrivance, cause or procure, or aid or assist in causing or procuring the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the commissioners of excise for permits, or any or part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, to appear visible in the substance of any paper whatever; and every person not authorised or appointed as aforesaid, who shall engrave, cast, cut, or make, or cause or procure to be engraved, cast, cut, or made, or aid or assist in engraving, casting, cutting, or making any plate, type, or other thing in imitation of or to resemble any plate or type made or used by the direction of the commissioners of excise, for the purpose of marking or printing the paper to be used for permits; and every person, except as before excepted, who shall knowingly have in his or her custody or possession, without lawful excuse (proof whereof shall lie on the person accused), any such plate or type, (*d*) shall for every such offence be adjudged a felon, and shall be transported for the term of seven years, (*e*) or shall be imprisoned, at the discretion of the Court before whom such person shall be tried, for any period not less than two years.' (*f*)

Sec. 4. 'Every person who shall counterfeit or forge, or cause or procure to be counterfeited or forged, or assist in counterfeiting or forging any permit, or any part of any permit, or shall counterfeit any impression, stamp, or mark, figure, or device provided or appointed, or to be provided or appointed by the commissioners of excise to be put on such permit, or shall utter, give, or make use of any counterfeited or forged permit, knowing the same or any part thereof to be counterfeited or forged, or shall utter, give, or make use of any permit with any such counterfeited impression, stamp, or mark, figure, or device, knowing the same to be counterfeited; or if any person or persons shall knowingly or willingly accept or receive any counterfeited or forged permit, or any permit with any such counterfeited impres-

(*d*) See the 11 & 12 Vict. c. 121, s. 18, and 18 & 19 Vict. c. 38, s. 11, which extend this clause to the engraving, &c., plates, &c., for the purpose of making certificates under those Acts.

(*e*) Now penal servitude for any term not exceeding seven and not less than three years.

(*f*) This statute contains no provisions as to principals in the second degree or accessories; the principals in the second degree, therefore, are punishable according to the common law in the same manner as principals in the first degree, and the accessories are punishable under the 24 & 25 Vict. c. 94, vol. i. p. 174, *et seq.*



sion, stamp, or mark, figure, or device thereon, knowing the same to be counterfeited, shall for every such offence be adjudged guilty of a misdemeanor, and shall be transported for the term of seven years, (g) or fined and imprisoned, at the discretion of the Court.'(h)

Sec. 15. 'Every officer of excise who shall deliver out, or suffer to be delivered out, any paper prepared or provided, or appointed by the commissioners of excise to be used for permits in blank, or before such permit shall be filled up and issued agreeable to and in conformity with a request note; and every officer who shall knowingly give or grant any permit to any person not entitled to receive the same, or shall knowingly give or grant any false or untrue permit, or shall make any false or untrue entry in the counterpart of any permit given or granted by him, or shall knowingly or willingly receive or take any goods or commodities into the stock of any person or persons brought in with any false or untrue or fraudulent permit, or shall knowingly or willingly grant any permit for the removal of any goods or commodities out of or from the stock of any person or persons who shall have received or retained such goods or commodities, or any of them, under or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or shall knowingly or willingly give any false credit in the stock of any person or persons beyond the credit to which such stock is justly and truly entitled, so as to enable such person or persons falsely and fraudulently to obtain a permit or permits; or if any such officer shall knowingly or willingly suffer the same to be done directly or indirectly; every officer so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction shall suffer such punishment by fine and imprisonment, or fine or imprisonment, as the Court shall award; and every officer so convicted shall from thenceforth be incapable of holding any office or place in or relating to any of the revenues of the United Kingdom.'

By the Custom Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 28, 'If any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of any commissioner of customs, or of any accountant and comptroller-general of the customs, or of any person acting for them respectively, to any draft, instrument, or writing, whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the said commissioners of customs, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting, any draft, instrument, or writing in form of a draft, made by such accountant and comptroller-general or person as aforesaid, or shall utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud any person whomsoever; every such person or persons so offending, being thereof convicted, shall be declared and adjudged to be guilty of felony.' (i)

(g) Now penal servitude for any term not exceeding seven and not less than three years.

(h) See the 11 & 12 Vict. c. 121, s. 18,

and 18 & 19 Vict. c. 38, s. 11, which extend this clause to forging, &c., certificates under those Acts.

(i) The instruments mentioned in this

By 34 & 35 Vict. c. 103, (An Act to amend the law relating to the Customs and Inland Revenue) s. 8, 'If any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of any commissioner of customs, or of any accountant and comptroller-general of the customs, or of any person acting for them respectively, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the said commissioners of custom, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such accountant and comptroller-general or person as aforesaid, or shall utter or publish the same knowing it to be forged or counterfeited, with an intention to defraud any person whomsoever, every such person or persons so offending, being thereof convicted, shall be declared and adjudged to be guilty of felony.'

By sec. 19, Each of the several sections (*j*) of this Act set forth in column No. 1 of the table to this Act shall be deemed and taken to be incorporated in and form part of 'The Customs Consolidation Act, 1853,' in the order and place assigned to each such section in and by column No. 2 of the said table, and the said several sections of this Act shall be read and construed with the said 'Customs Consolidation Act, 1853,' and the provisions of the latter Act shall be deemed to relate to and be applicable to the said several sections of this Act, in the same manner and to the same extent as if the said several sections of this Act had been originally enacted therein, in the order and place so assigned to each such section in and by the said table.

By the 5 & 6 Vict. c. 35 (Property Tax Act), s. 181, 'If any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in forging, counterfeiting, or altering, any certificate of the commissioners of stamps and taxes, or of any other commissioners acting in the execution of this Act, or any certificate or receipt which the cashier of the Bank of England, or the receiver-general of stamps and taxes, or any officer for receipt, is by this Act authorised to give on the receipt of any money payable under this Act, or shall utter any such forged, counterfeited, or altered certificate or receipt as aforesaid, with intent to defraud Her Majesty, or any body politic or corporate, or any person whomsoever, every person so offending, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be transported for a term not exceeding fourteen years.' (*k*)

The 7 & 8 Geo. 4, c. 53, s. 56, enacts, 'That if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited,

section seem to be warrants for the payment of money within the meaning of the 24 & 25 Vict. c. 98, s. 23, and the forgery of them is now punishable under that section. As to principals in the second degree and accessories, see the same Act, sec. 49, vol. i. p. 191. See the 7 & 8 Geo. 4, c. 53, s. 56, *infra*.

(*j*) The above section 8 is one of them, being in lieu of section 28 in 18 & 17 Vict. c. 107, The Customs Consolidated Act, 1853.

(*k*) Penal servitude for any term not exceeding fourteen and not less than three years.

or shall knowingly and wilfully aid or assist in forging or counterfeiting, the name or handwriting of any receiver-general of excise, or of any excise comptroller of the cash as aforesaid, or of any of the persons duly authorised as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money, bills, notes, drafts, cheques, or orders, for the payment of money, in the hands or custody of the governor and company of the Bank of England, on account of such receiver-general as aforesaid; or if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in the forging or counterfeiting, of any draft, instrument, or writing in the form of a draft, instrument, or writing made by any receiver-general of excise, or by any excise comptroller of the cash as aforesaid, or by any person or persons authorised as aforesaid, or shall utter or publish any draft, instrument, or writing so forged or counterfeited, knowing the same to be forged or counterfeited, with an intention to defraud His Majesty or any person whomsoever; every person so offending, and being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.' (l)

By the 24 & 25 Vict. c. 98, s. 8, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill or exchequer bond, or exchequer debenture, (m) or any endorsement on or assignment of any exchequer bill or exchequer bond or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (n)

Sec. 9. 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his custody or possession any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills or exchequer bonds or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imi-

(l) Mr. Lonsdale (St. Cr. L. 90) observes that this section appears to be superseded by the 1 Will. 4, c. 66, s. 10 [re-enacted by the 24 & 25 Vict. c. 98, s. 23], so far as relates to the forging of any draft, instrument, or writing, for or in order to the receiving or obtaining any of the bills, notes, drafts, cheques, or orders for the payment of money in the hands or custody of the governor and company of the Bank of England on account of the receiver-general of excise. With respect to the other instruments above mentioned, viz., those for or in order to the receiving or obtaining any of the

money in the Bank of England on account of such receiver-general, they appear to be warrants for the payment of money within the 1 Will. 4, c. 66, s. 4, which is re-enacted by the 24 & 25 Vict. c. 98, s. 39, and the forgery, &c., thereof, will be punishable accordingly.

(m) See *ante*, p. 699.

(n) This clause is taken from part of the 1 Will. 4, c. 66, s. 3, and 16 & 17 Vict. c. 23, s. 41. There was a similar clause in the 48 Geo. 3, c. 1, s. 9 (1), as to the forgery of exchequer bills in Ireland. See also the 24 & 25 Vict. c. 5, s. 13.

tate such words, letters, figures, marks, lines, threads, or devices, or any plate peculiarly employed for printing such exchequer bills, bonds, or debentures, or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, bonds, or debentures, or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.’ (o)

Sec. 10. ‘Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills, bonds, or debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall knowingly have in his custody or possession any paper whatsoever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any parts of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall cause or assist in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or shall take or assist in taking any impression of any such plate, die, or seal as in the last preceding section mentioned, shall be guilty of felony, and being convicted thereof shall be liable,’ as in sec. 9. (p)

Sec. 11. ‘Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive, or knowingly have in his custody or possession, any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commissioners of Her Majesty’s treasury, for the purpose of being used as exchequer bills or exchequer bonds or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die, or seal as in the last two preceding sections mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding three years, with or without hard labour.’ (q)

(o) This clause is framed on the 5 & 6 Vict. c. 66, s. 9, and 16 & 17 Vict. c. 132, s. 10, which extended to Ireland. See also the 24 & 25 Vict. c. 5, s. 18.

The words ‘frame,’ ‘mould,’ ‘exchequer debentures,’ and ‘seal,’ are new.

(p) This clause is framed on the 5 & 6 Vict. c. 66, s. 9, and 16 & 17 Vict. c. 132, s. 10, which extended to Ireland. See also the 24 & 25 Vict. c. 5, s. 18.

The words ‘debentures’ and ‘seal’ are new.

(q) This clause is framed on the 5 & 6 Vict. c. 66, s. 10, and the 16 & 17 Vict. c. 132, s. 11, which extended to Ireland. See also 24 & 25 Vict. c. 5, s. 19.

The words ‘exchequer debentures’ and ‘seals’ are new.

any paper or other substance or material whatsoever, with any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid; or if any person shall use, utter, sell, or expose to sale, or shall cause or procure to be used, uttered, sold, or exposed for sale, or shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any paper or other substance or material having thereon the impression or any part of the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression to be false, forged, or counterfeit; or if any person shall, with intent to defraud Her Majesty, her heirs or successors, privately or fraudulently use, or cause or procure to be privately or fraudulently used, any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, or shall with such intent privately or fraudulently stamp or mark, or cause or procure to be stamped or marked, any paper or other substance or material whatsoever, with any such die, plate, or other instrument as last aforesaid; or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any paper or other substance or material so privately or fraudulently stamped or marked as aforesaid; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, (u) or to be imprisoned for any term not exceeding four years, nor less than two years, as the Court shall award.' (v)

(u) See note (r), *supra*.

(v) Sec. 23, 'If any person shall fraudulently get off or remove, or cause or procure to be gotten off or removed from any letter or cover, or any paper or other substance or material, the stamp or impression of any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, with intent to use, join, fix, or place such stamp or impression for, with, or upon any other letter, cover, paper, or other substance or material; or if any person shall fraudulently use, join, fix, or place for, with, or upon any letter or cover, or any paper or other substance or material, any such stamp or impression as aforesaid which shall have been gotten off or removed from any other letter, cover, paper, or other substance or material; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from, or shall cause or procure to be so erased, cut,

scraped, discharged, or gotten out of or from any letter or cover, or any paper or other substance or material, any name, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such letter or cover, paper, or other substance or material, or that the same may be used for the purpose of defrauding Her Majesty, her heirs or successors, of any of the rates or duties aforesaid; or if any person shall make, do, or practise, or be concerned in any other fraudulent act, contrivance, or device whatever, not specially provided for by this or some other Act of Parliament, with intent or design to defraud Her Majesty, her heirs or successors, of any of the rates or duties aforesaid; every person so offending in any of the several cases in this clause mentioned shall forfeit and pay to Her Majesty, or her heirs and successors, the sum of twenty

The statutes authorising issues of exchequer bills frequently contain a clause relating to the forging, &c., of the certificates or receipts therein mentioned. The statutes also occasionally passed in order to grant annuities for the discharge of certain exchequer bills, made the forging of the certificates, &c., therein mentioned, offences.

The forging the name or handwriting of the receiver-general of the post-office, or persons employed by him, to any draft, instrument, &c., has been made the subject of especial legislative enactment.

The 1 Vict. c. 36, s. 33, enacts, 'that every person who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, the name or handwriting of the receiver-general for the time being of the general post-office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining of any money in the hands or custody of the governor and company of the Bank of England or Ireland, on account of the receiver-general of the post-office, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any draft, warrant, or order of such receiver-general, or of any person employed by or under him, for money or for payment of money, with intent to defraud any person whomsoever, shall be guilty of felony, and being convicted thereof shall be transported beyond the seas for life.' (r)

The 3 & 4 Vict. c. 96, 'An Act for the Regulation of the Duties of Postage,' by sec. 22 enacts, (s) 'that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any die, plate, or other instrument, or any part of any die, plate, or other instrument, which hath been, or shall or may be provided, made, or used by or under the direction of the commissioners of stamps and taxes, or by or under the direction of any other person or persons legally authorised in that behalf, for the purpose of expressing or denoting any of the rates or duties which are or shall be directed to be charged under or by virtue of the authority contained in the said recited Act of the last session of Parliament, (t) or under or by virtue of this Act; or if any person shall forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression, or any part of the stamp, mark, or impression, of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, upon any paper, or other substance or material whatever; or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument, resembling or intended to resemble, either wholly or part, any die, plate, or other instrument, which hath been, or shall or may be so provided, made, or used as aforesaid, or if any person shall stamp or mark, or cause or procure to be stamped or marked,

(r) Now penal servitude for life or for any term not less than three years.

(s) By 43 & 44 Vict. c. 33, which creates postal orders, 'Secs. 19, 22, 23, 26, 29, 30, of 3 & 4 Vict. c. 96 . . . shall apply as if

herein re-enacted with the substitution of poundage under this Act for the duties therein mentioned, and of orders under this Act for the envelopes therein mentioned.'

(t) 2 & 3 Vict. c. 52, s. 3.

any paper or other substance or material whatsoever, with any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid; or if any person shall use, utter, sell, or expose to sale, or shall cause or procure to be used, uttered, sold, or exposed for sale, or shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any paper or other substance or material having thereon the impression or any part of the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression to be false, forged, or counterfeit; or if any person shall, with intent to defraud Her Majesty, her heirs or successors, privately or fraudulently use, or cause or procure to be privately or fraudulently used, any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, or shall with such intent privately or fraudulently stamp or mark, or cause or procure to be stamped or marked, any paper or other substance or material whatsoever, with any such die, plate, or other instrument as last aforesaid; or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any paper or other substance or material so privately or fraudulently stamped or marked as aforesaid; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, (u) or to be imprisoned for any term not exceeding four years, nor less than two years, as the Court shall award.' (v)

(u) See note (r), *supra*.

(v) Sec. 23, 'If any person shall fraudulently get off or remove, or cause or procure to be gotten off or removed from any letter or cover, or any paper or other substance or material, the stamp or impression of any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, with intent to use, join, fix, or place such stamp or impression for, with, or upon any other letter, cover, paper, or other substance or material; or if any person shall fraudulently use, join, fix, or place for, with, or upon any letter or cover, or any paper or other substance or material, any such stamp or impression as aforesaid which shall have been gotten off or removed from any other letter, cover, paper, or other substance or material; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from, or shall cause or procure to be so erased, cut,

scraped, discharged, or gotten out of or from any letter or cover, or any paper or other substance or material, any name, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such letter or cover, paper, or other substance or material, or that the same may be used for the purpose of defrauding Her Majesty, her heirs or successors, of any of the rates or duties aforesaid; or if any person shall make, do, or practise, or be concerned in any other fraudulent act, contrivance, or device whatever, not specially provided for by this or some other Act of Parliament, with intent or design to defraud Her Majesty, her heirs or successors, of any of the rates or duties aforesaid; every person so offending in any of the several cases in this clause mentioned shall forfeit and pay to Her Majesty, or her heirs and successors, the sum of twenty

Sec. 29. 'If any person shall make, or cause to procure to be made, or shall aid or assist in the making, or shall knowingly have in his custody or possession, not being legally authorised by the commissioners of excise, or other person or persons appointed by the commissioners of Her Majesty's treasury, and without lawful excuse (the proof whereof shall lie on the person accused), any mould or frame, or other instrument, having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any machinery, or parts of machinery, for working any threads into the substance of any paper or any such thread, and intended to imitate or pass for such words, letters, figures, marks, lines, threads, or devices; or if any person, except as before excepted, shall make, or cause or procure to be made, or aid or assist in the making of any paper, in the substance of which shall be worked or shall appear visible any words, letters, figures, marks, lines, threads, or other devices peculiar to and worked into or appearing visible in the substance of any paper heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same; or if any person, except as before excepted, shall knowingly have in his custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever, in the substance whereof shall be worked, or appear visible, any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or devices, and intended to imitate or pass for the same; or if any person, except as aforesaid, shall by any art, mystery, or contrivance, cause or procure, or aid or assist in causing or procuring, any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or devices, and intended to imitate or pass for the same, to appear worked into or visible in the substance of any paper whatever; then and in every such case every person so offending shall for every such offence be adjudged a felon, and shall be transported for the term of seven years, (*w*) or shall be imprisoned, at the discretion of the Court before whom such person shall be tried, for any period not less than two years.' (*x*)

Sec. 30. 'If any person not lawfully authorised, and without lawful excuse (the proof whereof shall lie on the person accused), shall purchase or receive, or take or have in his custody or possession, any paper manufactured and provided by or under the directions of the commissioners of excise, or other person or persons appointed to provide the same by the commissioners of Her Majesty's treasury, for the purpose of being used for postage covers, envelopes, or stamps, and for receiving the impression of the dies, plates, or other instruments pro-

pounds, to be recovered with full costs of suit, and all expenses attending the same.' The 3 & 4 Vict. c. 96, contains no provisions for the punishment of accessories after the fact; they are therefore punishable under the 24 & 25 Vict. c. 94, s. 4, vol. i. p. 180, *et seq.*

(*w*) Penal servitude for any term not exceeding seven and not less than three years.

(*x*) See note (*v*), *supra*, *ad finem*, and the 9 & 10 Vict. c. 24.



vided, made, or used under the direction of the commissioners of stamps and taxes, or other person or persons legally authorised in that behalf, before such paper shall have been duly stamped with such impression and issued for public use, every such person shall for such offence be guilty of a misdemeanor and being convicted thereof, shall, at the discretion of the Court before whom such person shall be tried, be imprisoned for any period not more than three years, nor less than six calendar months.' (y)

The 4 & 5 Will. 4, c. 15, entitled, (z) 'An Act to regulate the office of the receipt of His Majesty's Exchequer at Westminster,' by sec. 28, enacts, 'that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering, any warrant, order for payment, or other document whatsoever, by this Act directed or authorised to be issued or made, or shall utter or publish as true, or knowingly or willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such warrant, order for payment, or other document whatsoever, with intent to defraud His Majesty, the governor and company of the Bank of England, or any other person or persons, any person so offending shall be deemed guilty of felony, and shall upon conviction be transported beyond the seas for the term of his natural life.' (a)

The 2 & 3 Will. 4, c. 125, s. 64, entitled, 'An Act for enabling His Majesty to direct the issue of exchequer bills to a limited amount, for the purposes and in the manner therein mentioned, and for giving relief to Trinidad, British Guiana, and St. Lucie,' enacts, 'that if any person or persons shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any certificate or certificates of the said commissioners, by this Act appointed as aforesaid, or any of them, or any receipt or receipts to be given by the cashier or cashiers of the governor and company of the Bank of England in pursuance of this Act, or shall wilfully deliver to the auditor of the receipt of His Majesty's exchequer for the time being, or to any officer appointed by him, or to the said commissioners by this Act appointed, or any of them, or to any officer or officers appointed by them or any of them, in the execution of the powers of this Act, or shall utter any such forged, counterfeited, or altered certificate or certifi-

(y) Sec. 66, 'for the more effectual prosecution of offences committed against the post-office,' enacts, 'that in any indictment or criminal letters for any offence committed upon or in respect of any property which may be laid in or stated to belong to the postmaster-general, it shall be sufficient to state any such property to belong to and lay it in "Her Majesty's postmaster-general," and it shall not be necessary to specify the name or addition of any such postmaster-general; and that whenever, in any indictment or criminal letters for any offence committed against the post-office Acts, it shall be necessary to mention for any purpose whatever, "Her Majesty's postmaster-

general," it shall be sufficient to describe such postmaster-general, as "Her Majesty's postmaster-general," without any further or other name, addition, or description whatsoever.'

(z) So much of this Act as relates to the preparation and issue of exchequer bills is repealed by the 29 & 30 Vict. c. 25.

(a) Penal servitude for life, or for any term not less than three years. This Act contains no provision for the punishment of principals in the second degree and accessories; such principals are therefore punishable like principals in the first degree, and the accessories under the 24 & 25 Vict. c. 94, vol. i. p. 180, *et seq.*

cates, receipt or receipts, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person whomsoever; then and in every such case, all and every person or persons so offending, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony.' (b)

The 5 & 6 Will. 4, c. 51, entitled, 'An Act for granting relief to the Island of Dominica,' and to amend the 2 & 3 Will. 4, c. 125, by sec. 5, (c) enacts, that 'all and every the several clauses, powers, provisions, enactments, penalties, and restrictions, in the said Act contained, so far as the same can be made applicable and are not varied by this Act, shall be taken to extend to this Act, and to everything to be done in pursuance of this Act, and as if all such clauses, powers, provisions, and enactments were herein repeated and made applicable to the said Island of Dominica, and to the loans and grants to be made in pursuance of this Act; and to every matter and thing to be done in pursuance of this Act; and all and every the securities to be taken in pursuance of this Act shall be taken in such manner as by the said Act is directed with respect to the securities thereby authorised or directed to be taken; and all and every such securities shall have such force, priority, and effect, in all respects as if they were taken in pursuance of and under the authorities of the said in part recited Act; and all and every the rules, orders, and directions made or to be made by the said commissioners shall apply to the said Island of Dominica, and the loans to be granted and the securities to be taken in pursuance of this Act, in all respects whatsoever, as if the loans hereby authorised to be made had been authorised by the said Act.'

By the 46 Geo. 3, c. 45, s. 9, the forging the hand of the treasurer of the ordnance, &c., to any draft or writing for obtaining money from the Bank of England, and the uttering any such draft, &c., knowing the same to be forged, were made capital offences. (d)

The 2 Will. 4, c. 53, (e) entitled, 'An Act for consolidating and amending the laws relating to the payment of army prize-money,' by sec. 49 enacts, amongst other things, that 'if any person shall forge or counterfeit or alter, or cause or procure to be forged or counterfeited or altered, or knowingly and willingly act, or aid or assist in forging or counterfeiting or altering the name or handwriting of any officer, non-

(b) The 1 Vict. c. 84, recites this section, and the present punishment for offences contained in it, by sec. 1 and 3 of that Act, and the 9 & 10 Vict. c. 24, s. 1, and the Penal Servitude Acts (vol. i. p. 73, *et seq.*), is penal servitude for life or for any term not less than three years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years, and with or without solitary confinement for any portion or portions of such imprisonment not exceeding one month at any one time, and not exceeding three months in any one year. Neither the 2 & 3 Will. 4, c. 125, nor the 1 Vict. c. 84, contain any provision for the punishment of

principals in the second degree and accessories. The principals in the second degree, therefore, are punishable in the same manner as principals in the first degree, and the accessories under the 24 & 25 Vict. c. 94, vol. i. p. 180, *et seq.*

(c) So much of this section as incorporates or applies any repealed enactments is repealed by 37 & 38 Vict. c. 35.

(d) The instruments enumerated in this enactment seem to be warrants for the payment of money within the 24 & 25 Vict. c. 98, s. 23, and the forgery of them is punishable under that section.

(e) Repealed as to the post-office, 1 Vict. c. 82, s. 1.

commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served, or be supposed to have served, in His Majesty's army or other military service, or the name or handwriting of any officer or under officer, clerk, or servant of or in the employ of the commissioners of the said Royal Hospital at Chelsea, or the name or handwriting of any officer or person in any way concerned in the paying, or the ordering, directing, or causing the payment of any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, or shall falsely make, forge, counterfeit, or alter, or willingly act, aid, or assist in the false making, forging, counterfeiting, procuring, or altering any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, authority, document, or writing whatsoever, relating to or in any wise concerning the payment of or the obtaining or claiming any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid in order to receive, obtain, or claim any such prize-money, grant, bounty-money, share, or other allowance of money, due or payable, or supposed to be due or payable as aforesaid, or shall utter or publish as true, or knowingly and willingly act or aid, or assist in uttering or publishing as true, any falsely made, or forged, or counterfeited, or altered letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, authority, document, or writing whatsoever, with intention to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim, from the said commissioners of the said Royal Hospital, or from any officer, under officer, clerk, or servant of the said commissioners, or from any person whatsoever authorised, or supposed to be authorised, to pay the same, the payment of any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, with intention to defraud any person or persons whatsoever, or any body, or bodies politic or corporate whatsoever, or shall knowingly take a false oath in order to obtain letters of administration, or the probate of any will, in order to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account or in respect of the service of any officer, non-commissioned officer, soldier, or other person as aforesaid, who shall have really served, or be supposed to have served, in His Majesty's army or other military service, or shall demand or receive any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, upon letters of administration, or a probate of a will, knowing the will on which such probate shall have been obtained to be false, forged, or counterfeited, or knowing such letters of administration, or the probate of such will as last aforesaid, to have been obtained by means of any such false oath, with intention to defraud any person or persons

whatsoever, or any body or bodics politic or corporate whatsoever, all and every person so offending, being thereof lawfully convicted, shall be and are as is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years, (*f*) as the Court before whom such person or persons shall be convicted shall adjudge.' (*g*)

The 7 Geo. 4, c. 16, entitled 'An Act to consolidate and amend several Acts relating to the Royal Hospitals for soldiers at Chelsea and Kilmainham,' by sec. 38, enacts, that 'if any person shall willingly and knowingly personate, or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person, entitled or supposed to be entitled to any pension, wages, pay, grant, or other allowance of money, prize-money, or relief, due or payable, or supposed to be due or payable, for or on account of any service done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in His Majesty's army, or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, non-commissioned officer, or soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant, or other allowance of money, prize-money, or relief due or payable, or supposed to be due or payable, for or on account of any services done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid; or if any person shall forge, or counterfeit, or alter, or cause or procure to be forged, or counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person, entitled or supposed to be entitled to any pension, wages, pay, grant, allowance of money, prize-money, or relief due or payable, or supposed to be due or payable, for or on account of any such service, or supposed service, as aforesaid, or the name or handwriting of any officer, under officer, clerk, or servant of the said commissioners of the said hospital at Chelsea, or of any officer or person in any way concerned in the paying or ordering, directing, or causing the payment of the said pensions, wages, pay, money, allowance of money, prize-money, or relief, or any of them; or shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, document, or authority whatsoever, relating to or anywise concerning the payment, or obtaining or claiming any pension, wages, pay, grant, allowance of money, prize-money, or relief, for and in order to the receiving, obtaining, or claiming any such pension, wages, pay, grant, allowance of money, prize-money, or relief; or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged,

(*f*) Now penal servitude for life, or for any term not less than three years.

(*g*) The 2 Will. 4, c. 53, contains no express provision for the punishment of ac-

cessories after the fact, consequently they are punishable under the 24 & 25 Vict. c. 94, s. 4, vol. i. p. 182.

counterfeited or altered, any such letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, document, or authority whatsoever, with intent to obtain the payment of any such pension, wages, pay, money, or allowance of money, prize-money, or relief from the said commissioners of the said hospital at Chelsea, or from any officer, under officer, clerk, or servant of the said commissioners, or from the person authorised or supposed to be authorised to pay the same, or with intent to defraud any person whatsoever, or any corporation whatsoever; every person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be transported for life, (h) or for such term of years as the Court shall adjudge.' (i)

The first count of an indictment on the 7 Geo. 4, c. 16, s. 38, charged that the prisoner feloniously forged 'a certain receipt relating to and concerning the payment of a certain pension, viz., of £4 11s. 0½d., supposed to be payable to one Nicholas Morrill, as an out-pensioner of Chelsea Hospital for a certain time, viz., for ninety-two days, from 1st July, 1838, to 30th September following, both days included, which said forged receipt is as follows, viz.:—

'Assignment receipt,  
84th foot, NICHOLAS MORRILL,

426  
1s. ½d. *per diem*.  
SHEFFIELD.

'We, the undersigned churchwarden and overseer of the parish of Brightside Bierlow, in the county of York, do hereby acknowledge to have received of T. C. Brookbank, Esquire, agent for the out-pensioners of Chelsea Hospital (by the hand of Mr. J. Thompson), the sum of £4 11s. 0½d., being the amount due to the above-named out-pensioner of the said hospital for ninety-two days, from 1st July, 1838, to 30th September following, both days included, by virtue of an assignment made by the aforesaid pensioner, conformably to an Act of Parliament passed in the 59th year of the reign of his Majesty King Geo. 3, entitled "An Act to amend the laws for the relief of the poor," five per cent. being deducted pursuant to the Act of Parliament, 28 Geo. 2, c. 1.

'£4 11s. 0½d.  
'Witness, J. PRINGLE.

'JOHN WILSON, Churchwarden.  
'THOMAS GRAY, Overseer of the Poor.

'We, the undersigned churchwarden and overseer of the parish aforesaid, do hereby certify that the above-named out-pensioner is alive, and entitled to his pension, being no otherwise provided for by government.

'Dated this 19th day of October, 1838.

'80.'

'JOHN WILSON, Churchwarden.  
THOMAS GRAY, Overseer of the Poor,'

(h) See note (f), *ante*, p. 737.

(i) Mr. Lonsdale (St. Cr. L. 132) observes that the above enactment appears to be superseded as far as relates to prize-money by the 2 Will. 4, c. 53, s. 49, *post*. The

7 Geo. 4, c. 16, contains no provision for the punishment of accessories after the fact; they, therefore, are punishable under the 24 & 25 Vict. c. 94, s. 4, vol. i. p. 182.

for and in order to the receiving the said pension, with intent thereby to obtain the payment of the said pension from the lords and others, commissioners of Chelsea Hospital: against the form, &c. Of the other counts, some charged the forging and others the uttering of the receipt, omitting the certificate, others the forging, and the rest the uttering of the certificate only, omitting the receipt, varying in each class the statement of the intent, but all alleging in the language set out from the first count, that the forged instrument related to, &c., &c., 'the payment of a certain pension (specifying the amount) supposed to be payable to the said Nicholas Morrill as an out-pensioner of the said hospital.' And no count alleged such pension to be in fact payable; or that Nicholas Morrill was an out-pensioner. It was moved in arrest of judgment, that in order to constitute an offence under the latter branch of sec. 38, it was necessary that there should be an actually existing pension at the time of the commission of the act of forging or uttering, and that the indictment should allege the actual existence of such pension, and that it was not sufficient under that branch of the section to allege (as in this indictment) that the instrument forged related to a pension supposed to be payable. The forged instrument in question was proved to have been made and uttered by the prisoner for the purpose of procuring payment of a pension that had ceased to exist by the death of the pensioner before the period for which the receipt was signed; and therefore as the objection was one that affected not only the form of this indictment, but involved the question of the prisoner's guilt upon this and other similar charges, Erskine, J., reserved the question for the opinion of the judges; before whom it was contended that the offence as stated in this indictment was not an offence comprehended in the clause recited, there being no allegation of an actual existing pension payable to some person, but only of a pension supposed to be payable. The latter part of sec. 38 created no offence, except in respect of a pension actually in existence, and there must be some person in existence to whom it was payable. There were in this branch of the section no such words as 'supposed to be due and payable;' those words were found in the first part of the section, and they appeared to have been intentionally omitted in the enactment respecting this offence. But even if the words were in the clause, the allegation would be bad for uncertainty, inasmuch as it did not state by whom the pension was supposed to be payable; it might be a supposition in the mind of the prisoner only, and that would not be enough. But the judges present were all of opinion that the conviction was right (except Littledale, J., and Coleridge, J., who thought otherwise), and the conviction was affirmed. (j)

The personating or falsely assuming the name and character of a pensioner at Greenwich Hospital, and the forging of any documents for the purpose of obtaining the pensions paid at that establishment, have been from time to time subjected to severe punishments. A general enactment as to the offence of falsely personating the name or character of either soldier or sailor, for the purpose of obtaining any pension, prize-money, &c., has been already referred to, and will be mentioned in a subsequent chapter.

The 11 Geo. 4, c. 20, is repealed by the 28 & 29 Vict. c. 112, except sec. 80; and by the 28 & 29 Vict. c. 124, s. 6, 'if any person, in order to sustain any claim to any pay, wages, allotment, prize-money, bounty-money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, or other money payable by the admiralty, or to any effects or money in charge of the admiralty, — or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy, — does any of the following things, namely, — offers or utters to any person in the service of the Crown or of the admiralty any false affidavit, knowing the same to be false, or makes or subscribes or offers or utters as aforesaid, any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false, — every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.'

Sec. 7. 'The following sections of the Act 24 & 25 Vict. c. 98, shall be incorporated with this Act, and shall be read as if they were here re-enacted, namely, — sections forty to forty-two (*k*) and fifty to fifty-three (*l*) (all inclusive); and for this purpose the expression "this Act" used in the said incorporated sections shall be construed to include the present Act, and expressions therein used relating to forgery or forged writings shall be construed to apply to any act being a misdemeanor under the last foregoing provision of this Act, and to writings made, subscribed, offered, or uttered in contravention of that provision.'

Sec. 8, as to personation of seamen, is noticed, *post*.

By the 5 & 6 Vict. c. 45 (the Copyright Act), sec. 12, 'If any person shall wilfully make or cause to be made any false entry in the registry book of the stationers' company, or shall wilfully produce, or cause to be tendered in evidence, any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor and shall be punished accordingly.' (*m*)

By the 21 & 22 Vict. c. 90 (Medical Practitioners' Act), sec. 38, 'Any registrar who shall wilfully make or cause to be made any falsification in any matters relating to the register, shall be deemed guilty of a misdemeanor in England or Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be imprisoned for any term not exceeding twelve months.'

Sec. 39. 'If any person shall wilfully procure or attempt to procure himself to be registered under this Act, by making or producing, or causing to be made or produced, any false or fraudulent representation or declaration, either verbally or in writing, every such person so offending, and every person aiding and assisting him therein, shall be

(*k*) See these sections, *ante*, pp. 680, 681.

(*m*) See vol. i. p. 66.

(*l*) See these sections, vol. i. p. 83.

deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall on conviction thereof be sentenced to be imprisoned for any term not exceeding twelve months.'

By the 15 & 16 Vict. c. 56 (an Act relating to Pharmaceutical Chemists), sec. 15, 'If any registrar under this Act shall wilfully make or cause to be made any falsification in any matters relating to any register or certificate aforesaid, every such offender shall be deemed guilty of a misdemeanor.'

Sec. 16. 'If any person shall wilfully procure by any false or fraudulent means a certificate purporting to be a certificate of registration under this Act, or shall fraudulently exhibit a certificate purporting to be a certificate of membership of the Pharmaceutical Society, every such person so offending shall be adjudged guilty of a misdemeanor.'

By the Veterinary Surgeons' Act, 1881 (44 & 45 Vict. c. 62), sec. 11, 'Any person who wilfully procures or attempts to procure himself to be placed on the register of Veterinary Surgeons by making or producing, or causing to be made or produced, any false or fraudulent declaration, certificate, or representation, either in writing or otherwise, and any person aiding and assisting him therein, shall be deemed guilty in England or in Ireland of a misdemeanor and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be liable to a fine not exceeding £50, or to be imprisoned with or without hard labour for any term not exceeding twelve months.'

By sec. 12, 'If the registrar wilfully makes or causes to be made any falsification in any matter relating to the register of Veterinary Surgeons, he shall be deemed guilty of a misdemeanor, and shall be liable to a fine not exceeding £50, or to be imprisoned with or without hard labour for any term not exceeding twelve months.'

By 31 & 32 Vict. c. 121 (the Pharmacy Act, 1868, which amends the 15 & 16 Vict. c. 66), sec. 14, 'Any registrar who shall wilfully make or cause to be made any falsification in any matter relating to the said (n) registers, and any person who shall wilfully procure or attempt to procure himself to be registered under the Pharmacy Act, or under this Act, by making or producing, or causing to be made or produced any false or fraudulent representation or declaration, either verbally or in writing, and any person aiding or assisting him therein, shall be deemed guilty of a misdemeanor in England, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be sentenced to be imprisoned for any term not exceeding twelve months.'

By the 52 & 53 Vict. c. 41, s. 23, (1) 'Any person who makes a wilful misstatement of any material fact in any petition, statement of particulars, or reception order under the Lunacy Acts, or under this Act, shall be guilty of a misdemeanor.

(2) 'Any person who makes a wilful misstatement of any material fact in any medical or other certificate, or in any statement or report of bodily or mental condition under the Lunacy Acts, or under this Act, shall be guilty of a misdemeanor.

(n) Certain registers are by the Act to be kept. Sec. 13 provides for the registers being evidence.



(3) 'No prosecution for a misdemeanor under this section shall take place except by order of the Commissioners, or by the direction of the Attorney-General, or the Director of Public Prosecutions.'

By the Coal Mines' Regulation Act, 1887 (50 & 51 Vict. c. 58), sec. 32, 'Every person who commits any of the following offences, that is to say:—

(1) 'Forges or counterfeits, or knowingly makes any false statement in any certificate of competency under this Act, or in any certificate of service granted under this Act, or any Act repealed by this Act, or any official copy of such certificate, or

(2) 'Knowingly utters or uses such certificate or copy which has been forged or counterfeited, or contains any false statement, or

(3) 'For the purpose of obtaining for himself or any other person employment as a certificated manager or under manager, or the grant, renewal, or restoration of any certificate under this Act, or a copy thereof, either

(a) 'Makes or gives any declaration, representation, statement or evidence, which is false in any particular, or

(b) 'Knowingly alters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same, shall be guilty of a misdemeanor, and be liable, on conviction, to imprisonment for a term not exceeding two years with or without hard labour.'

The 2 & 3 Will. 4, c. 106, an Act to enable officers in the army, &c., to draw for, and receive their half-pay, enacts, by sec. 3, that 'if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting of any such authority or certificate or bill of exchange, or shall utter as true any such false, forged, or counterfeited authority or certificate or bill of exchange, knowing the same to be false, forged, or counterfeited, with intent to defraud any person or persons, body or bodies politic or corporate, every such person so offending shall be deemed guilty of felony, and being thereof lawfully convicted shall be transported for seven years, (o) or suffer imprisonment for any term not exceeding four years, as the Court shall direct.' (p)

The 5 & 6 Will. 4, c. 24, entitled 'An Act for the encouragement of the voluntary enlistment of seamen, and to make regulations for more effectually manning His Majesty's navy,' by sec. 3, 'in order to prevent, as far as may be, frauds and impositions with respect to protections,' enacts, 'that if any person shall forge or counterfeit any certificate of service in His Majesty's navy, or any instrument purporting to be a protection from such service, or shall fraudulently utter or publish any forged certificate of such service, or any forged instrument purporting to be a protection from such service, knowing the same to be forged, or shall fraudulently alter any certificate or protection which shall have been duly granted or issued; or if any person shall forge or fraudulently alter any extract from a baptismal register, or shall knowingly utter any false or fraudulently altered

(o) Now penal servitude for any term not exceeding seven and not less than three years.

(p) This Act contains no provisions for

the punishment of accessories after the fact; they therefore are punishable under the 24 & 25 Vict. c. 94, s. 4; see vol. i. p. 182.

extract from a baptismal register, or any false affidavit, certificate, or other document, in order to obtain from the Admiralty office a protection from His Majesty's naval service for himself or any other person; or if any person, being in the possession of a protection, shall lend, sell, or dispose thereof to any other person, in order fraudulently to enable such other person to make an unlawful use of the same; or if any person shall produce, utter, or make use of as a protection for himself any protection which shall have been made out or issued for any other individual; every person in any such manner offending shall be deemed guilty of a misdemeanor, and such protection shall thenceforward be null and void.'

The 2 & 3 Vict. c. 51, entitled 'An Act to regulate the payment and assignment in certain cases of pensions granted for service in Her Majesty's army, navy, royal marines and ordnance,' by sec. 8, reciting that 'great frauds have been practised, and exorbitant and usurious interest obtained from pensioners, upon assignments made under colour of the said Act of the fifty-ninth year of the reign of his said late Majesty King George 3, and according to the form set out in the said Act, although the money advanced thereon has not been advanced out of parish funds, nor to reimburse a parish for relief given to the pensioner by the churchwardens and overseers,' enacts, that 'if any person entitled to pension or other allowance shall assign or aid or assist in making an assignment thereof, or of any quarterly or other payment thereof, to any person or persons whatsoever, except to the guardians of any union or parish, or to the churchwardens and overseers of the poor of the parish wherein such pensioner resides, or to the heritors and kirk session of any place in Scotland where such pensioner resides, and except for relief granted out of the funds of such union, parish, or townland to such pensioner, or his wife or family residing with him in such parish, it shall be lawful for the lords and others, commissioners of Chelsea Hospital, so far as relates to army or other pensions payable by such commissioners, and for the Lord High Admiral or commissioners for executing the office of Lord High Admiral, with respect to naval and marine pensions or other allowance, immediately to take away the pension from the person so offending, or to suspend for any definite period the future payments thereof; and if any person or persons shall procure or induce a pensioner to make, or aid or assist him in making any assignment of pension, superannuation, or other allowance as aforesaid, to any person or persons other than the guardians of any union or parish as aforesaid, or the churchwardens and overseers of the parish wherein such pensioner resides, or any heritors and kirk session in Scotland as aforesaid, or shall make or aid or assist in making any assignment which shall not be given by the said pensioner or person entitled to other allowance as aforesaid, and received by the said guardians, parish officers, or heritors and kirk session, as a security for relief given or money granted or advanced out of the funds of such union, parish, townland, or place, and for reimbursing the guardians, churchwardens, and overseers, or heritors and kirk session advancing the same, or shall receive or accept as payment or security for money or for goods advanced or agreed to be advanced to or lent or given to any such pensioner or person entitled as aforesaid, or shall demand or charge any interest or pecuniary or other compen-

sation, for advancing money upon any pension or other allowance so assigned or taken, or pretended to be assigned or taken, such person or persons shall for every such offence be deemed guilty of a misdemeanor, and shall upon every conviction thereof be punished by such fine or imprisonment, or both, as the Court before which such person or persons shall be convicted shall adjudge.'

Sec. 9. 'If any person shall forge, or counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering any minute, copy of minute, assignment of pension, superannuation, or other allowance as aforesaid, order, certificate, receipt, document, or authority whatsoever, relating to or in any wise concerning the claiming or obtaining payment of any pension-money or other allowance as aforesaid, or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such minute, copy, assignment, order, certificate, receipt, document, or authority relating to or anywise concerning the claiming or obtaining payment of any pension-money or other allowance as aforesaid, or the name of any pensioner, justice of the peace, guardian, parish officer, or other officer, or any other person authorised, or supposed, or purporting to be authorised, to sign any such minute, copy, assignment, order, certificate, receipt, document, or authority, with intent or in order to obtain or to enable any other person to obtain, the payment of any such pension or pension-money, or other allowance as aforesaid from the commissioners of Chelsea Hospital or Her Majesty's paymaster-general respectively, or from any officer, under officer, clerk, or servant of the said commissioners of Chelsea Hospital, or of Her Majesty's paymaster-general respectively, or from any person authorised or supposed to be authorised to pay any pension or pension-money or other allowance as aforesaid, every such person so offending shall be guilty of felony, and shall and may be transported (g) for such term of years, or suffer such other punishment as the Court before which such person or persons shall be convicted shall adjudge.' (r)

By the Out-pensioners (Greenwich and Chelsea) Act, 19 & 20 Vict. c. 15, s. 5, 'Any person guilty of fraudulently receiving or endeavouring to receive pension-money, or money in the nature of pension, from the secretary-at-war, or from any officer or person employed or authorised to pay pensions, shall upon conviction be subjected to the same pains and penalties as are prescribed by law in the cases of frauds committed or attempted to be committed upon the commissioners of Chelsea Hospital, the Lord High Admiral or the commissioners of the admiralty, the treasurer of the navy, and the paymaster-general.'

A point may be here noticed, which arose upon the construction of the statutes by which powers of attorney to receive prize-money were regulated. The prisoner had been convicted upon an indictment which contained counts charging him with having forged a power of attorney of one J. O., a midshipman in His Majesty's service, to receive certain

(g) Now penal servitude for any term of years not less than three.

(r) This Act contains no provision for

the punishment of accessories after the fact; they therefore are punishable under the 24 & 25 Vict. c. 94, s. 4; see vol. i. p. 182.

prize-money then due, and also counts on the 2 Geo. 2, c. 25, charging him generally with the forgery of a deed. By the 45 Geo. 3. c. 72, s. 92, a form was prescribed for a negotiable order, by a petty officer on the agent or treasurer of Greenwich Hospital, with a certificate subjoined, &c., and the principal point made on behalf of the prisoner was, whether this prescribed form of an order invalidated every power for the purpose of receiving prize-money couched in other terms and in a different form than were contained in that statute. It is understood that, the point being submitted to the consideration of the twelve judges, all of them (except Graham, B., who dissented) thought that the forging a power of attorney, though not in the prescribed form, was a capital offence, and that the conviction was right; and that most of the judges thought that the power of attorney in question was a deed within the 2 Geo. 2, c. 25. (s)

It has been holden that the *muster books* of the King's ships, documented in the navy office, to which returns are regularly made, by the several commanders, of the names, &c., of their respective crews, may be admitted as evidence of the persons therein named having served on board the several ships in the capacities there mentioned. (t)

By the Merchant Seamen's Fund Act, 14 & 15 Vict. c. 102, s. 55, 'Every person who, for the purpose of obtaining, either for himself or for another, any pension, payment, or relief from the fund, fraudulently forges or alters, or procures to be forged or altered, or assists in forging or altering, any certificate or other document purporting to shew or assist in shewing a right to such pension, payment, or relief, and every person who for the purpose aforesaid fraudulently makes use of any forged or altered certificate or other such document as aforesaid, or any certificate or other such document as aforesaid not belonging to him, or who for the purpose aforesaid gives or makes, or procures to be given or made, or assists in giving or procuring to be given or made, any false evidence to (u) representation, knowing the same to be false, shall be punishable with transportation for seven years, (v) or may be summarily prosecuted before two or more justices, or in Scotland before two or more justices or the sheriff, and punished upon conviction by imprisonment for a period not exceeding six months, with or without hard labour.'

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 154, 'Every person who, for the purpose of obtaining, either for himself or for any other person, any money deposited in a seamen's savings' bank, or any interest thereon, forges, or fraudulently alters, assists in forging, or fraudulently altering, or procures to be forged, or fraudulently altered, any document purporting to shew or assist in shewing any right to any such money or interest, or makes use of any document which has been so forged or fraudulently altered as aforesaid, or gives, assists in giving, or procures to be given, any false evidence, knowing the same to be false, or makes, assists in making, or procures

(s) *R. v. Ricketts Lyon*, O. B. 1813, MS.

(t) *Rhodes's case*, 1 Leach, 24. *R. v. Fitzgerald*, 1 Leach, 20. 2 East, P. C. c. 19, s. 25, p. 911. *Tannet's case*, *cor.* Wood, B., *Kent Lent Ass.* 1818, MS.

(u) *Sic.* It should be 'or.'

(v) Now penal servitude for any term not exceeding seven years, and not less than three years.

to be made, any false representation, knowing the same to be false, or assists in procuring any false evidence, or representation to be given or made, knowing the same to be false; that person shall for each offence be liable to penal servitude for a term not exceeding five years, or to imprisonment for any term not exceeding two years, with or without hard labour.'

The 5 Geo. 4, c. 113, (*w*) entitled 'An Act to amend and consolidate the laws relating to the abolition of the slave trade,' enacts by sec. 10, 'that if any persons shall wilfully and fraudulently forge or counterfeited any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt (such receipts being required by this Act), or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his Majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate; then and in every such case the person or persons so offending, and their procurers, counsellors, aiders, and abettors, shall be and are hereby declared to be felons, and shall be transported beyond seas for a term not exceeding fourteen years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the Court before whom such offender or offenders shall be tried and convicted.' (*x*)

The 5 & 6 Will. 4, c. 45, entitled 'An Act to carry into further execution the provisions of an Act passed in the third and fourth years of his present Majesty, for compensating owners of slaves upon the abolition of slavery,' by sec. 12 enacts, that 'if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting, any receipt or receipts for the whole of or any part or parts of the contributions towards the said sum of fifteen millions, either with or without the name or names of any person or persons being inserted therein as the contributor or contributors thereto, payer or payers thereof, or of any part or parts thereof, or any certificate or other instrument to be issued by the commissioners for the reduction of the national debt, or shall alter any number, figure, or word therein, or utter or publish as true any such false, forged, counterfeited, or altered receipt or receipts, certificate or certificates, instrument or instruments, with intent to defraud the governor and company of the Bank of England, or the commissioners for the reduction of the national debt, or any body politic or corporate, or any person or persons whatsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy.' (*y*)

(*w*) See vol. i. p. 464.

(*y*) See 1 Vict. c. 84, ss. 1 & 3, and 37

(*x*) This provision seems incidentally repealed by the 3 & 4 Will. 4, c. 73, which abolishes slavery in the British colonies. & 38 Vict. c. 35.

The 6 Geo. 4, c. 78, s. 25, enacts 'that if any person shall knowingly or wilfully forge or counterfeit, interline, erase, or alter, or procure to be forged or counterfeited, interlined, erased, or altered, any certificate directed or required to be granted by any order of His Majesty, his heirs or successors, in council, now in force or hereafter to be made, touching quarantine, or shall publish any such forged or counterfeited, interlined, erased, or altered certificate, knowing the same to be forged or counterfeited, interlined, erased, or altered, or shall knowingly and wilfully utter and publish any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false, he or she shall be guilty of felony.' (z)

By the 24 & 25 Vict. c. 98, s. 33, 'whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, endorsement, declaration of trust, note, direction, authority, instrument, or writing made or purporting or appearing to be made by the accountant-general, or any other officer of the Court of Chancery in England or Ireland or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the governor and company of the Bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk as aforesaid, or shall offer, utter, dispose of, or put off any such certificate, report, entry, endorsement, declaration of trust, note, direction, authority, instrument, or writing, knowing the same to be forged or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour.' (a)

In a case upon the 12 Geo. 1, c. 32, the prisoner was indicted for forging a writing, purporting to be an office-copy of a report of the accomptant-general of money being paid into the bank pursuant to an order of Chancery, and also an office copy of a certificate of one of the cashiers of the bank, of the payment of the money into the bank. The second count was for publishing the same, knowing them to be forged, with intent to defraud, &c. And the third and fourth counts were, the one for forging, the other for publishing a writing in form of a writing purporting to be an office-copy of the certificate of the accomptant-general, and an office-copy of the receipt of the cashier of the bank. The certificate and receipt were set out verbatim in all the counts, and the offence was laid to be done with intent to defraud William Hunt. Upon the trial a special verdict was found, which was afterwards argued before Lord Mansfield and nine of the other judges. After the argument, Lord Mansfield observed, that the verdict left but one question to consider, namely, whether the

(z) As no punishment is expressly pointed out by the Act, either for principals or accessories, the principals are punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5, vol. i. p. 66, and the accessories under the 24 & 25 Vict. c. 94, vol. i. p. 182.

(a) This clause is framed from the 12 Geo. 1, c. 32, s. 9, and 23 & 24 Geo. 3, c. 22, s. 22 (l.), and is extended to the certificates, &c., of any judge or officer of the Landed Estates Court in Ireland, and of any officer of any court in England or Ireland.

offence was within the 12 Geo. 1, c. 32, s. 9, and in a subsequent term, eleven of the judges were of opinion that the indictment and special verdict were sufficient, and needed no amendment; and that the case was within the statute. (b)

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 66, 67, 104, 121, 130, 180, 199, 282, 564, 695, 722, makes the forgery and uttering of many documents therein mentioned either a felony or misdemeanor. By sec. 104, 'If any person forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any certificate of competency or an official copy of any such certificate, or makes, assists in making, or procures to be made, any false representation for the purpose of procuring, either for himself or for any other person, a certificate of competency, or fraudulently uses a certificate or copy of a certificate of competency which has been forged, altered, cancelled, or suspended, or to which he is not entitled, or fraudulently lends his certificate of competency, or allows it to be used by any other person, that person shall in respect of each offence be guilty of a misdemeanor.'

On an indictment on sec. 176 of the repealed Act (17 & 18 Vict. c. 104), which was couched in somewhat similar terms, it appeared that A. Goddard, a seaman, had served on board a British ship, and had been duly discharged in the presence of a shipping-master duly appointed under the said Act, and the master of the ship had signed, before the said shipping-master, in the proper form, a report of the character of Goddard, in which, opposite to the space for 'character for ability in whatever capacity,' was put the letter M, which signified that it was middling. Goddard went to the prisoner, who for half-a-crown made and delivered to Goddard a fresh one, being a fac-simile of the genuine one, except that G, which signified good, was substituted for the letter M, in the place before mentioned; and, on a case reserved, it was held that the prisoner was guilty of a misdemeanor within the section. (c)

By the 24 & 25 Vict. c. 98, s. 35, 'Whosoever shall forge or fraudulently alter any licence of or certificate for marriage, or shall offer, utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (d) to be kept in penal servitude for any term not exceeding seven years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (e)

Sec. 36. 'Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials which now is or here-

(b) Gibson's case, 1 Leach, 61. 2 East, P. C. c. 19, s. 22, p. 899, in which last authority the special verdict is fully stated, and the arguments of counsel given at considerable length, for the reason that the particular grounds on which the case was decided are not declared in the note. The prisoner was executed. 1 Leach, 63.

(c) R. v. Wilson, D. & B. 558.

(d) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(e) This clause is taken from the 1 Will. 4, c. 68, s. 20, and extended to Ireland.

It is also extended to certificates for marriage.

after shall be by law authorised or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and *unlawfully* insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and *unlawfully* give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing *such writing*, or the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (*f*) to be kept in penal servitude for life [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].’ (*g*)

Sec. 37. ‘Whosoever shall knowingly and wilfully insert or cause or permit to be inserted in any copy of any register directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall *unlawfully* destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register,

(*f*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*g*) This clause is framed on the 1 Will. 4, c. 66, s. 20, 6 & 7 Will. 4, c. 86, s. 43, relating to the registering of births, deaths, and marriages in England; 7 & 8 Vict. c. 81, s. 75, relating to the same purposes in Ireland; and 20 & 21 Vict. c. 81, s. 15, relating to burial boards.

The three former statutes contain a proviso that no person therein mentioned shall be liable to punishment for correcting accidental errors in the manner therein specified; but in the present clause the word ‘unlawfully’ is substituted for ‘wilfully’ in order that cases falling within the proviso should be excluded from this clause by the terms used in it. The proviso in each Act

is left unrepealed, and the Repeal Bill has a clause specially framed to preserve the proviso in each Act. This was the only course that could be taken in these Acts; for the clauses in question are altogether improperly framed, and proper clauses would not come within the scope of these Acts. Instead of being a proviso there ought to be a substantive enactment providing in what manner, by whom, before what witnesses, and within what period any erroneous entry in a register may be amended, and it should seem that it ought to be made compulsory to make such amendments upon such proof being adduced as might be pointed out in the clause. There is a much better clause in the Scotch Registration Act, 17 & 18 Vict. c. 80, s. 63, by which the amendment is to be made by the sheriff after hearing the parties there specified.



shall be guilty of felony, and being convicted thereof shall be liable' to the same punishment as in sec. 36. (*h*)

The 43 & 44 Vict. c. 41, s. 10, provides that where any burial has taken place under the Act without the rites of the Church of England, the person responsible for it shall transmit a certificate, in the form given in the Schedule, to the rector, vicar, incumbent, or officiating minister in charge of the parish or district in which the churchyard or graveyard is situate, or to which it belongs; or in the case of a cemetery or burial ground, to the person required by law to keep the register of burials; and enacts that, 'Any person who shall wilfully make any false statement in such certificate, and any rector, vicar, minister, or other such person as aforesaid receiving such certificate who shall refuse or neglect duly to enter such burial in such register as aforesaid, shall be guilty of a misdemeanor.'

By the 6 & 7 Will. 4, c. 86, s. 41, 'Every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury.' (*i*)

So much of this section as relates to registrars or registers of births and deaths is repealed by 37 & 38 Vict. c. 88 (Births and Deaths Registration Act, 1874), and by sec. 40 of this Act.

'Any person who commits any of the following offences, that is to say,

- (1) Wilfully makes any false answer to any question put to him by a registrar, relating to the particulars required to be registered concerning any birth or death, or wilfully gives to a registrar any false information concerning any birth or death, or the cause of any death; or,
- (2) Wilfully makes any false certificate or declaration, under or for the purposes of this Act, or forges or falsifies any such certificate or declaration, or any order under this Act, or knowing any such certificate, declaration, or order to be false or forged, uses the same as true, or gives or sends the same as true to any person; or,
- (3) Wilfully makes, gives, or uses any false statement or representation as to a child born alive, having been still born, or as to the body of a deceased person or a still born child in any coffin, or falsely pretends that any child born alive was still born; or,
- (4) Makes any false statement with intent to have the same entered in any register of births or deaths;

shall, for each offence, be liable, on summary conviction, to a penalty

(*h*) This clause is taken from the 1 Will. 4, c. 66, s. 22.

In Bowen's case, 1 Den. C. C. 22, the prisoner had obtained access to the registries of the diocese of Worcester and Gloucester, and had taken away copies of registers there deposited, and by some means or other obliterated the entries on them, and written on them in their stead

entries, which, if genuine, would have proved part of the pedigree of a claimant to the property of Mr. Wood, the banker of Gloucester; the words in *italics* were introduced in order to embrace all such cases.

(*i*) This clause is placed here as intimately connected with causing false entries to be actually made in registers. For the punishment see vol. i. *Perjury*.

not exceeding ten pounds, and on conviction on indictment to fine, or to imprisonment, with or without hard labour, for a term not exceeding two years, or to penal servitude for a term not exceeding seven years.'

By sec. 46, a prosecution or indictment for an offence under this Act shall be commenced within three years after the commission of such offence.

The prisoner was indicted under the 6 & 7 Will. 4, c. 86, s. 41, for making false statements of the particulars required by the Act for the registration of a marriage. The first count alleged that W. F. Hamilton was a clergyman, &c., and that 'before the committing of the offence in this count mentioned' he had solemnised a marriage between the prisoner and Esther Field, and 'after the solemnisation of the said marriage' the said W. F. Hamilton was about to register the particulars relating to the said marriage, and that the prisoner wilfully, &c., made to the said W. F. Hamilton, 'for the purpose of being inserted in the register of marriages, certain false statements, which were described. The prisoner stated to E. Speller, the parish clerk of the Trinity district Church, Marylebone, that he was residing at No. 31 Wimpole Street, in the said parish, and that Esther Field was of full age. This statement was first made to Speller for the purpose of procuring the publication of the banns between himself and Esther Field, and was inserted in the banns book; and from the banns book by Speller, *before* the solemnisation of the marriage, copied into the register book of marriages, the prisoner at the time reiterating his previous statements; there was evidence to shew that these statements were untrue. There was no evidence that the register book had been provided by the registrar-general. The prisoner and Esther Field were married by the Rev. F. Hamilton at the above church, and after the marriage Mr. Hamilton asked the prisoner whether the particulars entered previous to the marriage by Speller were correct, and an affirmative answer was given by the prisoner; after which the parties and witnesses signed the register. It was objected, (1) that it ought to have been proved that the register book had been furnished by the registrar-general; (2) that the prisoner could not be convicted under the first two counts, as they alleged the false statements to have been made to the officiating clergyman *after* the solemnisation of the marriage for the purpose of their being inserted in the register, whereas the insertion had been made before the marriage. But, on a case reserved, on these objections, all the judges present agreed that the first count was proved. (j)

An indictment on the same section alleged that the defendant made false statements of the particulars required to be registered in this,—that he was a widower, and the lady he married a widow. The defendant, being a widower, had, at the parish church of Paddington, married Mrs. M. A. V. Vaughan, she being then a widow, and a few months afterwards he had again married the same lady at St. George's, Hanover Square, he then stating, for the purpose of the registration of that marriage, that he was a widower and the lady a widow, which was alleged to be false, as he had married the same lady previously at Paddington. Lord Campbell, C. J., told the jury that 'in order that

you should convict the defendant on this indictment, you ought to be satisfied that he made the statement not only untruly, but wilfully and intentionally; for if you should think that he did it mistakenly, I am of opinion that he is not within the statute. It not unfrequently happens when persons have been married by a marriage perfectly legal and perfectly valid, that, for greater safety, they are re-married; and this often occurs, because a marriage in England is easier of proof than a marriage in Scotland, although both are equally valid.' (*k*)

The prisoner was indicted under the 6 & 7 Will. 4, c. 86, for feloniously causing to be registered in the register of deaths for the borough of W. a false entry of the death of J. Hodson. The prisoner would have been entitled to £50 on the death of J. Hodson if he died under the age of twenty-one; and in order to obtain the money, and persuade the trustee of the property that J. Hodson was dead, when in fact he was not, she went and desired the registrar at W. to register the death of J. Hodson, who, she said, had died in her presence, and she gave him the particulars, which he entered in the register from her dictation, and she signed the register with her mark. The trustee paid her the £50 on the certificate of the register which was shewn him, and had to pay the amount again to J. Hodson, who was alive. Cresswell, J., held that it was a felony within the 6 & 7 Will. 4, c. 86, s. 43, to procure a false entry in a register in the manner which had been proved here. (*l*)

So where the prisoner was indicted under the 6 & 7 Will. 4, c. 86, for having feloniously caused a false entry of a birth to be made in the register of the births of St. Clement Danes, the prisoner went to Mr. Jones, the registrar of births for St. Clement's parish, and asked him to register the birth of a child, which she said was her own, and she stated that she was the wife of W. Daley, of No. 77 Ship-yard, and that the child was born on the 1st of November, 1849. Mr. Jones cautioned her as to the necessity of making a true statement in the matter, and, as she persisted in the truth of her statement, he made

(*k*) *R. v. Lord Dunboyne*, 3 C. & K. 1. Lord Campbell referred to Lord Eldon's second marriage at Newcastle, where Lady Eldon was described by her maiden name, and added, 'Lord Eldon therefore did exactly the same in substance as that which is charged as a crime in the present case; indeed, if in the register of St. George's, Hanover Square, Lord Dunboyne had described the lady as Lady Dunboyne, which is what I suppose the prosecutor suggests he ought to have done, he would have appeared on the face of the register to have gone to that church to marry his own wife; and I confess that it appears to me that that would have been extremely absurd.' In *R. v. Hotine*, 9 Cox, C. C. 146, which was an indictment for making false statements to the registrar as to the name of the mother of a child, several points were raised, but not decided; as the jury acquitted the prisoner. He had first married M. A. Saunders, who left him, and he had afterwards married Sophia Robins, by whom he had had a son, whose birth he had regis-

tered, and under the heading 'Name and maiden surname of the mother,' he had caused to be entered 'Sophia Hotine, formerly Robins,' and it was alleged that the entry was false, as he knew his first wife was alive at the time he made it. It was objected that the Act did not require a man to state whether or not he was married to the mother of the child. A name might be gained by reputation, and the Act might apply to a woman's name gained by reputation. It was not confined to legitimate children. For the Crown it was contended that the words 'name and maiden surname of the mother' must mean surname before being changed by marriage; but no opinion was expressed on the point. Another point taken in this and the preceding case was that the prosecution must be commenced within three years after the offence committed; in the preceding case Lord Campbell let the case proceed, and in this case the point would have been reserved together with the other.

(*l*) *R. v. Mason*, 2 C. & K. 622.

the entry according to it, and she signed the entry as the person giving the information; the entry was false in every particular; and it was held that the prisoner was guilty of felony within the 6 & 7 Will. 4, c. 86, s. 43, which made it a felony to 'cause to be inserted in any register book' 'any false entry of any birth;' and that she was not merely guilty of the misdemeanor under sec. 41 of the same Act, of wilfully making a false statement for the purpose of its being inserted in any register of birth. (*m*)

A count alleged that the prisoner feloniously and wilfully did destroy, deface, and injure a certain register of the baptisms, marriages, and burials in C. The prisoner called to search the register, and whilst the curate was looking into a chest for another book, and had his back turned, the prisoner tore off the lower portion of one of the leaves of the register; the part of the leaf was torn off and entirely separated from the residue. [The part torn off contained five entire entries, and the whole of the entry of a marriage except 'October 4th, 1741,' and the prisoner had obtained access to the registry of the Bishop of Worcester, and altered the transcript there deposited by substituting a fictitious marriage on the said 4th of October for the real entry, and the object of the prisoner was that this transcript should become good secondary evidence of the fictitious marriage on the destruction of the register.] (*n*) The curate immediately detected the prisoner. The defence was that it was torn by accident; but the jury found that it was done wilfully. It was objected — 1st, that this was neither a destroying, defacing, nor injuring within the meaning of the Act, as the register when produced had the torn piece pasted to the residue of the leaf, and was as legible as before; but Tindal, C. J., thought that at the time it was actually torn off and separated, the register was defaced, or at all events injured, within the meaning of the statute. 2nd, that the indictment was bad, as it stated three distinct offences, — the destroying, defacing, and injuring the register; but Tindal, C. J., thought that, the language of the statute having been followed, it was no objection that the offences were charged cumulatively, though one only was proved. (*o*) Lastly, that the indictment ought to have charged that the offence was committed *scienter*; but Tindal, C. J., thought that was implied from the nature of the offence charged. And, on a case reserved, it was held that all that had been done was perfectly right on all the points. (*p*)

It was held that if a man gave a forged certificate of a marriage to the pretended wife in order that she might shew it to her father, the man was not guilty of an uttering within the 1 Will. 4, c. 66, s. 20. (*q*)

The 3 & 4 Vict. c. 92, entitled 'An Act for enabling courts of justice to admit non-parochial registers as evidence of births, or baptisms, deaths, or burials, and marriages,' by sec. 8 enacts, that 'every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming, or dedi-

(*m*) *R. v. Dewitt*, 2 C. & K. 905, Cresswell, J., after consulting Alderson, B.

(*n*) The statement between brackets is from 1 C. & K. 501, but was not contained in the case submitted to the judges.

(*o*) *Fuller's case*, 2 Leach, 916.

(*p*) *R. v. Bowen*, 1 Den. C. C. 22, 1 C. & K. 501.

(*q*) *R. v. Heywood*, 2 C. & K. 352.

cation, death or burial, or marriage, which shall be deposited with the registrar-general by virtue of this Act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or record, or shall wilfully insert or cause to be inserted in any of such registers or records any false entry of any birth or baptism, naming, or dedication, death, or burial, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be an extract from any register or record, knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony.' (r)

The statutes authorising government to raise money by way of annuities, usually contain clauses making it a felony to forge, &c., any register, certificate, affidavit, &c., therein mentioned, or to personate any true nominee.

The 10 Geo. 4, c. 24, entitled 'An Act to enable the commissioners for the reduction of the national debt to grant life annuities, and annuities for terms of years,' by sec. 41 enacts, that 'if any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any register or registers of the birth, or baptism, or death, or burial, of any person or persons to be appointed a nominee or nominees under the provisions of this Act, or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of this Act, or any certificate of any justice of the peace or magistrate, or of any officer acting under the said commissioners for the reduction of the national debt, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister, or consul, or chief magistrate of any province, town, or place, or other person authorised by this Act to grant any certificate of the life or death of any nominee; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or certificates of any officer of the commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or the name or names of any person or persons in or to any transfer of any bank annuities or long annuities, or in or to any certificate or other instrument for the payment of money for the purchase of any annuity under the provisions of this Act, or in or to any transfer or acceptance of any such annuity in the books of the governor and company of the Bank of England, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorise, or purporting to authorise, the transfer or

(r) As this is a felony for which the 3 & 4 Vict. c. 92, provides no express punishment, the principals are punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5, vol. i. p. 66, and the accessories are punishable under the 24 &

25 Vict. c. 94, vol. i. p. 180, *et seq.* The 21 & 22 Vict. c. 25, s. 3, extends the 3 & 4 Vict. c. 92, s. 8, &c., to registers deposited under the 21 & 22 Vict. c. 25, in the General Register Office.

acceptance of any bank annuities or long annuities, or any life annuity, or any annuity for years of whatsoever kind, under the provisions of this Act, or authorising or purporting to authorise the receipt of any life annuity, or any annuity for years of whatsoever kind, granted under this Act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully utter or deliver or produce to any person or persons acting under the authority of this Act any such forged register or copy of register, or any such forged certificate, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, his heirs and successors, or with intent to defraud any person or persons whomsoever, then and in every such case all and every persons and person so offending and being lawfully convicted thereof, shall be adjudged guilty of felony, and shall suffer death.' (s)

The 2 & 3 Will. 4, c. 59, entitled 'An Act to transfer the management of certain annuities on lives from the receipt of His Majesty's exchequer to the management of the commissioners for the reduction of the national debt,' &c., by sec. 19 enacts, that 'if any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by this Act, or by the commissioners for the reduction of the national debt, under any of the provisions of this Act, or under any authority given to them for that purpose; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or order of any officer of the commissioners for the reduction of the national debt, or the name or names of any person or persons in or to any transfer of any annuity, or in or to any certificate, order, warrant, or other instrument for the payment of money for the purchase of any annuity under the provisions of this Act, or in or to any transfer or acceptance of any such annuity in the books of the commissioners for the reduction of the national debt, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorise, or purporting to authorise, the transfer or acceptance of any annuities or any life annuity of whatsoever kind, or authorising or purporting to authorise the receipt of any life annuity of whatsoever kind granted under any of the said recited Acts or this Act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully utter or deliver, or produce to

(s) Several branches of the above enactment appear to be superseded by the 24 & 25 Vict. c. 98. With respect to the remaining branches, the offences therein described not having been repealed by the 1

Will. 4, c. 66, and that Act not having made them punishable with death, persons convicted thereof are punishable under the 24 & 25 Vict. c. 98, s. 48, *ante*, p. 634.

any person or persons acting under the authority of this Act any forged register or copy of register of any birth, baptism, or marriage, or any forged declaration, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, his heirs and successors, or with intent to defraud any person or persons whomsoever; then and in every such case all and every person and persons so offending and being lawfully convicted thereof shall be adjudged guilty of felony, and suffer death.' (t)

The 16 & 17 Vict. c. 45 (Savings' Bank Annuities Act), sec. 31, provides for the forgery, &c., of registers, certificates, and other documents used or required under that Act.

By the 24 & 25 Vict. c. 98, s. 31, 'Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, entry, certificate, endorsement, document, or writing, made or issued under the provisions of any Act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, endorsement, document, or writing, which shall be required or directed to be signed by or by virtue of any Act passed or to be passed, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (u) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (v)

By the 25 & 26 Vict. c. 53 (Transfer of Land Act), s. 105, 'If in any proceeding to obtain the registration of any land, or any land certificate or certificate of title, or otherwise in any transaction relating to land which is or is proposed to be put upon the registry, any person acting either as principal or agent shall, knowingly and with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding,

(t) The 1 Vict. c. 84, repeals the punishment of death imposed by this section, and the present punishment is provided by the 1 Vict. c. 84, ss. 1 & 3, *ante*, p. 735, *note* (d). Neither the 2 & 3 Will. 4, c. 59, nor the 1 Vict. c. 84, contains any provision for the punishment of accessories after the fact; they are therefore punishable under the 24 & 25 Vict. c. 94, s. 4, vol. i. p. 182. See also the 1 & 2 Vict. c. 49, s. 10.

(u) The words in brackets are repealed, but the punishment, except as to solitary

confinement, remains the same. See *ante*, p. 50, *note* (o).

(v) This clause is framed on the 2 & 3 Anne, c. 4, s. 19; 6 Anne, c. 35, s. 26; and 8 Geo. 2, c. 6, s. 31, relating to Yorkshire; 7 Anne, c. 20, s. 15, relating to Middlesex; and the 6 Anne, c. 2, s. 17 (1.); 8 Anne, c. 10, s. 4 (1.); 8 Geo. 1, c. 15, s. 4 (1.), and 13 & 14 Vict. c. 72, s. 62 (1.), relating to Ireland.

The clause is new in England, except as to Middlesex and Yorkshire.

or concealing from any judge, or the registrar, or any person employed by or assisting the registrar, any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the Court by which he is convicted shall award; the act or thing done or obtained by means of such fraud or falsehood shall be null and void to all intents and purposes, except as against a purchaser for valuable consideration without notice.' (w)

Sec. 138. 'If any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any order of the Court of Chancery in relation to registered land, or fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of the entry on the register of any caveat or notice of a charge, or of the erasure from the register or alteration on the register of any caveat or notice of a charge, such person shall be deemed to be guilty of a misdemeanor; and any order procured by fraud, and any act consequent on such order, and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.'

Sec. 139. 'Any person convicted of a misdemeanor under the last preceding section shall be liable to imprisonment for any term not exceeding three years, with or without hard labour, or to be fined such sum as the court by which he is convicted shall think just.'

By the 25 & 26 Vict. c. 67 (Declaration of Title Act), sec. 44, 'If in the course of any proceeding before the court under this Act any person, acting either as principal or agent, shall, knowingly and with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding, or concealing from the Court any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the Court by which he is convicted shall award; the order or declaration of title obtained by means of such fraud or falsehood shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.'

Sec. 45. 'If in the course of any proceeding before the Court under this Act any person shall fraudulently forge or alter, or assist in forging or altering, any certificate or other document relating to such land, or to the title thereof, or shall fraudulently offer, utter, dispose of, or put off any such certificate or other document, knowing

(w) Sec. 106. 'No proceeding or conviction for any act hereby declared to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.'

Sec. 107. 'Nothing in this Act contained shall entitle any person to refuse to

make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court of law or equity, or in the court of bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding.'



the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be kept in penal servitude for life, or for any term not less than three years, — or to be imprisoned for a term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (x)

The 10 Geo. 4, c. 50, entitled 'An Act to consolidate and amend the laws relating to the management, &c., of His Majesty's woods, forests, parks, and chases, &c.,' by sec. 124 enacts, that 'if any person or persons shall knowingly and wilfully forge or counterfeit, or knowingly and wilfully act or assist in forging or counterfeiting, the name or handwriting of the lord high treasurer or of the commissioners of His Majesty's treasury for the time being, or of any or either of them, to any power of attorney for the sale or transfer of any stock, or the name or handwriting of the said commissioners for the time being of His Majesty's woods, forests, and land revenues, (y) or of any or either of them, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, or of the Bank of Ireland, or of any private banker, on account of the said commissioners, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting, any draft, instrument, or writing in form of a draft, made by the said commissioners, or any or either of them, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intent to defraud the said governor and company of the Bank of England, or of the Bank of Ireland, or any private banker, or any body corporate, or any person or persons whomsoever, every person or persons so offending, being thereof lawfully convicted, shall be and is and are hereby declared and adjudged to be guilty of felony.' (z)

The 1 & 2 Will. 4, c. 22, which was passed to amend the laws relating to hackney-carriages, &c., in the metropolis, by sec. 33 enacts that 'if any person applying for or procuring or attempting to procure any licence under any of the provisions of this Act shall use or employ any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person, or shall

(x) Secs. 46 & 47 of this Act are the same as secs. 106 & 107 of the 25 & 26 Vict. c. 53.

(y) Now commissioners of Her Majesty's woods and forests, land revenues, works and buildings, 2 & 3 Will. 4, c. 1.

(z) Mr. Lonsdale (St. C. L. 196) observes that the 10 Geo. 4, c. 50, s. 124, appears to be incidentally repealed, or at all events to be superseded by the 1 Will. 4, c. 66, s. 6, as to the forgery of any power of attorney; and he also observes that although the other instruments above described appear to be warrants or orders for the payment of money within the meaning of the 1 Will. 4, c. 66, s. 4, yet the forgery thereof not having been a capital offence at the time of the passing of that Act, is not now punishable under

the 1 Vict. c. 84, ss. 2 & 3, but persons committing the same are punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5. The 10 Geo. 4, c. 50, contains no provision for the punishment of accessories after the fact to any of the above offences, nor of accessories before the fact to the offences of forging the handwriting of the commissioners of woods, forests, &c., and uttering the forged instruments above mentioned, nor for the punishment of principals in the second degree to the offence of uttering; all such accessories are therefore punishable under the 24 & 25 Vict. c. 94, vol. i. p. 180, *et seq.*, and the principals in the second like the principals in the first degree.

wilfully or knowingly insert or cause to be inserted in any requisition for any such licence, or in any such licence, any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person, or shall wilfully or knowingly insert or cause to be inserted in any such requisition or in any such licence as aforesaid, the name of any person as being a proprietor or part proprietor of any hackney-carriage, who shall not at the time of the application for such licence be in fact a proprietor or part proprietor of such hackney-carriage; the person so offending shall be guilty of a misdemeanor, and being convicted thereof, he shall be liable to be punished by fine or imprisonment, or by both, as the Court shall award; such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the Court shall think fit.'

The 2 & 3 Will. 4, c. 120, which consolidates the laws relating to stage-carriages and horses let for hire in Great Britain, by sec. 10 enacts, that 'if any person applying for or procuring or attempting to procure any licence under this Act for or in respect of any stage-carriage, shall use or employ any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person, or shall insert or cause to be inserted in any requisition for any such licence, or in any such licence, any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person as being the proprietor or part proprietor of the stage-carriage for or in respect of which such licence shall be applied for or procured, or shall wilfully or knowingly insert or cause to be inserted in any such requisition, or in any such licence as aforesaid, the name of any person as being a proprietor or part proprietor of such carriage, who shall not at the time of the application for such licence be in fact a proprietor or part proprietor of such carriage; the person so offending shall be guilty of a misdemeanor, and being convicted thereof he shall be liable to be punished by fine or imprisonment, or by both, as the Court shall award; such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the Court shall think fit; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.'

The 6 & 7 Vict. c. 86, 'An Act for regulating hackney and stage-carriages in and near London,' by sec. 20 enacts, that 'every person who shall forge or counterfeit, or who shall cause or procure to be forged or counterfeited, any licence or ticket by this Act directed to be provided for the driver of a hackney-carriage, or for the driver or the conductor of a metropolitan stage-carriage [or for any waterman]; (a) and also every person who shall sell or exchange, or expose to sale, or utter any such forged or counterfeited licence or ticket, and also every person who shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of such forged or counterfeited licence or ticket, knowing such licence or ticket to be forged or counterfeited, and also every person knowingly and wilfully aiding and abetting any person in committing any such offence as aforesaid, shall be guilty of a misdemeanor, and, being thereof convicted, shall be liable to be punished by fine or

(a) The part within brackets is repealed by 37 & 38 Vict. c. 96.

imprisonment, or by both, such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the Court shall think fit.'

By the Sea Fisheries Act, 1883, (46 & 47 Vict. c. 22), sec. 17, 'If any person forges the signature of a sea-fishery officer' to any document drawn up in pursuance of the Act, 'or makes use of any such document knowing the signature thereto to be forged, such person shall be liable on conviction on indictment to be imprisoned, with or without hard labour, for a term not exceeding two years, and the costs of the prosecution of any such person on indictment may be paid as in cases of felony.' (b)

As to forging ballot papers, &c., at parliamentary and municipal elections, see vol. i. p. 457.

Upon the trial of any indictment for any offence in this chapter the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt.

(b) For a similar provision in the Submarine Telegraphs Act, 1885 (48 & 49 Vict. c. 49), see sec. 8, vol. iii. p. 446.

## CHAPTER THE FORTIETH.

### OF THE FORGERY OF PRIVATE PAPERS, SECURITIES, AND DOCUMENTS.

#### SEC. I.

##### *Statutes in force. (a)*

By the 24 & 25 Vict. c. 98, s. 20, 'Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court,] (b) to be kept in penal servitude for life [or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (c)

Sec. 21. 'Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof, shall be liable,' as in sec. 20. (d)

Sec. 22. 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, endorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any endorsement or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof, shall be liable,' as in sec. 20. (d)

(a) The decisions on repealed statutes will be found in the Appendix to this volume, — Appendix I as to forgery of private paper; Appendix K as to deeds, bills of exchange, and promissory notes; Appendix L as to undertakings for the payment of money; Appendix M as to receipts; Appendix N as to delivery orders; Appendix O as to requests.

(b) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(c) The first part of this clause is taken from the 1 Will. 4, c. 66, s. 10, and is similar to the 3 Geo. 2, c. 4, s. 1 (1.), and 17 Geo. 2, c. 11, s. 1 (1.).

The second part of the section is new, and creates the following offences: 1, forging or uttering, knowing it to be forged, any assignment of any bond; 2, forging the name or signature of a witness attesting the execution of any deed or bond; 3, uttering any deed or bond, having on it any such forged name or signature, knowing it to be forged.

(d) This clause is taken from the 1 Will.

Sec. 23. 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any endorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, (e) bill, or other security for the payment of money, or any endorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 20. (f)

Sec. 24. 'Whosoever, with intent to defraud, shall draw, make, sign, accept, or endorse any bill of exchange (g) or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration (h) or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or endorsed by procuration or otherwise, without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or endorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court.] (i) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (j)

Sec. 25. 'Whenever any cheque or draft on any banker shall be

4, c. 66, s. 3. There were similar provisions in the 3 Geo. 2, c. 4, s. 1 (I.), and 17 Geo. 2, c. 11, s. 1 (I.).

(e) Bank notes were not money or goods within the 2 Geo. 2, c. 25. Harrison's case, *post*.

(f) This clause is taken from the 1 Will. 4, c. 66, ss. 3 & 10. There were somewhat similar clauses in the 3 Geo. 2, c. 4, s. 1 (I.); 17 Geo. 2, c. 11, s. 1 (I.); 13 & 14 Geo. 3, c. 14, s. 1 (I.); 25 Geo. 3, c. 37, s. 1 (I.); and 39 Geo. 3, c. 63, s. 1 (I.).

This clause is new as far as it relates to any authority or request for the payment of money, or to any authority for the delivery or transfer of any goods, &c., or to any endorsement on or assignment of any such undertaking, warrant, order, authority, request, or accountable receipt as is mentioned in the clause.

The words 'authority, or request for the payment of money,' are introduced to get rid of the question so commonly arising in cases of this kind, whether the forged instrument were either a warrant or order for the payment of money. Requests for the payment of money were not within these words. *R. v. Thorn*, C. & M. 206; 2 M. C. C. 210. Whenever there is any doubt as to the legal

character of the instrument, different counts should be inserted describing it in each by one only of the terms warrant, order, authority, or request.

A forged endorsement on a warrant or order for the payment of money was not within the former enactments. *R. v. Arcott*, 6 C. & P. 408. But this clause includes that and other forged endorsements.

The words 'for procuring or giving credit' were taken from the 39 Geo. 3, c. 63, s. 1 (I.).

(g) For definition of bill of exchange, see 45 & 46 Vict. c. 61, s. 3, *ante*, p. 605, note (f).

(h) See *R. v. White*, 1 Den. C. C. 208; 2 C. & K. 404, a case decided before this Act.

(i) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(j) This clause is new, and was framed in order to make persons punishable who, without authority, make, accept, or endorse bills or notes 'per procuration,' which was not forgery under the former enactments. *Maddock's case*, 2 Russ. C. & M., *post*; *R. v. White*, 1 Den. C. C. R. 208; 2 C. & K. 404.

crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 20. (*k*)

Sec. 30. 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll relating to any copyhold or customary estate, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 20. (*l*)

Sec. 39. 'Where by this or by any other Act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or testamentary writing, or a deed, bond, or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an endorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an endorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money, within the true intent and meaning of this Act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this Act, and punished accordingly.' (*m*)

It is to be observed, that although this Act does not extend to Scotland, yet it applies to the forging or uttering in England documents purporting to be made, or actually made out of England, and to the forging or uttering in England bills of exchange, promissory notes, bonds, &c., purporting to be payable out of England. (*n*)

By the Post Office (Money Orders) Act, 1880 (43 & 44 Vict. c. 33), s. 3, 'Any person who with intent to defraud obliterates, adds to, or alters any such lines or words on an order issued under this Act as would in the case of a cheque be a crossing of that cheque, or knowingly offers, alters, or disposes of any order with such fraudulent obliteration, addition, or alteration shall be guilty of felony, and be liable to the like punishment as if such order were a cheque. Pro-

(*k*) This clause is taken from the 21 & 22 Vict. c. 79, s. 3, and is so framed as to meet the case of a draft either issued with a crossing on it, or crossed after it was issued. The clause is extended to Stocks under the Local Authorities Loan Act by 38 & 39 Vict. c. 83, s. 32.

(*l*) This clause is taken from the 1 Will. 4, c. 66, s. 10, and is new in Ireland. It has been doubted whether there be any case

in Ireland to which it can apply; but it is understood that there is one manor in Ireland in which there are copyhold or customary estates.

(*m*) This clause is taken from the 1 Will. 4, c. 66, s. 4, and extended to Ireland.

The words in italics are introduced to make this clause correspond with the other parts of this Act.

(*n*) See sec. 40, *ante*, p. 680.

vided, always, that any banker, or corporation or company acting as bankers, in the United Kingdom who, in collecting in such capacity for any principal, shall have received payment or been allowed by the Postmaster-General in account in respect of any money order issued under this Act, or of any document purporting to be such a money order, shall not incur liability to any one except such principal by reason of having received such payment or allowment; but this section shall not relieve any principal for whom such order or document shall have been so held or presented of any liability in respect of his possession of the same or of the proceeds thereof.'

## SEC. II.

### *Cases decided on Statutes in Force.*

The prisoner altered the name of the person ordained deacon so as to change it to his own, and made other alterations in letters of orders signed, sealed, and issued under his episcopal seal by the Bishop of Bath and Wells: Held, that such document was not a deed within the 24 & 25 Vict. c. 98, s. 20, and therefore the prisoner could not be convicted of felony under that section. (*o*)

An I. O. U. in the following form: 'I. O. U. thirty-five pounds — A. C.

'G. W.'—given by A. C., the prisoner, to his creditor for the amount of his debt, by which means he obtained further time for payment, and upon which was forged the signature of another person, is an instrument upon which the latter person would be liable if the signature had been genuine; and is therefore an undertaking for the payment of money within the meaning of the 23rd section of the 24 & 25 Vict. c. 98, and the subject matter of forgery within that section. (*p*)

(*o*) *R. v. Morton*, 42 L. J. M. C. 58, *et per Bovill*, C. J. It must be treated as a deed if it confers any right or passes any interest, or is a confirmation of an Act which confers a right or passes an interest. This document does not. This document passes no interest, creates nothing, gives no title, or authority, or anything; it merely certifies that a certain ceremony has been performed. No authority is given by this document, nothing has passed from the bishop. Under those circumstances it is in the nature of a mere declaration or certificate of the person having been admitted into holy orders. The case as to an award, though it may be under the Stamp Acts, shews that an award is not a deed, though under seal. A will under seal and delivered is not a deed; warrants of magistrates under seal are not deeds. So again, certificates of admission to learned bodies or societies, as a certificate of admission as a physician, are merely certificates authenticated in a solemn manner. A

certificate as to shares is frequently under the seal of the company, but it is nothing more than a certificate. It shocks one's common sense to be told that these are deeds. The probate of a will is a certificate of the will having been proved before the archbishop, and of the act of administration having been granted to persons mentioned, but it has never been suggested that it is a deed. *Et per Blackburn*, J.: Spelman's is the best definition of a deed, viz., 'fait scriptum solenne quo firmatur donum, concessio pactum contractis et hujusmodi.' A deed, bond or writing obligatory' within the section of the statute we are considering means a deed of the same kind as a bond or writing obligatory. It means something passing an interest or power. As to the probate of a will, however, as at present advised, I am disposed to think that it may be a deed, inasmuch as it operates to pass property.

(*p*) *R. v. Chambers*, 41 L. J. M. C. 15, *et per Kelly*, C. B.: I think this was a

Forging a document purporting to guarantee a master to a certain amount in money against the dishonesty of a clerk, is forging an undertaking for the payment of money within the 24 & 25 Vict. c. 98, s. 23. (*q*)

V. abstracted a number of forms of post-office orders from a local post-office, filled them up for various amounts, and signed them 'G. J., pro postmaster.' He uttered these orders in payment for goods, and signed them as having received the amounts: Held, that although no letters of advice had been forwarded, the orders were orders for the payment of money, and V. might be indicted for uttering forged orders for the payment of money. (*r*)

A friendly society had branches in various towns. A member belonging to one branch could not be received into the court of another branch as a clearance member without a document called a 'clearance,' certifying that he had paid all the dues and demands of the branch to which he belonged, and authorising the other branch to receive him: Held, that such 'clearance' was not an acquittance or receipt for money within section 23 of 24 & 25 Vict. c. 98, and that a conviction for forging such a document must be quashed. (*s*)

The prisoner was indicted for uttering a forged receipt for money, which was in the following form:—

|       |  |    |
|-------|--|----|
|       | 'Bermondsey, Rotherhithe,<br>and Deptford Roads. | 1/ |
| '19/2 | 'St. James's Gate,<br>'18                        |    |

'Clears Fort Place, East Lane, Plough Bridge, St. James's, China Hall, Rotherhithe, New Road, Gibraltar, Swan Bar, and on all side-bars of the trust.'

The prisoner was a carman in the employ of the South Western Railway Company, who every evening repay their carmen any sums they have expended during the day for passing with their vans or carts through any turnpikes, and the prisoner gave the officer of the company, whose duty it was to pay or allow him any money he had expended in passing through St. James's turnpike gate, the said false ticket, as a voucher for his having passed through the gate and paid the toll; whereas he had not passed through any gate belonging to the trust or paid any toll. The false ticket in form and colour resembled and was an imitation of a turnpike ticket, given on passing through St. James's gate. The figure 1/ on the right-hand side indicates that 1s. has been paid on passing through the turnpike gate. If a larger or smaller sum than 1s. has been paid, the sum actually paid is inserted. It was objected that the document was merely a

security for the payment of money, and an undertaking within the meaning of that section. It may be said that the instrument shewed no consideration, but there was consideration in fact. The case finds that further time for payment was obtained by giving it. The consideration need not now appear on the face of the document. The document

amounted to an undertaking by G. W. to pay the debt of the prisoner.

(*q*) *R. v. Joyce*, 34 L. J. M. C. 168, 10 Cox, C. C. 100, L. & C. 576.

(*r*) *R. v. Vanderstein*, 10 Cox, C. C. 177, Irish.

(*s*) *R. v. Franch*, 39 L. J. M. C. 58.



pass and not a receipt; but on a case reserved, the conviction was affirmed. (t)

An ordinary railway ticket is not an acquittance or receipt for money within the above 23rd section. (u)

A building society was in the habit of taking money on deposit at interest, and upon repaying such deposit required a receipt to be given by the depositor for the amount repaid. The prisoner was convicted of forging one of such receipts, which was in the following form: 'Received of the South Lancashire Building Society the sum of £417 13s. on account of my share, No. 8071, pp., SUSEY AMBLER, WILLIAM KAY.' Susey Ambler was the depositor, and the prisoner a local agent of the society. By the custom of the society such a document was treated as an authority, warrant, or request to pay the deposit, but not as an order. Held, that the above document might be described in the indictment as a warrant, authority, or request for the payment of money by procuration within the meaning of the 24 & 25 Vict. c. 98, s. 24. (v)

### SEC. III.

#### *Statutes in force as to having Moulds, &c., for making Paper with Banker's Name on it.* (w)

By the 24 & 25 Vict. c. 98, s. 18, 'Whosoever, without lawful authority or excuse (the proof thereof shall lie on the party accused), shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any body corporate, company, or person carrying on the business of bankers (other than and except the Banks of England and Ireland respectively), appearing visible in the substance of the paper, or knowingly have in his custody or possession any such frame, mould, or instrument, or make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such body corporate, company, or person shall appear visible, or by any art or contrivance cause the name or firm of any such body corporate, company, or person to appear visible in the substance of the paper upon which the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (x) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (y)

By sec. 19, 'Whosoever, without lawful authority or excuse (the

(t) *R. v. Fitch*, L. & C. 159. *R. v. Howley*, *ibid.*

(u) *R. v. Gooden*, 11 Cox, C. C. 672.

(v) *R. v. Kay*, 39 L. J. M. C. 118.

(w) Some cases on repealed statutes will be found in Appendix P at the end of this volume.

(x) The words in brackets are repealed, but the punishment, except as to solitary

confinement, remains the same, see *ante*, p. 50, note (o).

(y) This clause is taken from the 1 Will. 4, c. 66, s. 17. There were similar provisions in the 41 Geo. 3, c. 57, s. 1. The Select Committee of the Commons struck out the words 'by any art or contrivance;' but, by some accident, they were not omitted in the reprint of the bill.

proof whereof shall lie on the party accused), shall engrave or in any wise make upon any plate whatsoever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince, or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons, resident in any country not under the dominion of Her Majesty, or shall use, or knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any part of any such foreign bill, note, undertaking, or order shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 18. (z)

The prisoner was indicted for making upon a certain plate, to wit, a plate of glass, an Austrian note for the payment of one gulden. The prisoner employed a photographer to counterfeit Austrian bank notes, his directions being to take the impression of the note on glass by means of a photographic process, and then get it engraved on metal or wood, so as afterwards to strike off the notes when the proper bank-note paper could be procured from the Continent. The photographer, accordingly, took off, on a glass plate, a 'positive' impression of the note, and shewed it to the prisoner, who was apprehended whilst approving of the impression and giving further directions with respect to it. The process of photography consists in exposing to the light a plate of glass properly prepared with collodion, with the note opposite, by which means the shadow or impression of the note is produced on the glass. The impression is called 'a positive,' and by converting it into 'a negative,' which is easily done, notes can either be printed by photography to any extent, on properly prepared sensitive paper, or may be engraved from as directed by the prisoner; but the impression of the note could not be printed or engraved until the positive was converted into a negative. The impression is a mere shadow on the surface of the glass, and easily washed off until fixed, and it was necessary to varnish the impression taken in order to fix it for production at the trial. It was objected that the statute did not contemplate the use of photography, but an 'engraving or making,' by cutting into the surface of some material for the purpose of taking impressions therefrom; that producing an evanescent shadow of the note on glass was not within the statute, and that the engraving of the note, which was ultimately contemplated, was never made; the objections were overruled, and, on a case reserved, it was held that the conviction was right. The words of the 24 & 25 Vict. c. 98, s. 19,

(z) This clause is taken from the 1 Will. 4, c. 66, s. 19. There were similar provisions in the 43 Geo. 3, c. 139, ss. 1, 2.

are, 'Whosoever shall in any wise make, &c., upon any plate, &c., any bill of exchange, &c.' Now the prisoner here clearly made on a plate an undertaking or order for the payment of money. The undertaking consisted of certain words which by a certain process had been put on the plate in their exact form. The object of the statute is to prevent counterfeit securities; it is very wide in its language, and omits all words or questions of intent, and this case clearly falls within it. It was contended that the prisoner was interrupted before the offence was complete; but the statute applies to any stage of the process, even though the photographic copy be an undertaking of an evanescent form. (a)

#### SEC. IV.

##### *Falsification of Accounts Act, 1875.*

The 38 Vict. c. 24 (The Falsification of Accounts Act, 1875), recites, 'Whereas it is expedient to amend the law so as to punish the falsification by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents,' and enacts as follows:—

Sec. 1. 'That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make, or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for a term not exceeding seven years, (b) or to be imprisoned, with or without hard labour, for any term not exceeding two years.'

Sec. 2. 'It shall be sufficient in any indictment under this Act to allege a general intent to defraud without naming any particular person intended to be defrauded.'

Sec. 3. 'This Act shall be read as one with the Act of the 24 & 25 Vict. c. 96.'

The prisoner, who was employed as a collector, collected a sum of money on behalf of his employer, but gave to the clerk, whose duty it was to enter payments in a cash book, a slip of paper containing a note that he had collected a smaller sum than he had actually collected. The clerk accordingly, acting in good faith, copied this into the cash book. It was held that the prisoner was rightly convicted. (c)

It would seem to be clear law that the making of a false original entry in a book or account is not a forgery. *In re Windsor*, 6 B. & S. 522, S. C. *Ex parte Windsor*, 34 L. J. M. C. 163.<sup>1</sup>

(a) R. v. Rinaldi, L. & C. 330.

(b) Not less than three years.

(c) R. v. Hutt, 15 Cox, C. C. 564, per

Lord Coleridge, C. J., Huddleston, B.,  
Grove, Manisty, and Mathew, JJ.

#### AMERICAN NOTE.

<sup>1</sup> It appears to be so by statute in New York. See Bishop, vol. ii. s. 586 (3), and R. v. Phelps, 49 How. Pr. 462.

## CHAPTER THE FORTY-FIRST.

### OF DEMANDING PROPERTY UPON FORGED INSTRUMENTS.

By the 24 & 25 Vict. c. 98, s. 38, 'Whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (b)

This clause is new, and is intended to embrace every case of demanding, &c., any property whatsoever upon forged instruments. It is intended to include bringing an action on any forged bill of exchange, note, or other security for money. The words, 'procure to be delivered or paid to any person,' &c., were inserted in order to include cases where one person by means of a forged instrument causes money to be paid to another person, and to avoid the difficulty which had arisen in the cases as to obtaining money by false pretences. (c)

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement remains the same, see *ante*, p. 50, note (c).

(b) This clause is framed in part from the 38 Geo. 3, c. 53, s. 2 (1.), which provided

against demanding money on forged bank-notes, and the 11 Geo. 4, c. 20, s. 85, which relates to obtaining money under forged wills, or probates fraudulently obtained.

(c) See *R. v. Wavell*, R. & M. C. C. 224; *R. v. Garrett*, 1 Dears. C. C. 232, *ante*.

## CHAPTER THE FORTY-SECOND.

### OF FALSELY PERSONATING ANOTHER.

**At common law.** — The bare fact of personating another, for the purpose of fraud, is no more than a cheat or misdemeanor at common law, and punishable as such. (a) And the principal cases in which it has been considered as indictable have been laid as cases of conspiracy.

In a case where the prisoner had been acquitted on an indictment preferred against him for forgery, upon its appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person, (b) he was indicted again for the misdemeanor; but it is observed that this second indictment did not turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as the cheat. (c) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnise a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction proceeded upon that ground. (d) And in a case where a cheat was effected by one person pretending to be a merchant, and another pretending to be a broker, we have seen that judgment appeared ultimately to have been given for the Crown, on the ground that it was a case of conspiracy. (e) A case, however, is reported, in which the indictment only charged that the defendant personated a clerk to a justice of the peace, with intent to extort money from several persons, for procuring their discharge from misdemeanors for which they stood committed; and the Court refused to quash it upon motion, and put the defendant to demur to it. (f) But it is observed, that it might probably have occurred to the Court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another; that it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices. (g) How far the *refusal* to quash the indictment upon motion can be considered as an authority is questionable; as we have seen that it was the practice of the Court.

(a) 2 East, P. C. c. 20, s. 6, p. 1010.

(b) *Ante*, p. 575.

(c) 2 East, P. C. c. 20, s. 6, p. 1010.  
The defendants were convicted upon this second indictment.

(d) *R. v. Robinson*, 1 Leach, 37. 2 East, P. C. c. 20, s. 6, p. 1010.

(e) *R. v. Mackarty*, *ante*, p. 462.

(f) *Dupee's case*, 2 Sess. Cas. 11, 2 East, P. C. c. 20, s. 6, p. 1010.

(g) 2 East, P. C. c. 20, s. 6, p. 1011.

as often declared, not to quash on motion indictments for offences founded in fraud or oppression, though such indictments might appear not to be sustainable, but to leave the defendants to plead. (*h*)

**By statute.** — The offence of falsely personating another for purposes of fraud is so nearly allied to forgery, and so often blended with it, that these offences have been frequently included by the Legislature in the same enactments, and made felonies alike subject to the same punishment. Many of the statutes, therefore, which relate to falsely personating, with a few cases determined upon their construction, have necessarily been introduced in the preceding chapters; as those concerning the personating the proprietors of public stocks, &c., (*i*) and the personating of soldiers and seamen, and their widows, &c., in order to obtain wages, pensions, prize-money, &c. (*j*)

By 37 & 38 Vict. c. 36 (The False Personation Act, 1874), sec. 1, 'If any person shall falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be kept in penal servitude for life, or any period not less than five (*k*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour.'

Sec. 2, 'Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law.'

Sec. 3, 'No offence against this Act shall be prosecuted or tried at any Court of General or Quarter Sessions of the peace.'

Sec. 4, 'This Act may be cited for all purposes as the False Personation Act, 1874.'

By 2 Will. 4, c. 53, entitled 'An Act for consolidating and amending the laws relating to the payment of army prize-money,' sec. 49, 'if any person shall knowingly and willingly personate or falsely assume the name or character, or procure any other person to personate or falsely assume the name or character, of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize-money, grant, bounty-money, share, or other allowance of money, due or payable or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served or be supposed to have served in His Majesty's army or in any other military service, or shall personate or falsely assume, or act, aid, (*l*) or assist in personating or falsely assuming the name or character, or procure any other person to personate or falsely assume the name or character, of the executor or administrator, wife, widow, next of kin, relation, or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order to

(*h*) *Ante*, p. 464, note (*g*).

(*i*) *Ante*, p. 695, *et seq.*

(*j*) *Ante*, p. 785, *et seq.*

(*k*) Now three years.

(*l*) See *R. v. Lake*, 11 Cox, C. C. 333.

As to personation of a man in the army, see 44 & 45 Vict. c. 59, s. 142. As to obtaining pensions by personation, see 47 & 48 Vict. c. 55, s. 3. 28 & 29 Vict. c. 124, ss. 6-9.

receive or enable any other person to receive any prize-money, grant, bounty-money, share, or other allowance of money due or payable or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any such officer, non-commissioned officer, soldier, or other person as aforesaid; all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years, (n) as the Court before whom such person or persons shall be convicted shall adjudge.' (o)

By 28 & 29 Vict. 124 (The Admiralty Powers, &c., Act, 1865), s. 8. 'If any person in order to receive any pay, wages, allotment, prize-money, bounty-money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, payable or supposed to be payable by the admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding five years, (p) or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.'

Upon some of the former statutes relating to the false personating of seamen, it was decided, that as the false personating must be done in order to receive the wages, &c., of some seaman, &c., *entitled or supposed to be entitled thereto*, there must be some evidence to shew that there was such a person of the name and character assumed, who was either entitled, or might *prima facie* at least be supposed to be entitled, to receive the wages, &c., attempted to be acquired. Thus where the prisoner was indicted on the 31 Geo. 2, c. 10, for personating and falsely assuming the name and character of Wm. Wheeler, a person supposed to be entitled to prize-money, for service done on board His Majesty's ship *Terpsichore*, in order to receive certain prize-money, &c., one of the objections taken after conviction was, that there was no evidence that Wm. Wheeler ever served on board the *Terpsichore* in any capacity, or, indeed, that any such person existed; and the judges, after a conference, held that the conviction was wrong, there being no evidence that there was any such person as Wm. Wheeler, who either was entitled, or at least *prima facie* entitled, to prize-money as a seaman on board the *Terpsichore*. (q)

In a case upon one of the former statutes, 54 Geo. 3, c. 93, s. 89, the indictment charged the prisoner with personating and falsely

(n) Penal servitude for life or for any term not less than three years, see 9 & 10 Vict. c. 24, as to imprisonment.

(o) The 1 Will. 4, c. 53, contains no express provision for the punishment of accessories after the fact, consequently they are punishable under the 24 & 25 Vict. c.

94, s. 4, vol. i. p. 182. See the remainder of sec. 49 of the 2 Will. 4, c. 53, *ante*, p. 735.

(p) Not less than three years.

(q) Brown's case, 2 East, P. C. c. 20, s. 4, p. 1007. S. P. in *M'Annally's case*, *ibid.* p. 1009.

assuming the name and character of one Joshua Boatwright, a seaman entitled to certain prize-money; and it was proved that the prisoner applied at Greenwich Hospital for prize-money in the name of Boatwright; but it appeared that he did not obtain the money, and that Boatwright was then dead. It was objected, that to personate Boatwright under these circumstances, or to assume his name and character, was not an offence within the meaning of the Act, which related only to existing persons; that after the death of Boatwright he could not be entitled to prize-money, but that the personal representatives or next of kin were the persons entitled, and that in fact he was not supposed to be entitled to prize-money, since it was supposed at the prize-office that he was dead, and that his next of kin was in the course of obtaining administration in order to receive it. But on a case reserved, the judges were of opinion that the conviction was right, and that the statute applied, though the seaman personated was dead. (r) So where the prisoner personated one Cuff, who was dead, and whose prize-money had been paid to his mother, the judges were of opinion that a conviction upon the same statute was right. (s)

In a case upon the 57 Geo. 3, c. 127, s. 4, the indictment charged the prisoner with wilfully and knowingly personating and falsely assuming the name and character of Peter M'Cann, a person entitled to prize-money for and in respect of his services performed on board of a ship of His Majesty's, called the Tremendous, in order to receive such prize-money, with intent to defraud the commissioners and governors of the Greenwich Hospital; and a second count described Peter M'Cann as a person supposed to be entitled, &c., for services supposed to have been performed. It appeared by the prize-list and muster-book of the Tremendous, produced by the proper officer from Greenwich Hospital, that there was a person of the name of Peter M'Cann entitled to prize-money, but no person of the name of Peter M'Cann. The learned judge by whom the prisoner was tried inclined to direct an acquittal upon this variance in the name, but he ultimately left the case to the jury, directing them to say whether the prisoner intended to personate Peter M'Cann. The jury found that he did so intend, and returned a verdict of guilty; but, upon a case reserved, the judges were of opinion that the 'personating' must apply to some person who had belonged to the ship, and that the indictment must charge a personating of some such person; and as that was not the case here, they held the conviction wrong. (t)

It was held upon the same statute, 57 Geo. 3, c. 127, s. 4, that all persons present aiding and abetting another in the personating and falsely assuming the name, &c., of a seaman, were principals, and that the offence was not confined to the individual only, by whom the seaman was personated. (u)

As to personating the owner of any share or interest of or in any of the public stocks, &c., see 24 & 25 Vict. c. 98, s. 3, *ante*, p. 695, and 26 & 27 Vict. c. 28, s. 15, *ante*, p. 697; 33 & 34 Vict. c. 58, s. 4, *ante*, p. 698.

(r) *R. v. Martin*, R. & R. 324.  
(s) *R. v. Cramp*, R. & R. 327.

(t) *R. v. Tannet*, R. & R. 351. See *R. v. Pringle*, 2 M. & Rob. 276, *ante*.  
(u) *R. v. Potts*, R. & R. 353.



As to personating the owner of any share or interest of or in India stock, &c., see 26 & 27 Vict. c. 73, s. 14, *ante*.

By 30 & 31 Vict. c. 131 (The Companies Act, 1867), s. 35, whoever falsely and deceitfully personates any owner of any share or interest of or in any company, or of any share, warrant, or coupon issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share, or interest, or share warrant, or coupon, or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than five (*v*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to personation of voters at parliamentary and municipal elections, see Vol. I. p. 458, *et seq.*

It is not an offence under sec. 3 of the 14 & 15 Vict. c. 105, to personate a voter who is dead. (*w*)

By 28 Vict. c. 36, s. 11 (The County Voters Registration Act, 1865), any person falsely or fraudulently signing any such declaration [as is mentioned in sec. 10 of that Act], in the name of any other person, whether such person shall be living or dead; and every person transmitting as genuine any false or falsified declaration, knowing the same to be false or falsified, and any person knowingly and wilfully making any false statement of fact in such declaration, shall be guilty of a misdemeanor, and punishable by fine or imprisonment for a term not exceeding one year, and the revising barrister shall have power to impound any such declaration.

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), sec. 25, 'If any person falsely or fraudulently signs any such declaration [as is mentioned in sec. 24 of the Act], or any declaration either as claimant or witness in respect of a claim to vote as a lodger in the name of any other person whether that person is living or dead, or in a fictitious name, or sends as genuine any false or falsified declaration knowing the same to be false or falsified, or knowingly and wilfully makes any false statement of fact in any declaration of the nature aforesaid, he shall be guilty of a misdemeanor, and punishable by fine or by imprisonment for a term not exceeding one year, and the revising barrister shall have power to impound the declaration.'

By the 24 & 25 Vict. c. 98, s. 34, 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognisance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorised in that behalf, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (*x*) to be kept in penal servitude for any term not exceeding seven years [and not less

(*v*) Now three years.

(*w*) *Whiteley v. Chappell*, 11 Cox, C. C. 307.

(*x*) The words in brackets are repealed,

but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].’ (y)

In the construction of the 21 Jac. 1, c. 26, s. 2 (now repealed), it was holden that the bare personating of bail before a judge at chambers, or the acknowledging thereof in another name, was no felony, but only a misdemeanor, unless the bail was filed. (z) But yet it appears in one case that the offence was considered as complete by the personating; as, though the bail-piece was filed at Westminster, the trial was had in London, the county where the bail was personated. (a) It seems that if bail were put in under feigned names of persons who had no existence, the offender could not be prosecuted upon this repealed statute for felony. (b)

(y) This clause is framed from the 1 Will. 4, c. 66, s. 11. There was a similar clause in the 10 Car. 1, Sess. 3, c. 20, s. 1 (l.).

(z) 1 Hale, 696. Timberley’s case, 2 *ibid.* 90. 1 Hawk. P. C. c. 47, s. 5, 2 East, P. C. c. 20, s. 4, p. 1009. The words of the 21 Jac. 1, c. 26, s. 2, were ‘That all and every person and persons which shall acknowledge or procure to be acknowledged any fine or fines, recovery or recoveries, deed or deeds enrolled, statute or statutes, recognisance or recognisances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same,’ shall be

adjudged felons. The words of the new clause render it unnecessary for the recognisance or bail to be filed. C. S. C.

(a) Beesley’s case, T. Jones, 64. 1 Hawk. P. C. c. 47, s. 4. But in 2 East, P. C. c. 20, s. 5, p. 1010, it is observed that according to the report of the same case in Ventris (1 Vent. 301), Twisden, J., said that it must be tried in Middlesex, where the bail-piece was filed; the entry being *venit coram domino rege, &c.*

(b) Anon. 1 Str. 384. 1 Hawk. P. C. c. 47, s. 6. But the court in this case ordered the bail and the attorney to be set in the pillory.

## CHAPTER THE FORTY-THIRD.

### OF MALICIOUS INJURIES TO PROPERTY.<sup>1</sup>

WE now come to the consideration of those injuries to property which proceed rather from malicious or wanton motives than from any proposed gain to the offender. Injuries of this kind were made punishable by different statutes passed from time to time, as they appeared to be required for the protection of the community; but the provisions contained in these statutes are now amended and consolidated into one statute.

The several enactments of this statute will be mentioned in the succeeding chapters, in such arrangement as may seem most appropriate; but its general provisions may be properly stated in the first instance.

**Malice against the owner not necessary.**<sup>2</sup>—The 24 & 25 Vict. c. 97, s. 58, enacts, that malice against the owner of the property shall not be essential in offences of this description; an ingredient in the offences, under some of the repealed statutes, which had often obstructed the course of justice, and (as in the instance of maiming cattle) had screened the perpetrators of very barbarous acts from deserved punishment. The words of this section are, 'that every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.' (a)

(a) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 25; 9 Geo. 4, c. 56, s. 32 (I.); and 8 & 9 Vict. c. 44, s. 2.

#### AMERICAN NOTES.

<sup>1</sup> See *Skill v. S.*, 6 Humph. 283. *S. v. Holmes*, 5 Ired. N. C. 364. *C. v. Walden*, 3 Cush. 558. *S. v. Pierce*, 7 Ala. 728. *P. v. Horr*, 7 Barb. 9. *S. v. Leavitt*, 32 Maine, 183. *U. S. v. Gideon*, 1 Min. 292. *S. v. Newby*, 64 N. C. 23. *Hobson v. S.*, 44 Ala. 380. *Moseley v. S.*, 28 Ga. 190. *Snap v. P.*, 19 Ill. 80.

In the American States various statutes have been passed in some degree similar to the English statute; yet differing from it, and from one another, in many particulars. In some States the offence is made felony, in others misdemeanor. In some (as New York) the offence may be committed on real as well as personal property. In New Hampshire dogs are within the statute; in Virginia and Minnesota, not. In Missouri it has been held that a buffalo, though do-

mesticated, does not come within the word "cattle." So hogs were held to be included in the words "other timber and property." *Bishop*, ii. s. 983, *et seq.*

<sup>2</sup> In America, however, it is necessary to prove malice directed against the owner of the property injured, unless, perhaps, in Georgia (*Moseley v. S.*, 28 Ga. 190) or Alabama (*Johnson v. S.*, 37 Ala. 457). A malicious injury done with a view to protect a man's own property is not within the statutes. *S. v. Landreth*, 2 Car. L. R. 446. *Lane v. S.*, 16 Tex. Ap. 172. *Thomas v. S.*, 14 Tex. Ap. 200. See, however, *S. v. Waters*, 6 Jones N. C. 276, and *Snap v. P.*, 19 Ill. 80, 68 Am. D. 582. But the decisions seem to turn on the particular words of the statute in force in the particular State.

Before this Act it was held that if the thing attempted to be done would, if successful, have prejudiced a particular individual, it would be intended that such prejudice was meant, without any proof of actual malice against such individual. (b)

If an indictment under the 7 & 8 Geo. 4, c. 30, alleged an intent to injure the owner of the property set fire to, it was supported, although the jury found that the prisoner intended to injure another person. (c)

On an indictment for setting fire to a hovel it appeared that the prisoner had been in a low state of mind, and doubts as to his sanity had been entertained, and there was no evidence of ill-will against any one; and Crompton, J., told the jury that it was not necessary for the prosecution to prove express malice in the prisoner; malice did not mean that he had a particular spite against the prosecutor. If a man, being in his right mind, burnt property belonging to another, a jury ought to infer malice from the act itself. And the question was then left to the jury whether the prisoner knew right from wrong. The jury at first found the prisoner not guilty on the ground of insanity; but, in answer to Crompton, J., they said they thought the prisoner was in such a state of mind that he did not know that the effect of burning the hovel would be to injure any other person. Crompton, J., 'That is a verdict of not guilty.' (d)

The prisoners were indicted for feloniously and maliciously obstructing an airway belonging to a mine of one Phelps, by building a wall across the airway; the prisoners were in the employ of Protheroe, between whom and Phelps there was a dispute respecting two mines in their respective occupations, lying close together. Protheroe, professedly with the view of exerting his supposed right against Phelps, directed the prisoners to effect the obstruction charged in the indictment, and the prisoners accordingly made such obstruction. (e) The effect of the obstruction would be to drive back the choke damp into Phelps's mine, and prevent the working. Lord Abinger, C. B., 'If a master, having a doubt or no doubt of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable to an action of trespass, but it would not be felony in the servants. The rules respecting acts *mala in se* do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. But if the servant *bonâ fide* did these acts, I think they do not amount to an offence within this statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so, acting *bonâ fide*, I am of opinion

(b) *R. v. Philp*, R. & M. C. C. R. 263. See this case *post*, as to other points. See *R. v. Foster*, 6 Cox, C. C. 25, *post*.

(c) *R. v. Newill*, R. & M. C. C. R. 458. In his charge to the Bristol grand jury in 1832, Tindal, C. J., observed, that 'where a statute directs that to complete an offence it must have been done with the intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law when a man wilfully does

that which is illegal, and which, in its necessary consequence, must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him.' 5 C. & P. 266, note.

(d) *R. v. Davies*, 1 F. & F. 69.

(e) This statement is taken from the report of *James v. Phelps*, 11 Ad. & E. 483.

that that is not a felony in them, even if in so doing they obstruct the airway of a mine. What I feel is this, that if these men acted *bonâ fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this Act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged.' (f)

And this decision was confirmed in an action brought by one of the prisoners against Phelps, for a malicious prosecution, in which it was contended that the proviso in sec. 24 of the 7 & 8 Geo. 4, c. 30 (which authorised justices summarily to convict in cases of malicious injuries to real or personal property), that 'nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of,' raised a strong inference that the Legislature did not intend to except from the operation of sec. 6 acts done in the supposed exercise of a right, as there was no such proviso in sec. 6. But the Court of Queen's Bench were of a contrary opinion, and Lord Denman, C. J., observed, 'As to the 7 & 8 Geo. 4, c. 30, s. 24, I think it makes strongly against the argument of the defendant's counsel. That section gives a power to convict summarily for malicious mischief; and it contains a proviso that, where there is a *bonâ fide* acting under a supposed right, the party acting shall not be liable to conviction even for the trespass. Now why was there no such provision in the case of felony? For this plain reason, that the principles of the common law prevent the act from being felonious where there is no malice in the intention.' (g)

Sec. 54. 'Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [at the discretion of the Court] (h) to be imprisoned for any term not exceeding two years, with or without hard labour [and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (i)

Sec. 59. 'Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud

(f) *R. v. James*, 8 C. & P. 131. Lord Abinger, C. B., directed the prisoners to be acquitted.

(g) *James v. Phelps*, *ubi supra*. In this case some judges 'expressed an opinion that an obstruction not wilful or with knowledge could not amount to a felony from the general principles of criminal justice,' per Lord

Denman, C. J., in *Fletcher v. Calthrop*, 6 Q. B. 880.<sup>1</sup>

(h) The words in brackets are repealed.

(i) This clause is taken from the 9 & 10 Vict. c. 25 s. 8, and extended to all the felonies against this Act.

By sec. 55, justices of the peace may issue warrants for searching houses, &c., for gunpowder, &c., &c.

#### AMERICAN NOTE.

<sup>1</sup> In Tennessee a person who *bonâ fide* throws down a fence believing it to be his own is not guilty of 'wilfully or ma-

liciously' doing so. *Goforth v. S.*, 8 Humph. 87. *Dye v. C.*, 19 Gratt. 662.

any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done.' (*j*)

Sec. 60. 'It shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).' (*k*)

On an indictment for arson of a house with intent to defraud, it was suggested that the motive might have been the desire to realise the sum insured upon the furniture, &c.; and Pollock, C. B., held that evidence was admissible that the prisoner was in easy circumstances, and had a comfortable income. (*l*)

As to the punishment of principals in the second degree and accessories, see sec. 56, Vol. I. p. 191.

Sec. 72 provides for the trial, punishment, &c., of indictable offences mentioned in this Act, which shall be committed within the jurisdiction of the Admiralty of England or Ireland. (*m*)

Sec. 73 states when a person convicted under this Act may be fined or compelled to find sureties for keeping the peace, &c.

Sec. 74 relates to hard labour.

Sec. 75 relates to solitary confinement and whipping.

Sec. 77. The Court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner and in all respects as in cases of felony.

By sec. 57, any person suspected of any felony against the Act and loitering at night may be apprehended; and by sec. 61, any person found committing any offence against the Act may be apprehended.

The statute contains various regulations as to the summary proceedings by conviction before magistrates, which are authorised by its provisions for the punishment of minor offences.

By the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), sec. 22, 'Any person who unlawfully and maliciously cuts or injures any

(*j*) This clause is a very important amendment. It extends every clause of the Act not already so extended to persons in possession of the property injured, provided they intend to injure or to defraud any other person. It, therefore, brings tenants within the provisions of the Act, whenever they injure the demised premises or anything growing on or annexed to them, with intent to injure their landlords, and gets rid of the doubt entertained in *Mills v. Collett*, 6 Bing. R. 85, whether a tenant who maliciously cut down a tree on the demised premises was within the former Act.

(*k*) This clause is framed from the 14 & 15 Vict. c. 100, s. 8, and renders it unnecessary to allege in an indictment for any offence against this Act, or to prove on the trial an intent to injure or defraud any particular person. It places the law on these points in the same position as in cases of forgery and false pretences. See *R. v. Newbould*, *post*, p. 787.

(*l*) *R. v. Grant*, 4 F. & F. 322.

(*m*) This clause is framed from the 7 & 8 Geo. 4, c. 80, s. 43; 9 Geo. 4, c. 56, s. 55; 7 Will. 4 & 1 Vict. c. 89, s. 14, and 7 & 8 Vict. c. 2.

electric line or work with intent to cut off any supply of electricity shall be guilty of felony, and be liable to be kept in penal servitude for five years or to be imprisoned with or without hard labour for two years.'

The general provisions of the 7 Geo. 4, c. 64, as to offences committed on the boundaries of counties, or begun in one county and completed in another, or committed during a journey or voyage, and the provisions as to the statement of property, will apply to offences by malicious injury.(n)

(n) See these provisions, vol. i. p. 4, *et seq*

## CHAPTER THE FORTY-FOURTH.

### OF ARSON AND THE BURNING OF BUILDINGS, MINES, SHIPS, CORN, TREES, &c.<sup>1</sup>

#### SEC. I.

##### *Arson at Common Law, Definition of.*

**At common law.** — Arson is, at common law, an offence of the degree of felony; and has been described as *the malicious and wilful burning the house of another.* (a) The burning a party's own house does not come within this definition; but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (b) The burning of barns, with corn or hay within them, though distant from a house, and no part of the mansion, is felony at common law. (c)

The burning necessary to constitute arson of a house at common law, must be an *actual burning* of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house by putting fire into or towards it, will amount to the offence, if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete, though the fire be put out, or go out of itself. (d)

Upon an indictment for setting fire to an outhouse, it appeared that the roof of the outhouse was made of pieces of wood with straw put upon them, and that smoke was seen to issue out of the bottom of the roof; there was a good deal of smoke in the straw; some handfuls of straw were pulled out, and there were sparks in the straw when on the ground, but no sparks were seen in the straw when on the roof; no flame was seen; a ball of linen was pulled out of the roof with the

(a) 3 Inst. 66. 1 Hale, 566. 1 Hawk. P. C. c. 39. 4 Blac. Com. 220. 2 East, P. C. c. 21, s. 1, p. 1015.

(b) 1 Hale, 568, 569. 1 Hawk. P. C. c. 39, s. 15. 4 Blac. Com. 221. 2 East, P. C. c. 21, s. 7, p. 1027.

(c) 3 Inst. 67. Barham's case, 4 Co. 20 a. Sum. 86. 1 Hawk. P. C. c. 39, s. 1. 4 Blac. Com. 221.

(d) 3 Inst. 66. Dalt. 506. 1 Hale, 568, 569. 1 Hawk. P. C. c. 39, ss. 16, 17. 2 East, P. C. c. 21, s. 4, p. 1020.

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#### AMERICAN NOTE.

<sup>1</sup> See Sampson v. C., 5 W. & Serg. 385. Jesse v. S., 28 Miss. 100. Phillips v. S., 19 Texas, 158. Allen v. S., 10 Ohio (N. S.) 287. Shepherd v. P., 19 N. Y. 537. Roberts v. S., 7 Cald. 359. P. v. Cotteral, 18 Johns.

115. C. v. Posey, 4 Call. 109. C. v. Barney, 10 Cush. 487. S. v. M'Gowan, 20 Conn. 245. P. v. Orcutt, 1 Parker C. R. 252.



straw; smoke and sparks came from the ball; the ball was trod out; the ball was burnt right through on one side; the fire on the roof was extinguished by throwing some water upon it. On the following day, two half matches were found in the straw on the ground, which was pulled from the roof, but there was no appearance of burning in these. On the same day, several handfuls of straw were taken out of the roof, and there was burnt straw in some of these handfuls; and on the same day, on examining the straw lying on the ground down by the building, there were some burnt ashes, and the ends of some of the straws were burnt, and the ends of some of them dropped off like a powder, and the ends of some of the straws had been reduced to ashes; no part of the wood, either in the pieces on which the straw was laid, or in the posts of the building, was burnt. Upon a case reserved upon the question whether this was a setting on fire, the judges held the conviction right. (e)

So where the prisoner was indicted under the 1 Vict. c. 89, s. 3, for setting fire to a house, and it appeared that the floor near the hearth had been scorched; it was charred in a trifling way; it had been at a red heat, but not at a blaze; it was held that this was a sufficient burning. (f)

On an indictment for setting fire to a house, it appeared that a small faggot was found lighted and burning on the boarded floor of the kitchen; it was taken up and put in the grate; a part of the boards of the floor was scorched black, but not burnt; the faggot was nearly consumed; but no part of the wood of the floor was consumed. It was urged that as wood might be scorched without ever being actually on fire, there was not sufficient to constitute the offence. Cresswell, J., 'I have conferred with my brother Patteson, and he concurs with me in thinking that, as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn, and entirely consume, without blazing at all.' (g)

The burning must also be *malicious and wilful*; otherwise it is only a trespass. No negligence or mischance, therefore, will amount to such burning. (h) And for this reason it has been holden, that if an unqualified person should, in shooting at game, happen to set fire to the thatch of a house, it will not be a burning of this description. (i) And so if a man unlawfully shoot at the poultry of another: (j) but it has been observed, that in such case it should seem to be understood that the party did not intend to steal the poultry, but merely to

(e) R. v. Stallion, R. & M. C. C. R. 398.

(f) R. v. Parker, 9 C. & P. 45, Parke, B., and Bosanquet, J.

(g) R. v. Russell, C. & M. 541.<sup>1</sup>

(h) 3 Inst. 67. 4 Blac. Com. 222. If the burning is in the exercise of a *bond fide*

claim of right, it is not wilful or malicious. R. v. Twose, 14 Cox, C. C. 327.

(i) 1 Hale, 569, where this is laid down contrary to the opinion of Dalt. c. 105, p. 506.

(j) Id. Ibid. See 1 Hale, 89.

#### AMERICAN NOTE.

<sup>1</sup> In America, it seems that if any of the fibres of the wood are wasted by the fire it is immaterial how small the quantity wasted

is. S. v. Mitchell, 5 Ire. 350. P. v. Haggerty, 46 Cal. 354.

commit a trespass; for otherwise, the first intent being felonious, the party must abide all the consequences. (*k*)

It has, however, been held in Ireland that where a sailor, while stealing some rum on board ship, accidentally set fire to the spirit, and so set the ship on fire, he could not be indicted for arson. (*l*)

If A. have a malicious intent to burn the house of B., and in setting fire to it burn the house of C. also, or if the house of B. escape by some accident, and the fire take in the house of C. and burn it, this shall be said in law to be the malicious and wilful burning of the house of C., though A. did not intend to burn that house. (*m*) And accordingly it has been said, that if one man command another to burn the house of J. S., and he do so, and the fire thereof burn another house, the commander is accessory to the burning such other house. (*n*) So it has been held that if a person set fire to a stack, the fire from which is likely to communicate to a barn, and it does so, and the barn is burnt, he is in point of law indictable for setting fire to the barn. (*o*) So where the prisoners set fire to a summer-house which was in a wood, and some of the trees overhung it, and their branches were burnt by the fire, which consumed the summer-house and also burnt some of the trees, it was held that the prisoners might be convicted under the 7 & 8 Geo. 4, c. 30, s. 17, of setting fire to the wood. (*p*)

And such malicious and wilful burning of the house of another may be by the means of setting fire to the party's own house; and this, though it should appear that the primary intention of the party was only to burn his own house. If in fact other houses were burnt being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony. (*q*) Thus where the defendant

(*k*) 2 East, P. C. c. 21, s. 3, p. 1019; vol. iii. p. 123.

(*l*) *R. v. Faulkner*, 13 Cox, C. C. 550, following *R. v. Pembilton*, L. R. 2 C. C. R. 118, vol. iii. p. 123, and it would therefore seem that the foregoing citation from East is subject to some qualification.<sup>1</sup>

(*m*) 1 Hale, 569. 3 Inst. 67. 1 Hawk. P. C. c. 39, s. 19. And the indictment may charge it accordingly.

(*n*) Plowd. 574. 2 East, P. C. c. 21, s. 7, p. 1031.

(*o*) *R. v. Cooper*, 5 C. & P. 535, Parke, J. Tindal, C. J., in his charge to the Bristol grand jury, 1832, 5 C. & P. 268, note, said, 'Nor will it be necessary to prove that the house, the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence if he is shewn to have feloniously set on fire another house, from which

the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended.' See *Curtis v. The Hundred of Godley*, 3 B. & C. 248. But in *Turner's case*, 1 Lewin, 9, it is said that Parke, J., left it to the jury whether the prisoner intended by setting fire to a stack of haulm to set fire to a building close adjoining, and that the judges were of opinion this direction was right. In *R. & M. 239*, this point is not noticed, and it is at variance with all the other authorities.

(*p*) *R. v. Price*, 9 C. & P. 729, Gurney, B. The summer-house in this case was not a building the burning whereof was then a felony.

(*q*) 2 East, P. C. c. 21, s. 8, p. 1031. And see the case of *Coke v. Woodburne*, 6 St. Tri. (by Hargr.) 222.

#### AMERICAN NOTE.

<sup>1</sup> Mr. Bishop doubts the correctness of this decision, and points out that it is settled law that when the offence does not require a spe-

cific intent a man is punishable whenever meaning to do one wrong he does another. Bishop, i. ss. 327, 336.

was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c. ; and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house, in order to defraud an insurance office, and that in consequence several houses of other persons, adjoining to his own, were burnt down ; Buller, J., said that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony (the misdemeanor being merged) and could not be convicted on this indictment ; and, therefore, he directed an acquittal. (r) And in a case of a similar kind, which occurred about the same time, Grose, J., in passing sentence in the Court of King's Bench, said, that if it had so happened that any of the neighbouring houses had been set on fire in consequence of the defendant's wilful and malicious act in setting fire to his own house (which was proved to have been done in order to cheat the insurance office), it would clearly have amounted to a capital felony. (s)

In order, however, to constitute the felonious offence of arson at common law, the fire must burn the house of *another*. Therefore, it has been holden not to be felony in a party to burn a house, whereof he was in possession under a lease for years. (t)

And it has been held, that a wife who set fire to her husband's house was not guilty of felony within the 7 & 8 Geo. 4, c. 30, s. 2. An indictment described the prisoner as the wife of J. March, and charged her with setting fire to a certain house of the said J. March, with intent to injure him, against the statute. It appeared that March and his wife had lived separate for about two years ; and previous to the act, when she applied for the candle with which it was done, she said it was to set her husband's house on fire, because she wanted to burn him to death. Upon a case reserved upon the question whether it was an offence within the 7 & 8 Geo. 4, c. 30, s. 2, for a wife to set fire to her husband's house for the purpose of doing him a personal injury, the conviction was held wrong, the learned judges thinking that, to constitute the offence, it was essential that there should be an intent to injure or defraud some third person, not one identified with herself. (u)

And it was decided, that a person in possession of a copyhold dwelling-house could not be guilty of arson by burning it, although he had a long time before surrendered it into the hands of the lord of the manor, to the use of another person, his heirs, and assigns, for securing the payment of money borrowed : for it was considered that,

(r) Isaac's case, *cor.* Buller, J. 2 East, P. C. c. 21, s. 8, p. 1031. But see now the 14 & 15 Vict. c. 100, s. 12 ; vol. i. p. 62.

(s) Probert's case, 2 East, P. C. c. 21, s. 7, p. 1031.

(t) Holmes's case, Cro. Car. 376. W. Jones, 351.<sup>1</sup>

(u) R. v. March, R. & M. C. C. R. 182. The 7 & 8 Geo. 4, c. 30, s. 2, contained the words, 'whether the same or any of them respectively shall then be in the possession of the offender,' which are also found in the 24 & 25 Vict. c. 97, s. 8, and see sec. 59. See R. v. Wallis, R. & M. C. C. R. 344.

#### AMERICAN NOTE.

<sup>1</sup> In America this is otherwise. See Bishop, ii. s. 12.

while the tenant continued in possession, it was his own house. (*v*) And upon the same principle it was decided, that a tenant in possession under an agreement for a lease for three years, from a person who held under a building lease, was not guilty of arson by burning the house. (*w*)

But if a landlord, or reversioner, sets fire to his own house of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant. (*x*) And it was determined, that a widow entitled to dower, but not having it assigned, from a house, the equity of redemption of which had descended from her husband to his eldest son, for whose benefit she had let it and received the rent, was guilty of arson, by burning it while in the possession of her tenant. (*y*)

It should be observed, however, that a mere residence in a house, without any interest therein, will not prevent it from being considered as the house of *another*. As where the prisoner was a poor man, maintained by a parish, and had, sometime before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning, and was resident therein with his family at the time of the fact being committed, having the sole possession and occupation of it, but without payment of any rent: all the judges held that it could not be considered as *his* house; and that he was properly convicted of the arson. (*z*)

It will be presently seen that the questions as to the possession and ownership of the house in which the arson is committed, are of less importance under the statute law; as the 24 & 25 Vict. c. 97, makes the setting fire to a house, &c. *with intent to injure or defraud any person*, a felony, whether such house, &c., shall be in the possession of the person so setting fire thereto, or of others. (*a*)

The remaining inquiry concerning arson at common law is as to the meaning of the word *house*.<sup>3</sup> And this, it may be briefly observed, extends not only to the dwelling-house, but to all outhouses, which

(*v*) Spalding's case, 1 Leach, 218. 2 East. P. C. c. 21, s. 6, p. 1025.<sup>1</sup>

(*w*) Breeme's case, 1 Leach, 220. 2 East, P. C. c. 21, s. 6, p. 1026. And this and several of the preceding cases were recognised in Pedley's case, 1 Leach, 242, where Lord Mansfield said that Holmes's case (*supra*, note (*s*)) was confirmed to be good law, though he very much lamented that the law was so settled; and the bias of his mind was in favour of Foster, J.'s opinion in Harris's case, Fost. 115. In a case which occurred shortly afterwards, Lord Mansfield said, that 'it was certainly true that it could

be no felony in the defendant to burn a house of which he was in possession.' Scofield's case, Cald. 397. 2 East, P. C. c. 21, s. 7, p. 1028. It is doubtful now what would be held since the Married Women's Property Act, 1882, where the house is the wife's and the husband sets fire to it.

(*x*) Fost. 115. 4 Blac. Com. 221.

(*y*) Harris's case, Fost. 118. 2 East, P. C. c. 21, s. 6, p. 1023.

(*z*) Gowen's case. 2 East, P. C. c. 21, s. 6, p. 1027. Rickman's case, *ibid.* s. 11, p. 1034.

(*a*) And see s. 59, *ante*, p. 778.<sup>2</sup>

#### AMERICAN NOTES.

<sup>1</sup> Probably even a tenant on sufferance cannot be guilty of arson at common law. Bishop, ii. s. 13.

<sup>2</sup> In some of the States of America, the statutes are so framed as to include the setting fire to the prisoner's own house, especially with intent to defraud the insurer. Bishop, ii. ss. 12, 17.

<sup>3</sup> In America, it seems that a house built for habitation but not yet slept in is a "house;" but if a particular statute uses the word "dwelling-house," such a house is not within the terms of that statute. *C. v. Barney*, 10 Cush. 478. Bishop, ii. s. 11 and s. 17, note (11).

are *parcel* thereof, though not adjoining thereto, or under the same roof; (b) of which kind of outhouses mention has been made in a former part of this work. (c) It appears that the indictment need not charge the burning to be of a *mansion* house, but only of a *house*. (d)

It has been already stated that the burning a man's own house in a town, or so near to other houses as to create danger to them, though not within the definition of arson, is yet a great misdemeanor at common law. (e)

## SEC. II.

### *Statutes in Force. (f)*

By the 24 & 25 Vict. c. 97, s. 1, 'Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (g) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (h)

Sec. 2. 'Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof (i) shall be liable,' as in sec. 1. (j)

Sec. 3. 'Whosoever shall unlawfully and maliciously set fire to any house, (k) stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm-building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch

(b) 3 Inst. 67. 1 Hale, 570. 1 Hawk. P. C. c. 39, s. 1. Sum. 86. 4 Black. Com. 221. 2 East, P. C. c. 21, s. 5, p. 1020. See *Surman v. Darley*, 14 M. & W. 181.

(c) *Ante*, pp. 15, 69.

(d) 3 Inst. 67. Sum. 86.

(e) *Ante*, p. 783. *Holmes's case*, Cro. Car. 376. *Scofield's case*, Cald. 397. 2 East, P. C. c. 21, s. 6, p. 1023, and s. 7, p. 1028. It appears from these cases that where an indictment charges an act to have been done with a *felonious* intent, and the jury find a verdict of guilty; if the charge, as laid, do not amount to felony, but amounts in law to a misdemeanor, the court will pronounce judgment as for that offence. See *Probert's case*, 2 East, P. C. c. 21, s. 7, p. 1030.

(f) The decisions on repealed statutes will be found in Appendix R to this volume.

(g) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(h) This clause is taken from the 7 Will. 4 & 1 Vict. c. 89, s. 3, and 9 & 10 Vict. c. 25, s. 9.

The words 'church, chapel, meeting-house, or other place of divine worship,' are taken from the 9 Geo. 4, c. 55, s. 10 (1.), and thus the terms of this clause are made the same as those in sec. 11, and in sec. 50 of the *Larceny Act*, as to breaking into and stealing in churches, &c. The words in the 7 Will. 4 & 1 Vict. c. 89, s. 3, were 'church or chapel, or chapel for the religious worship of persons dissenting from the United Church of England and Ireland.' The 7 & 8 Geo. 4, c. 30, s. 8, had these words also, with the addition of 'duly registered or recorded.'

(i) This section is silent about the intent with which the act is done. In *R. v. Jeans*, Gloucester Spr. Ass. 1842, the prisoner was convicted under this section before *Cresswell, J.*, although there was no evidence to shew that he knew that any person was in the house at the time when he set fire to it. MSS. C. S. G.

(j) This clause is taken from the 7 Will. 4 & 1 Vict. c. 89, s. 2.

This offence was previously capital.

(k) See *R. v. Edgell*, 11 Cox, C. C. 132, and *R. v. Kimbrey*, 6 Cox, C. C. 464.

thereof, whether the same shall then be in the possession of the offender (*l*) or in the possession of any other person, with intent thereby to injure or defraud any person (*m*) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court,' as in sec 1. (*n*)

Sec. 4. 'Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, *port, dock, or harbour, or to any canal or other navigation*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.' (*o*)

Sec. 5. 'Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 4. (*p*)

Sec. 6. 'Whosoever shall unlawfully and maliciously set fire to any building other (*q*) than such as are in this Act before mentioned shall

(*l*) In an indictment charging arson, the first count alleged that prisoners set fire to a shop of and belonging to the prisoner N., and then being in the possession of the said N., with intent to injure, and the second count was the same, alleging an intent to defraud. Upon the evidence the jury found that the prisoner N. was tenant of the premises, and had the intention of injuring the landlady of the shop, and also to defraud an insurance office. Held, upon an indictment framed upon 24 & 25 Vict. c. 97, s. 3, that if the allegation of the property in the shop amounted to an averment that N. was owner in fee, it was immaterial and might be struck out, and that if it meant merely that he was tenant, it was proved. And that in either case it was competent on this indictment for the jury to find that there was an intent to injure the landlady, inasmuch as by the 60th section of the 24 & 25 Vict. c. 97, it was unnecessary to allege an intent to defraud any particular person. *R. v. Newbould*, 41 L. J. M. C. 63, *et per* Martin, B., the statement that the shop belonged to the prisoner was clearly superfluous and may be rejected.

(*m*) These words are peculiar to this section. Where the intent alleged is to defraud

an insurance company, due notice to produce the policy must be given to the prisoner.<sup>1</sup>

(*n*) This clause is framed from the 7 Will. 4 & 1 Vict. c. 89, s. 3; 7 & 8 Vict. c. 62, s. 1; and 9 & 10 Vict. c. 25, s. 9. *R. v. Child*, *post*, p. 788.

(*o*) This clause is taken from the 14 & 15 Vict. c. 19, s. 8, and extended to buildings belonging to ports and harbours.

(*p*) This clause is new. Before this Act passed there was no statute applicable to the burning of any public building, however important, unless it could be held to fall within the term 'house.' See *Donnagan's case*, 1 Leach, 69.

(*q*) An unfinished house, brick built, of which all the walls external and internal were built and finished, the roof on and finished, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, is a building within the meaning of the 24 & 25 Vict. c. 97, s. 6, the setting fire to which is made a felony. *R. v. Manning*, 41 L. J. M. C. 11, *et per* Kelly, C. B. 'The question turns upon the 6th section of the 24 & 25 Vict. c. 97. Now the 3rd section throws light upon this section, for it enacts that "whosoever shall unlawfully and maliciously set fire to any

#### AMERICAN NOTE.

<sup>1</sup> In America, it has been held to be immaterial whether the policy be valid or not.

*McDonald v. P.*, 47 Ill. 533. But it has been said that it must be valid. *Bishop*, ii. s. 3.

be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (r) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour], and, if a male under the age of sixteen years, with or without whipping.' (s)

Sec. 7. 'Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, *under such circumstances (t) that if the building were thereby set fire to the offence would amount to felony*, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 6. (u)

house, stable, coachhouse, outhouse, warehouse, office, shop, mill, &c., or shall be," &c. The argument might be urged that these several buildings thus enumerated in the 3rd section are all completed buildings, and therefore, that the buildings referred to in the 6th section must be *ejusdem generis* and a completed building, but this is not so in fact, as the enumeration of buildings in the 3rd section includes buildings which may form part of a structure. Take, for example, an office which may form part of a house, and may be a complete office on the ground floor, whilst the house above it may not be completed. So again, a shop may be part of a house consisting of a shop with upper floors intended for residence, as for lodgings, or for other purposes. There the shop or office would be within the 3rd section. Then there being nothing in the 3rd section to limit its operation to completed buildings, the 6th section is extended to buildings other than such as are before mentioned. It is to be observed that the expression used is, "any building other" and not "any other building." I think, therefore, that the ruling of the learned judge was correct, and that it was a question for the jury. This building was a building fairly and substantially within the meaning of the Act of Parliament. I say nothing as to what extent of partial building would be necessary to satisfy the Act of Parliament. It may be that in a case where the walls of a house have been only raised two or three yards it may not amount to such a building, but I give no opinion upon this matter. I limit my judgment to the case before us.

(r) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (o).

(s) This clause will include every building not falling within any of the previous sections of the Act. It will include ornamental buildings in parks and pleasure-grounds, hothouses, pineries, and all those buildings which, not being within the curtilage of a dwelling-house, and not falling within any term previously mentioned, were unprotected before this Act passed.

The term 'building' is no doubt very indefinite, but it was used in the 9 & 10 Vict. c. 25, s. 2; see sec. 9, *post*, p. 790; and it

was thought much better to adopt this term, and leave it to be interpreted as each case might arise, than to attempt to define it; as any such attempt would probably have failed in producing any expression more certain than the term 'building' itself. See note (g), *supra*.

(t) *R. v. Heseltine*, 12 Cox, C. C. 404.

(u) This clause is framed from the 7 & 8 Vict. c. 62, s. 2, and 14 & 15 Vict. c. 19, s. 8, but extended to every kind of building previously mentioned in this Act.

The prisoner maliciously set fire to goods in a dwelling-house, with intent to injure the owner of the goods, who was a lodger in the house, and not to injure the house or the landlord. The house, though endangered, was not set fire to. The jury found the prisoner guilty, but that he was not aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and that he was not reckless as to whether he did so or not. Held, that the prisoner was not properly convicted. *R. v. Child*, 40 L. J. M. C. 127, *et per* Blackburn, J. 'At the time of the trial I thought that the case was not one in which the conviction could be supported, but I reserved the question, because it seemed to me quite clear that the framers of the Act meant to include such a case, and did not express his idea. The former Act, 14 & 15 Vict. c. 19, s. 8, was as follows: "If any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony." Those words would plainly have included the present case, as laid in both counts of the indictment, because the prisoner wilfully and maliciously set fire to goods in a dwelling-house, which dwelling-house it has been made felony to set fire to. The character of the building was such that to set fire to goods therein would have been felony. It happened unfortunately that by 24 & 25 Vict. c. 97, the Legislature repealed the above section, and enacted instead that whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, *under such circumstances that if the building were thereby set fire to the offence*

Sec. 8. 'Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building or any matter or thing in the last preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (v) to be kept in penal servitude for any term not exceeding fourteen [and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping.' (w)

would amount to felony, shall be guilty of felony. Now Mr. Greaves has added a note to the above section in his edition of the Criminal Law Consolidation Acts, stating that the italicised words were advisedly substituted instead of the terms used in the former Acts, in consequence of the case of *R. v. Lyons*, 1 Bell, C. C. 38; 28 L. J. M. C. 33, and that "the Committee of the Lords were satisfied that the new terms would include every case that could arise." So that the intention and object was so to embrace this case in the new words in the statute that has repealed the old. Now by a note in 1 Russell on Crimes, 4th edit. p. 742, the learned author puts it in this way, viz.,—"The natural and probable result of setting anything on fire is that it will burn whatever may happen to be in proximity to it during its progress, and not merely what happens to be so when the fire was lighted. . . . The proper mode to look at cases of this kind is to suppose that the prisoner actually applied a light to each particular thing to which the fire extended, at the very time the fire reached it. Suppose a rick were set fire to and the fire extended to a house, and that there was no one in the house when the rick was set on fire, but that when the fire reached the house there was a man in it, can it be doubted that this would be setting fire to a house with a man in it, within the 24 & 25 Vict. c. 97, s. 22?" But I cannot agree with him. I think in order to be a malicious setting the house on fire, the ignition of the house must not only be the natural and probable consequence of the prisoner's act, but it must be at best that he was reckless, and here the jury have found that he was not. But, then, since the effect of their finding was clearly to defeat the intention of the statute, I thought it right to reserve the point. The words of the Act do not go to the length intended, and those who prepared it have narrowed the effect of the section, instead of extending it.' If a person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not amount to a felony under the section, even although the house catch fire, unless the circumstances shew that the person setting fire to the goods knew that by so doing he would probably cause the house to catch fire, and was reck-

less whether it did so or not. *R. v. Natrass*, 15 Cox, C. C. 73. *R. v. Harris*, 15 Cox, C. C. 75.

The prisoners were indicted for setting fire to certain post letters in a dwelling-house, divers persons then being in the said house, against the 24 & 25 Vict. c. 97, s. 7; there were other counts framed on the 8th section of the Act. One prisoner was sixteen years of age, the other eighteen, and they were seen opposite a post-office, the letter-box of which is upon the floor under the shop window-ledge, and letters are dropped in from the slit outside. Both went close to the box, and the younger was about to drop in the remains of a paper he had lighted from his pipe, when the elder said, 'What the devil is the use of that? It is not half big enough.' He then lighted a larger piece, and dropped both pieces through into the box. Both ran away. The pieces of paper partly burnt twenty-nine letters. Williams, J., 'How can you support this indictment? From the evidence it appears that this act on the part of the prisoners was what is vulgarly called a lark, and that there was no intention to set fire to the house. . . . No doubt, if they intended the fire to do its worst, they would be guilty, but if they only set fire to the letters, and it was contrary to their intention to burn the house, even if the house had been burned, they would not have been guilty. I shall so leave the case to the jury.' *R. v. Batstone*, 10 Cox, C. C. 20.

See the note to the next subsequent section.

(v) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(w) This clause is taken from the 9 & 10 Vict. c. 25, s. 7.

The words 'or any other matter or thing in the last preceding section mentioned,' were introduced by the Committee of the Lords in order to refer to the words 'any hay, straw, wood, or other vegetable produce, coal, turf, or other matter or thing,' which were then in the preceding section; but the Select Committee of the Commons struck out all those words except 'matter or thing.' The words of reference in this clause must, therefore, now be read 'any matter or thing in, against, or under any building.'



Sec. 9. 'Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (x) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (y)

On an indictment under this section it was held, by Lopes, J., after consulting Lord Coleridge, C. J., that the endangering of life must result from the damage done to the building mentioned in the indictment, but that it is not necessary that the persons whose lives were endangered should have been inside the building. For the purpose of proving such endangering of life evidence of damage to other buildings that might be inhabited was inadmissible, but is admissible to shew the nature and extent of the explosion and its tendency to destroy the particular building. (z)

Sec. 10. 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, *under*, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any *engine*, machinery, working tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable,' as in sec. 8. (a)

The 12 Geo. 3, c. 24, s. 1, enacts, 'that if any person or persons shall either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt,

(x) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(y) This clause embodies the 9 & 10 Vict. c. 25, ss. 1, 2. Under sec. 2 of that Act, where life was endangered, the offence was capital. See the 24 & 25 Vict. c. 100, s. 12.

(z) *R. v. McGrath*, 14 Cox, C. C. 598.

(a) This clause is taken from the 9 & 10 Vict. c. 25, s. 6. The prisoners were indicted under this section for damaging the house of J. Gate by the explosion of gunpowder, J. Gate and his wife being therein. In Cumberland there is a custom in country places, when a wedding has taken place, for the neighbours to assemble with guns, and fire a kind of *feu de joie* in honour of the event, the bridegroom or his friends treating them. In pursuance of this custom the prisoners and others went with a gun thus to celebrate the marriage of Gate's daughter with one Noble. On arriving at Gate's house they asked for drink, and said they had come to shoot. Noble treated them to beer, and gave the one who had the gun 2s. 6d. not to fire. Having got the beer they wanted something

to eat, but were put out of Gate's house. They then began to fire the gun; at first in front of the house; then they fired under the door, filling the house with smoke. They fired off the gun next through the keyhole of the door, and, being out of percussion-caps, applied a candle to the nipple for the purpose. The effect of this shot was to drive the key with great violence into the house, cutting the arm of Mrs. Gate, and knocking Gate insensible off his chair, by striking him on the head. It also blew the lock of the door to pieces, and split the door. The prisoners were afterwards very abusive and violent on the inmates rushing out to capture them and their gun. Martin, B., was of opinion that the statute was not meant to apply to such a case as this, but rather to malicious injuries to houses, by placing or throwing explosive substances against or into them, with intent to destroy the house or injure the inmates. This was more in the nature of wanton mischief or assault, and he directed an acquittal. *R. v. Brown*, 3 F. & F. 821. If this case is correctly reported, it deserves reconsideration. C. S. G.

or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning or otherwise destroying of any of His Majesty's ships or vessels of war, whether the said ships or vessels of war be on float, or building, or begun to be built, in any of His Majesty's dock-yards, or building or repairing by contract in any private yards, for the use of His Majesty, or any of His Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or any of His Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence, being thereof convicted, in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy. (b) By the second section of this Act, any person who shall commit any of the offences before mentioned out of the realm, may be indicted and tried either in any county within the realm, or in such island or place where such offence shall have been actually committed, as His Majesty, his heirs, &c., may deem most expedient for bringing such offender to justice.

The 27 & 28 Vict. c. 119 (An Act to make provision for the discipline of the Navy), articles of war 30, enacts, 'that every person subject to this Act who shall unlawfully set fire to any dock-yard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft, or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as is hereinafter mentioned.'

The 39 Geo. 3, c. 69, s. 104, a public local Act, for rendering more commodious and for better regulating the port of London, enacts, 'that if any person or persons whomsoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this Act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basins, cuts, or other works to be made by virtue of this Act, every person so offending, in any of the said cases, shall be adjudged guilty of felony, without benefit of clergy.'

By the 24 & 25 Vict. c. 97, s. 58, the punishments imposed by that Act will equally apply whether the offence be committed from malice conceived against the owner of the property or otherwise.

The 7 & 8 Geo. 4, c. 29, s. 13, and 24 & 25 Vict. c. 96, s. 53, only determined what shall be considered a dwelling-house for the purpose of burglary, housebreaking, and stealing in a dwelling-house; and there is no statutory provision as to what shall be considered a house in the case of arson. (c)

With respect to the indictment, it may be observed that it is clearly necessary in an indictment for arson at common law to lay the offence to have been done *wilfully* and *maliciously*; and though the words

(b) This offence is still capital, 7 & 8 Geo. 4, c. 28, ss. 6 & 7. As there is no express provision for the punishment of accessories

after the fact, they are punishable under the 24 & 25 Vict. c. 94, s. 4, vol. i. 182.

(c) See M'Donald's case, 2 Lew. 46, per Alderson, B.

'wilful and malicious' did not occur in the 9 Geo. 1, c. 22, yet they seem to have been considered as necessary in an indictment upon that statute. (*d*)

Upon an indictment for any offence mentioned in this chapter (except the attempts specially provided for as such), the jury may, under the 14 & 15 Vict. c. 100, s. 9, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt.

(*d*) Minton's case, 2 East, P. C. c. 21, s. 5, p. 1033.

## CHAPTER THE FORTY-FIFTH.

### INJURIES TO BUILDINGS BY TENANTS.

**Tenants of houses, etc., maliciously injuring them.** — By the 24 & 25 Vict. c. 97, s. 13, 'Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor.' (a)

(a) This clause was framed from the 9 Geo. 4, c. 56, s. 24 (1.), the terms being considerably altered.

This clause extends the former enactment to any tenant of any part of a dwelling-house or other building.

This clause is a very important improvement in the law of England, as tenants have very frequently, especially when under notice to quit, wilfully injured houses and buildings to a great extent. This clause

only extends to houses and buildings; but the effect of sec. 59, *ante*, p. 778, is to render a tenant liable for any other malicious injury mentioned in this Act, if done with intent to injure the landlord.

No punishment for the offence created by this section was inserted, because it was thought that the common law punishment of fine or imprisonment, or both, was the proper punishment.

## CHAPTER THE FORTY-SIXTH.

### OF KILLING AND MAIMING CATTLE AND OTHER ANIMALS. (a)

It has been holden that no indictment lies at common law for unlawfully with force and arms maiming a horse. (b)

The 9 Geo. 1, c. 22 (commonly called the Black Act), was for a considerable time the principal statute upon the offence of maliciously maiming and killing cattle. But that and other statutes are now repealed.

By the 24 & 25 Vict. c. 97, s. 40, 'Whosoever shall unlawfully and maliciously kill, maim, or wound (c) any cattle, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (d) to be kept in penal servitude for any term not exceeding fourteen [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (e)

Sec. 41. 'Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit.' (f)

(a) The cases on repealed statutes will be found in Appendix S at the end of this volume.

(b) *Ranger's case*, 2 East, P. C. c. 22, s. 16, p. 1074.

(c) See *R. v. Bullock*, *post*, p. 795.

(d) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(e) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 16, and 9 Geo. 4, c. 56, s. 17 (1.), the punishment being altered by several subsequent Acts.

(f) This clause is new, and is a great improvement of the law, as it will protect domestic animals from malicious injuries. It includes any beast or animal, not being cattle, which is the subject of larceny at common law. It also includes birds which are the subject of larceny at common law; such are all kinds of poultry, and, under certain circumstances, swans and pigeons. So also it includes any bird, beast, or other animal ordinarily kept in a state of confinement, though not the subject of larceny, such as parrots and ferrets; and it is to be observed that the words 'ordinarily kept in

Upon an indictment for wounding a gelding, contrary to the statute 24 & 25 Vict. c. 97, s. 40, the prisoner was convicted upon evidence which shewed that the gelding had suffered a laceration of the roots of the tongue, which protruded, and a tearing of the mouth, which injuries might have been caused by a pull of the tongue by the hand, but there was no evidence to shew that any other instrument than the hand had been used:—Held, that there was sufficient evidence of a wounding; and the conviction was affirmed. (*g*)

Where a man caused the death of a mare from internal injuries, not intending by his act to kill, maim, or wound her, but knowing that the act would or might kill, maim, or wound her, and acting recklessly, and not caring whether she was injured or not, though without any ill will or spite, either towards the owner of the animal or the animal itself, and without any motive except the gratification of his own depraved tastes, he is guilty of maliciously killing the mare, contrary to the 24 & 25 Vict. c. 97, s. 40. (*h*)

The placing of poisoned flesh in a garden for the purpose of killing a trespassing dog is not an offence within this section, but it can, it seems, be summarily dealt with under 27 & 28 Vict. c. 115, s. 2. (*i*)

It should seem that the indictment upon the present statute ought, like an indictment upon the repealed clause of the 9 Geo. 1, c. 52, to specify the kind of cattle injured, and that such statement must be supported by the evidence.

**Principals in the second degree and accessories.**—Every principal in the second degree, and every accessory before the fact, is punishable in the same manner as the principal in the first degree, and every accessory after the fact is liable to be imprisoned for any time not exceeding two years.

The 12 & 13 Vict. c. 92, makes any person cruelly beating or otherwise ill-treating any cattle, &c., or improperly driving the same, liable to be summarily convicted. (*k*)

a state of confinement' are a description of the mode in which the animal is usually kept, and do not render it necessary to prove that the bird or animal was confined at the time when it was injured. Lastly, the clause includes any bird or animal kept 'for any domestic purpose,' which clearly embraces cats.

(*g*) *R. v. Bullock*, 37 L. J. M. C. 47, L. R. 1 C. C. R. 115, *et per* Cockburn, C. J. The case last referred to (Jennings's case, 2 Lew. 130) gives the reason for putting the construction upon the old statute—viz., that the word 'wound' was used in conjunction with the other words, 'stab' and 'cut.' But under the statute which we now have to construe, there is

nothing to shew that we are not at liberty to construe the word 'wound' according to its ordinary interpretation. The mischief which is done to the animal is quite as great, although only done by the hand, as if an instrument had been used. It may possibly be that the guilt of the prisoner may not be so great as if he had inflicted the wound by the use of an instrument; but it is equally within the terms and spirit of the statute, and the conviction must be affirmed.

(*h*) *R. v. Welch*, 1 Q. B. D. 28. 45 L. J. M. C. 17. 13 Cox, C. C. 121.

(*i*) *Daniel v. Jones*, 2 C. P. D. 351.

(*k*) And see the 17 & 18 Vict. c. 60, 38 & 39 Vict. c. 66.

## CHAPTER THE FORTY-SEVENTH.

### INJURIES TO GROWING CORN, WOODS, &C., AND TO STACKS OF CORN, &C.

By the 24 & 25 Vict. c. 97, s. 16, 'Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 17. 'Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (c)

Sec. 18. 'Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, under such circumstances that if the same were thereby set fire to the offender would be, under either of such sections, guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding seven [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (d)

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(b) This clause is taken from the 7 & 8 Geo. 4. c. 30, s. 17, and 9 Geo. 4. c. 56, s. 18 (1.).

The clause is extended to crops of hay, grass, and any kind of cultivated vegetable produce.

(c) This clause is taken from the 1 Vict. c. 89, s. 10.

The clause is extended to stacks of all kinds of cultivated vegetable produce, gorse, and bark.

(d) This clause is taken from the 9 & 10 Vict. c. 25, s. 7. See the note to sec. 7, *ante*, p. 788.

A stack of coal seed straw and wheat stubble, or haulm, is not a stack of straw. (e) So a stack composed of sedges and rushes, the produce of the fens, is not a stack of straw; for straw, in its usual and legal acceptation, means the straw of wheat, barley, oats, and rye. (f) But a stack principally composed of wheat straw, with stubble laid on the top to prevent its blowing away, is a stack of straw. (g) A quantity of straw packed on a lorry, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within the meaning of the above 17th section. (h)

The judges will take judicial notice that beans are 'pulse,' (i) and that barley is corn or grain, (j) and therefore indictments using those words are good.

A stack of the flax plant with the seed in it is a stack of grain. (k)

A score of faggots piled up one on another in a loft under an archway do not constitute a stack of wood. (l) But a stack of hay may be under a building. (m)

An indictment for setting fire to certain wood, to wit, twenty yards square of wood, is bad; for proof of setting fire to a single detached tree would support it. (n)

The offence of setting fire to a stack is not of a local nature. (o)

An indictment for setting fire to a stack need not allege any intent to injure. (p)

(e) *R. v. Tottenham*, R. & M. C. C. 461.

(f) *R. v. Baldock*, 2 Cox, C. C. 55.

(g) *R. v. Newill*, R. & M. C. C. 458.

(h) *R. v. Satchwell*, 42 L. J. M. C. 63,  
L. R. 2, C. C. R. 21.

(i) *R. v. Woodward*, R. & M. C. C. 323.

(j) *R. v. Swatkins*, 4 C. & P. 548.

(k) *R. v. Spencer*, D. & B. 131, 26 L. J.  
M. C. 16.

(l) *R. v. Aris*, 6 C. & P. 348.

(m) *R. v. Munson*, 2 Cox, C. C. 186.

(n) *R. v. Davy*, 1 Cox, C. C. 60.

(o) *R. v. Woodward*, R. & M. C. C. 323.

(p) *Ibid.*



## CHAPTER THE FORTY-EIGHTH.

### OF INJURING AND DESTROYING TREES, SHRUBS OR UNDERWOOD.

OFFENCES of the kind mentioned in the title to this chapter were treated only as trespasses and misdemeanors by several ancient statutes: they were afterwards made offences of the degree of felony; but all the former statutes upon this subject are repealed.

By the 24 & 25 Vict. c. 97, s. 20, 'Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound), shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude [for the term of three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 21. 'Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds), shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 20. (c)

Sec. 22. 'Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 19, and is extended to Ire-

land. The 9 Geo. 4, c. 56, s. 19 (I.), provided for similar offences.

(c) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 19. The 9 Geo. 4, c. 56, s. 19 (I.), was similar as to the daytime.

done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, *either against this or any former Act of Parliament*, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (*whether both or either of such convictions shall have taken place before or after the passing of this Act*), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable [at the discretion of the Court] (*d*) to be imprisoned for any term not exceeding two years, with or without hard labour, [and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (*e*)

The words of this statute are much larger than the words of the 9 Geo. 1, c. 22, s. 1, which were, 'unlawfully and maliciously cut down or otherwise destroy any trees.' But upon this clause it was held that cutting down apple trees was sufficient, although the trees were not thereby totally destroyed. (*f*)

The prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 19, for feloniously injuring one ash tree, one elm tree, and one hundred thorn shrubs growing in a certain hedge, thereby doing injury to an amount exceeding £5, and it appeared that the injury to the trees amounted to £1; but it would be necessary to stub up the old hedge and replant it; and the stubbing, quickwood, setting, and cleaning, and posts and rails to protect the new hedge, would cost £4 14s. 6d. It was objected that as the injury must be done in respect of growing trees, there was no evidence of such injury beyond one pound; and, upon a case reserved, it was held that the conviction was wrong, for it was not sufficient that the *consequential* injury should raise the amount of injury to £5. (*g*)

In one case (*f*) it was also held that the act must be done from malice to the owner, but this is no longer necessary. (*h*)

An indictment for damaging apple trees growing in a garden should state the damage to be done 'unlawfully and maliciously,' and it is not sufficient to state that it was done 'feloniously.' (*i*)

It seems that there might be cases in which a party might come within the 7 & 8 Geo. 4, c. 30, s. 19, though the tree cut were growing upon land in his occupation as tenant. (*j*) And all doubt on this subject is removed by sec. 59 of 24 & 25 Vict. c. 97, which was introduced to meet this and other like cases. (*k*)

(*d*) The words in brackets have been repealed.

(*e*) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 20, and is extended to Ireland. There was a similar clause, but confined to damage done between sunrise and sunset, in the 14 & 15 Vict. c. 92, s. 3 (1.).

(*f*) *R. v. Taylor*, R. & R. 373.

(*g*) *R. v. Whiteman*, Dears. C. C. 353.

(*h*) See sec. 58 of the Act, *ante*, p. 776.

(*i*) *R. v. Lewis*, Gloucester Sum. Ass. 1830, Bosanquet, J., MSS. C. S. G. See *R. v. Turner*, R. & M. 239.

(*j*) *Mills v. Collett*, 6 Bing. R. 85.

(*k*) *Ante*, p. 778.

We have seen that it was held that young pear trees about seven feet high were 'trees' within the meaning of the 7 & 8 Geo. 4, c. 29, s. 38, and not 'plants' within sec. 42 of that Act; and that the word 'adjoining' in the former section denoted land absolutely contiguous and without anything intervening, and only referred to the word 'dwelling-house.' (l)

The statute also contains provisions as to principals in the second degree, as to accessories, and as to abettors in misdemeanors. (m)

The destruction of a wood, coppice, &c., by fire has been mentioned in a former chapter. (n)

(l) *R. v. Hodges*, M. & M. 341, *ante*, p. 228.

(m) *Ante*, p. 779.

(n) *Ante*, p. 796.

## CHAPTER THE FORTY-NINTH.

### OF DESTROYING, &C., PLANTS, ROOTS, FRUITS, AND VEGETABLE PRODUCTIONS.

By the 24 & 25 Vict. c. 97, s. 23, 'Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude [for the term of three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 24. 'Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or enclosed, not being a garden, orchard, or nursery ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty shillings as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence, either against

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(b) As to the meaning of the terms 'plant' and 'vegetable production,' see R.

*v. Hodges*, M. & M. 341, *ante*, p. 228, and *R. v. Fraser*, R. & M. C. C. R. 419.

This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 21. There was a similar clause in the 14 & 15 Vict. c. 92, s. 3 (1.).

this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding six months as the convicting justice shall think fit. (c)

We have seen that clover was held to be a cultivated plant used for the food of beasts within the 7 & 8 Geo. 4, c. 29, s. 43. (d) But that it has been doubted whether grass growing in a field was a cultivated plant within the same clause. (e)

(c) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 22. There was a similar clause in the 14 & 15 Vict. c. 92, s. 3 (I.).

(d) *R. v. Brumby*, 3 C. & K. 315, *ante*, p. 229.

(e) *Morris v. Wise*, 2 F. & F. 51 *ante*, p. 229.

## CHAPTER THE FIFTIETH.

### OF CUTTING AND DESTROYING HOPBINDS.

By the 24 & 25 Vict. c. 97, s. 19, 'Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding fourteen [and not less than three] years — [or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 18, and is new in Ireland.

## CHAPTER THE FIFTY-FIRST.

### OF BREAKING DOWN, &C., SEA BANKS, LOCKS, AND WORKS ON RIVERS, CANALS, &C.

By the 24 & 25 Vict. c. 97, s. 30, 'Whosoever shall unlawfully and maliciously break down or cut down *or otherwise damage or destroy* any sea bank or sea wall, or the bank, dam, or wall of *or belonging to* any river, canal, drain reservoir, *pool*, or marsh, whereby any land *or building* shall be or shall be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, *break, or cut down*, level, undermine, or otherwise destroy, any *quay, wharf, jetty*, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work *belonging to any port, harbour, dock, or reservoir, or on or belonging to* any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 31. 'Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, *dam*, or wall of any river, canal, *drain, aqueduct*, marsh, *reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock*, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding seven years and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (c)

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(b) This clause is framed from the 7 & 8 Geo. 4, c. 30, s. 12, and 9 Geo. 4, c. 56, s. 12 (I.).

The words in italics are new; and in England the clause is new as far as it relates to any 'dam, drain, reservoir, weir, tunnel, towing-path, and water-course,' which words are taken from the 9 Geo. 4, c. 56, s. 12 (I.). These additions are very important amendments, as they include cases

where loss of life and great injury to property might ensue from such malicious acts. The Holmfirth reservoir might have been maliciously let off by cutting through its dam, and there are many similar reservoirs and pools, which might be caused to inundate large districts by the destruction of their dams.

(c) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 12, and 9 Geo. 4, c. 56, s. 13 (I.). The words in italics are introduced to extend the clause to protect the materials used to secure dams or drains, &c.

## CHAPTER THE FIFTY-SECOND.

### OF DESTROYING THE DAMS OF FISH-PONDS, &C., OR MILL-PONDS, AND OF PUTTING NOXIOUS MATERIALS INTO FISH-PONDS, &C.

By the 24 & 25 Vict. c. 97, s. 32, 'Whosoever shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam, *floodgate, or sluice* of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish *that may then be or that may thereafter be put* therein, or shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam or *floodgate* of any mill-pond, *reservoir, or pool*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding seven years [and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

In a case upon the 9 Geo. 1, c. 22, the words of which were, 'if any person shall unlawfully and maliciously break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed,' the judges thought that that provision applied only to cases of wanton and malicious mischief in cutting the head of a pond, and not to cases where it was used as the means of stealing the fish. (c)

The 7 & 8 Geo. 4, c. 30, s. 15, did not apply if a dam of a fish-pond was broken down under a colour of right. (d)

By the 36 & 37 Vict. c. 71 (The Salmon Fishery Act, 1873), sec. 13, the provisions of the 32nd section of the 'Malicious Injuries to Property Act,' so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words, 'or in any salmon river,' were inserted in the said section, in lieu of the words 'private rights of fishery' after the words 'noxious material in any such pond or water.'

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 15, and 9 Geo. 4, c. 56, s. 16 (1.). Under the former enactments, if a man had destroyed the floodgate or sluice of a pond, or the dam of a reservoir or pool, he would not have been punishable. These defects are remedied by the words in italics.

(c) *R. v. Ross*, R. & R. 10. The statute seems clearly to meet this case.

(d) *Michell v. Williams*, 11 M. & W. 205. The term 'malice' in its legal sense denotes a wrongful act, done intentionally, without just cause or excuse. See vol. iii. p. 2; and it is settled that such is its meaning in the Acts providing for the punishment of malicious injuries. See *ante*, p. 776, *et seq.*



## CHAPTER THE FIFTY-THIRD.

### OF DESTROYING OR INJURING BRIDGES, TURNPIKE GATES, &c.

By the 24 & 25 Vict. c. 97, s. 33, 'Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge, (whether over any stream of water or not), or any viaduct, or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 34. 'Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate or toll-bar or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of Parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor.' (c)

The malicious destruction or damaging of public bridges is said to be without doubt punishable as a misdemeanor at common law, being a nuisance to all the King's subjects. (d) With respect to wilful damage done to bridges, arches, walls, &c., erected by the commissioners

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 80, s. 13, and 9 Geo. 4, c. 56, s. 14 (I.). So much doubt had existed as to what was a public bridge, or part of one, which a county was bound to repair, in *R. v. Oxfordshire*, 1 B. & Ad. 289, *R. v. Oxfordshire*, 1 B. & Ad. 297, and *R. v. Derbyshire*, 2 Q. B. 745, that the words 'whether over any stream of water or not,' were introduced to remove that doubt, and to extend this clause to all bridges.

The clause is also extended to viaducts and aqueducts, so as to protect all those gigantic structures which have sprung either

out of the construction of railways and canals or from other causes.

The former clause was in terms confined to 'public bridges;' this clause includes every bridge over or under which any highway passes. It is therefore confined to public bridges where no highway passes under them, but includes both public and private bridges where a highway passes under them. But in other cases any injury to a private bridge exceeding the amount of five pounds would bring the case within sec. 51, and if less than that sum, within sec. 52.

(c) This clause is taken from the 7 & 8 Geo. 4, c. 80, s. 14, and 9 Geo. 4, c. 56, s. 15 (I.). The 14 & 15 Vict. c. 92, s. 9 (I.), makes the offences contained in this clause punishable summarily in Ireland.

(d) 2 East, P. C. c. 22, s. 27, p. 1081.

of turnpike-roads, pecuniary penalties, recoverable by summary conviction, are imposed by the general Turnpike Acts.

There are, however, a great number of bridges within this kingdom which it was made felony to injure or destroy, by the enactment of particular statutes. In some instances the offence was made capital, as in the case of Westminster Bridge, by 9 Geo. 2, c. 29, s. 5. But the 1 Geo. 4, c. 116, repeals this provision of the Westminster Bridge Act, and with respect to similar provisions in other statutes it enacts, 'that such parts of all former Acts relating to bridges as enact that if any person or persons shall wilfully and maliciously blow up, pull down, or destroy any bridge, or any part thereof, or attempt so to do, or unlawfully and without authority remove or take any works thereunto belonging, or in anywise direct or procure the same to be done, such offender or offenders, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy, shall from and after the passing of this Act be, and the same are hereby repealed. (e)

(e) See the Westminster Bridge Act, 16 & 17 Vict. c. 46, s. 14.

## CHAPTER THE FIFTY-FOURTH.

### OF DESTROYING FENCES, WALLS, STILES, OR GATES.

By the 24 & 25 Vict. c. 97, s. 25, 'Whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace, for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.' (a)

Where the prisoner was found ferreting rabbits in a hedge, and he had a dog with him, which had done some slight damage to the hedge in two or three places by breaking through it; Parke, B., held that the injury done to the hedge by the dog was not an offence within the 7 & 8 Geo. 4, c. 30, s. 23, and said, 'to constitute an offence under that Act, the injury done must be unlawful and malicious; it must be a wanton act of cutting or the like, with the object of doing damage to the thing injured. Here there was no spiteful object in damaging the fence; it was done merely in prosecution of the intention to kill the rabbits.' (b)

(a) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 23. There was a similar clause in the 14 & 15 Vict. c. 92, s. 3 (1.).

(b) *R. v. Prestney*, 3 Cox, C. C. 505. A very much sounder ground for this decision would have been that the dog acted

on his own impulse, and that there was no evidence that he acted on the instigation of the prisoner, and therefore the act was not the wilful, and still less the malicious act of the prisoner. See *ante*, p. 805, note (d), as to the meaning of 'malice.'

## CHAPTER THE FIFTY-FIFTH.

### OF SETTING FIRE TO, DESTROYING, AND DAMAGING MINES AND MINE-ENGINES.

By the 24 & 25 Vict. c. 97, s. 26, 'Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite or other mineral fuel, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 27. 'Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, *under such circumstances that, if the mine were thereby set fire to, the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding fourteen [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (c)

Sec. 28. 'Whosoever shall unlawfully and maliciously cause any water to be conveyed *or run* into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, *or damage with intent to destroy, obstruct, or render useless*, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding seven years] and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping: Provided that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.' (d)

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(b) This clause is taken from the 7 Will. 4 & 1 Vict. c. 89, s. 9, and 9 & 10 Vict. c. 25, s. 9, and extended so as to include anthracite and other mineral fuel.

(c) This clause is taken from the 9 & 10 Vict. c. 25, s. 7.

As to the words in italics, see the note to sec. 7, *ante*, p. 788.

(d) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 6, and 9 Geo. 4, c. 56, s. 7 (1). The words in italics are new.

Sec. 29. 'Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy, or render useless, any steam-engine or other engine for sinking, draining, *ventilating*, or working, or for in anywise assisting in *sinking, draining, ventilating, or working* any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, *or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway, or other way, or other work whatsoever, in any wise belonging or appertaining to or connected with or employed in any mine or the working or business thereof*, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 28. (e)

The prisoner was convicted of maliciously causing water to be conveyed into a mine, which was laid in one count as the mine of John Pickering and others, his partners; in another of John Dean Case; and in a third of Robert Roberts. The offence was committed on the 21st of May. John Pickering and his two brothers were lessees of the mine, and worked it till the 11th of May. They had borrowed £20,000 of the North and South Wales Bank. On the 11th of May, Roberts, acting for the bank, took possession of the mine, (but it did not appear whether in pursuance of any deed or judgment), the name upon the carts was altered from Pickering to Robert Roberts, and from that time the mine was worked by him. Roberts stated that he was put in possession by Mallaby, as the attorney for the bank; and he explained that to be as attorney for John Dean Case, who, he said, was trustee for the company, and being asked whether by deed, he answered in the affirmative. He had ever since worked the mine for the benefit of Case. It was objected that the first count failed, as the Pickerings had given up possession. As to Case, he was merely the agent or factor of the bank, and there was no evidence that he was a shareholder. And as to Roberts, he was merely agent or servant, and the property ought to have been laid in the registered officer of the banking company; but the judges, upon a case reserved, were unanimously of opinion that the conviction was right. (f)

(e) This clause is framed from the 7 & 8 Geo. 4, c. 80, s. 7; 9 Geo. 4, c. 56, s. 8 (1.); and 23 & 24 Vict. c. 29, s. 1, with the additions in italics.

(f) R. v. Jones, 2 M. C. C. R. 293. 1 C. & K. 181. The ground of decision is not stated, but probably the judges thought the possession of Roberts quite sufficient against a wrong-doer. In the report in C. & K.

Parke, B., said, 'It appears that Mr. Case was in possession by his servant, Mr. Roberts; but there is nothing to take the property out of the first lessees.' And Lord Abinger, C. B., said, 'It appears that the mine is worked on account of Mr. Case; but I should think that Mr. Roberts having his name on the carts would be some evidence at least that he was working the mine.'

We have seen that where one of the owners of adjoining mines, asserting that an airway belongs to him, directs his workmen to stop it up, and they acting *bonâ fide*, and believing that he has a right to give such an order, do so, they are not guilty of felony for stopping up the airway, even though the master knew that he had no right to it. But if any of the workmen knew that the stopping of the airway was a malicious act of his master, such workmen would be guilty of felony. (*g*)

If a steam-engine be set in motion without any machinery attached to it, with intent to damage it or render it useless, the case is within the statute. (*h*)

Damaging a drum moved by a steam-engine is not damaging the steam-engine, but damaging a scaffolding placed across the shaft of a mine, in order to work a level, is damaging an 'erection' 'used in conducting the business of a mine.' (*i*)

In an action against a hundred to recover compensation for the felonious demolition by rioters of a certain erection of the plaintiffs, used in conducting the business of a mine, it appeared that, a year after they had begun to work the mine, they took a lease of a slag bed and pool adjoining it at a distance of half a mile from the mine. The slag bed consisted of heaps of refuse ore, and a process had been discovered for extracting ore from the slag. Washing the slag was an important part of this process, and to supply the pool with water for washing the slag the plaintiffs diverted thereto a stream of water by means of a wooden trough erected upon piles. The trough did not approach the mine nearer than half a mile. The water supplied through this trough was at first used in washing the slag, and for no other purpose; but subsequently, and up to the time of the injury complained of, it had been regularly used in washing the ore gotten from the mine. The jury found that the trough was used in conducting the business of the mine, and it was held that as the jury had so found, the only question of law was whether such a trunk could be so used. 'The business of a mine was not merely to get the rough ore from the bowels of the mine, but to produce the ore itself separate from the earth which is brought up with it,' (*j*) and 'includes all that is done about the mine towards preparing the ore in a marketable state; and all erections used for this purpose, or as places of deposit for gunpowder, candles, and other mining materials, are within the protection of the statute. (*k*) The ore is not brought up by itself, but together with earth and other matters attached to it, which must be separated from it to make what is brought up ore. This trunk was used in the process of such separation, and that separation is part of the business of a mine, and therefore the trunk was an erection used in conducting the business of a mine within the 7 & 8 Geo. 4, c. 31, s. 2. (*l*)

(*g*) *R. v. James*, 8 C. & P. 131. Lord Abinger, C. B., *ante*, p. 778. If the act be done in the *bonâ fide* exercise of a supposed right, it is not done maliciously. *R. v. Matthews*, 14 Cox, C. C. 5.

(*h*) *R. v. Norris*, 9 C. & P. 241. See *R. v. Tracey*, *post*, p. 950.

(*i*) *R. v. Whittingham*, 9 C. & P. 234,

*Patteson, J.*, decided upon 7 & 8 Geo. 4, c. 30, s. 7.

(*j*) Per *Patteson, J.*

(*k*) Per *Coleridge, J.*

(*l*) *Barwell v. The Hundred of Winterstoke*, 14 Q. B. 704. The Court agreed that the question was the same as if it had arisen on an indictment for injuring the trunk.

## CHAPTER THE FIFTY-SIXTH.

### OF DESTROYING AND DAMAGING ARTICLES IN COURSE OF MANUFACTURE, AND OF DESTROYING, &C., IMPLEMENTS AND MACHINERY.

By the 24 & 25 Vict. c. 97, s. 14, 'Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Upon an indictment under the 28 Geo. 3, c. 55, s. 4 (now repealed), for maliciously damaging a frame used for making stockings, it appeared that the prisoner unscrewed, unfastened, and carried away a part, called the half-jack, from two frames used for the making of stockings. The half-jack is a piece of iron, which is an essential part of the frame, and when taken out the frame is rendered useless; but it may be taken out and again replaced without injury to the frame, and

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(b) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 3, and 9 Geo. 4, c. 56, s. 3 (1.).

The former enactments are extended to articles made of hair or alpaca.

The words 'or shall unlawfully,' &c., are repeated in order to obviate a doubt, which existed on the construction of the clause without them. See *R. v. Ashton*, 2 B. & Ad. 750, *post*, p. 815.

is sometimes so treated when the frame is taken to pieces to be cleaned. Most of the other parts of the frame may in like manner be taken out and replaced. The frames in this case were not otherwise injured than by taking away the half-jacks. It was objected, that this removal of the half-jack was not a damaging of the frame within the statute, which it was contended applied only to cases of breaking, bending, or straining some part of the frame, and not to the removal of a part, though that part might be an essential part. But, upon a case reserved, the judges were unanimously of opinion that the taking out and carrying away the half-jack was a damaging the frame within the meaning of the 28 Geo. 3, as it made the frame imperfect and inoperative. (c)

The 22 Geo. 3, c. 40, s. 1, made it a capital felony to break into any house, &c., with intent to destroy 'any serge or other woollen goods in the loom, or any tools employed in the making thereof,' and it was held that destroying part of a loom did not come within the meaning of that statute. (d)

The first count charged the prisoners with maliciously damaging 100 pieces of worsted stuff, 'in a certain process of manufacture,' with intent to destroy the same. Other counts stated the goods to be in 'a certain stage of manufacture,' and others stated them to be 'in the progress of manufacture.' The prosecutors were dyers, and received the stuffs from the manufacturer after the texture was complete, but while they were still in an unmarketable state. The stuffs which were damaged by the prisoners were, at that time, upon rollers, immersed in liquid, and in the actual process of being dyed; and the injury was done by throwing deleterious ingredients upon the stuffs themselves, and into the liquid in which they were immersed. For the prisoners it was contended, that as the article damaged was at the time of the damage being done in a complete state, so far as the manufacturing and texture were concerned, and only required dyeing to fit it for the market, the case did not come within the words of the Act. For the prosecution it was submitted, that the Legislature could not have intended to withdraw the protection of the Act, until the manufacture was so complete that the articles were fit for immediate sale. Coleridge, J. (after consulting with Parke, B.), said that they were both of opinion that the true construction of the Act was that contended for by the prosecutor; he therefore overruled the objection, and he referred to the provision in the same section relating to goods on 'the rack or tenters,' as shewing that the Act contemplated injuries to goods subsequent to the completion of the texture. (e)

The indictment stated that the prisoner six warps of linen yarn of the goods of A. B. unlawfully, maliciously, and feloniously did damage by throwing the said warps of linen yarn with great force unto and upon the ground, &c., with intent to render the same useless; against the form, &c. After conviction a writ of error was brought, and the errors assigned were, that it did not appear by the count that the said warps were at the time of the damage goods in any stage of manufacture, or that they were prepared for being woven or manufac-

(c) *R. v. Tacey*, R. & R. 452.

(e) *R. v. Woodhead*, 1 M. & Rob. 549.

(d) *R. v. Hill*, R. & R. 483. The repealed statute was framed to meet this case.



tured into, or were employed in the weaving or manufacturing, any such goods, &c.; and it was contended that the indictment did not state any offence within the statute, because the damaging warps was made an offence only where such warps had been prepared for or employed in spinning, &c., or otherwise manufacturing the goods mentioned in the previous part of the section; and that the indictment did not allege that the warps of linen were so prepared or employed. Lord Tenterden, C. J., in delivering the judgment of the Court, said, 'We are of opinion, on a careful examination of the statute, that it was not necessary to allege specifically in the count that the warps therein mentioned were prepared for or employed in carding, spinning, weaving, &c., or otherwise manufacturing goods. The third section of the 7 & 8 Geo. 4, c. 30, consists of three branches. The first branch enacts, that if any person shall unlawfully and maliciously damage, with intent to destroy, any goods therein described, being in the loom, &c., he shall be guilty of felony. Now in an indictment for an offence against that enactment, it would be undoubtedly necessary to allege that the goods were at the time of the damage in the loom, &c., because it was not the intention of the Legislature to make it an offence to destroy such goods wherever found, but to protect them only while they were in a course of manufacture. The same observation applies to the latter part of the second branch of the section, which makes it an offence to damage or break any loom prepared for or employed in manufacturing, &c.; it would not be sufficient in an indictment, framed upon that provision of the statute, to charge the mere destruction of a loom, without adding that it was one prepared or employed in some of the ways therein described, for the count then would be too general. But as to the damaging of any warp, or shute of silk, woollen, or linen, the question may, on the words of the Act, admit of some doubt. The whole sentence is, 'If any person shall unlawfully and maliciously damage, &c., with intent to destroy, any warp, or shute of silk, woollen, linen, &c., or any loom, frame, &c., prepared for or employed in carding, spinning, weaving, &c.;' and the question is, if the words, 'prepared for or employed,' &c., are to be considered as referring to all the preceding words, or to those only denoting the implements of manufacture. That must be ascertained by looking at the subject-matter of the enactment and the object which the Legislature had in view. That object in the first branch of the section was, the protection of goods while in the course of manufacture; in the second, the protection of the warp or shute, and of the machinery and implements, when they were prepared for or employed in the production of goods. Now as to the latter, it is necessary, with a view to the limited purpose which the Legislature had in view, that the concluding words should apply to them; but not so as to the warp, because a warp is a denomination of some kind of thread prepared to be woven and used in manufacture; it is in itself something 'prepared for manufacturing goods.' We were referred in the argument to former Acts of Parliament *in pari materia* which had been repealed, and it was said that, under some of those Acts, the word 'warp' was so connected with the words importing preparation for manufacture, that a similar connection must be understood here, and, consequently, it was necessary that

they should be so connected in an indictment on the present clause. To the party indicted that must, at all events, be immaterial, because the warp must be something already prepared for manufacture; and therefore the proof would be the same, whether the indictment contained such an allegation or not; but in the statute, 4 Geo. 4, c. 46, the word 'warp' is used absolutely by itself, without reference to any word denoting preparation for manufacture, and without any qualification before or after. The words which follow, 'or to burn, break, &c., any loom, &c., prepared for or employed in manufacturing,' constitute a distinct branch of the sentence, and after them a new sentence commences. Upon this view of the two Acts of Parliament, and considering that the word 'warp' is a well-known denomination of an article which is in some way or other prepared for or employed in manufacture, we are of opinion that it was not necessary to allege specifically in this case that the warp mentioned in the indictment was so prepared or employed. (*f*)

One count charged the prisoner with maliciously damaging certain cotton warps, being in a stage and progress of manufacture, with intent to destroy and render them useless. Another count was similar, but applied only to one warp. A third count charged the prisoner with destroying a cotton warp, with intent to destroy and render it useless. It appeared that some warps were sent in a cart by the manufacturers to a warp-sizer to be sized, and whilst they were in the cart on the way, one of them was destroyed by vitriol thrown on it. It was objected that the warp was not in any stage or progress of manufacture at the time it was destroyed; and therefore the two first counts were not proved: (*g*) and as to the third, the statute required the warp to be 'prepared for or employed in carding, &c.;' and this warp required 'sizing' to enable it to be used in any manufacture. It was answered that the indictment need not allege that the warp was 'prepared for,' &c., (*h*) and that the warp was within the meaning of the clause, though it required 'sizing.' Alderson, B., 'The warp must be something altogether prepared for manufacture, and the proof must be of something completely prepared for manufacture. It may be that the third count is not bad for not stating the warp to be completely prepared for manufacture; but, it is not sufficient, without proof, to support the want of that averment.' Having consulted Coleridge, J., Alderson, B., said, 'We have considered the question, and both agree that the words "prepared for" and "in process of manufacture" must be considered as referring to the warp. We are both agreed that the warp is not a warp unless it be prepared for or used in a certain process of manufacture.' (After referring to *R. v. Ashton*) 'I should be of opinion, that in order to bring the case within the statute it will not do simply to prove any warp to have been damaged, except a warp damaged which was prepared for and in the process of manufacture of goods of this description. But as there may be some doubt as to the facts, I think it better to take the opinion of the jury, how far this was a warp prepared for, or

(*f*) *R. v. Ashton*, 2 B. & Ad. 750.

(*h*) *R. v. Ashton*, *supra*.

(*g*) Nothing is said as to what became of this objection.

in the process of the manufacture of goods; as until it was what is called "sized," it is my impression that it was not such a warp, though called a warp in popular language. On these facts being found I will reserve the case.' (i)

One count charged the prisoner with maliciously cutting certain tackle, to wit, certain cords prepared for and employed in weaving; and another count with maliciously damaging the tackle with intent to destroy it. The prisoner was in the employment of a clothier. One day his loom was examined, and it was found the cords had been taken from the 'lambs' and 'treadles' and the 'slay' (a frame into which a number of steel rods are inserted) disengaged. This was caused by the thrum having been cut. The thrum ought not to be severed when a piece of cloth is taken from the machine. It would have taken a man about three days to replace the loom in its proper state. The new yarn is fastened to the old thrum, the ends being united. The thrum is the end of the woollen chain or thread left in the working tools or harness to fasten on to the next piece of cloth, and is the connecting link between the fabric and the machine. The chain is the one part, the shute the other. The thrum was cut off between the harness and the slay. The prisoner pulled one part of the thrum from another, and he tore it after he cut it. He took off the cords of the machine, of which there were between thirty and forty, by cutting some of them. He also cut off a small string which passed round the 'marker,' to regulate the size, and called the 'reeveing string.' The fastening of the threads to the thrum was the secret of the work. There was a different mode of tying the cords according to the work; the prisoner had his own tye; other workmen looked on and tried to get the secret. Every thread of the thrum is put through an eye in the 'hevel,' or tool, which has the effect of keeping them separate. There is a fresh thrum to every piece of work. The old thrum is cut off, and goes with the finished work to the master. The cords are to raise the harness for the shuttle to move to and fro. In order to form the fresh thrum, it is not necessary to go through the process of threading the eyes of the 'hevel;' but what the prisoner did made it necessary to thread the eye of every hevel. Williams, J., told the jury that what the prisoner appeared to have done was two things, cutting the thrum and cutting the cords. With reference to the question whether the cutting must have been done with intent to destroy or render useless, if the cords were cut maliciously, it was unnecessary to aver that the act was done with intent to destroy or render useless; for this simple reason, that, if actually cut, then, if done maliciously, it must be done with intent to destroy. If the prisoner committed the act thinking he had a right, or even a notion that he had a right, he would not be guilty; for that was not the offence charged. The question resolved itself into this: did the prisoner do it in anger and revenge to his employer, or from any supposed right to conceal his art? Although cutting the thrum was not the offence charged, it was material, as shewing the object of the prisoner; for if he cut the thrum maliciously, that is a key to the cutting the cords. (j)

(i) *R. v. Clegg*, 3 Cox, C. C. 295. The prisoner was acquitted on the ground of mistaken identity.

(j) *R. v. Smith*, 6 Cox, C. C. 198.

By the 24 & 25 Vict. c. 97, s. 15, 'Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (*k*) to be kept in penal servitude for any term not exceeding seven years [and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (*l*)

The prisoner was indicted, under 24 & 25 Vict. c. 97, s. 15, for maliciously damaging a steam-engine. It was proved that the prisoner had maliciously screwed up parts of the engine so that they would not work, and had reversed the plug of the pump which supplied the engine with water, and that the steam-engine was thus rendered useless and liable to burst. Held, that the prisoner was properly convicted. (*m*)

Upon an indictment for destroying a threshing machine it appeared that the prosecutor, in expectation of a mob coming to destroy his threshing machine, had himself taken it to pieces, and that the prisoners only broke the detached parts of it; but it was held that the offence was made out, although at the time when the machine was broken it had been taken to pieces, and was in different places, only requiring the carpenter to put the pieces together again. (*n*) So where the prisoner was indicted for destroying a threshing machine, and it appeared that it had been previously taken to pieces by the owner, by separating the arms and other parts of it, for the purpose of placing it in safety, but with a view to put it together again; and it was destroyed whilst in this disjointed state; it was decided, that the offence was within the statute of the 7 & 8 Geo. 4, c. 30, s. 4. (*o*) So where

(*k*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (*o*).

(*l*) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 4; and 9 Geo. 4, c. 56, s. 4 (*l*).

The clause is extended to all agricultural machines or engines.

(*m*) *R. v. Fisher*, 35 L. J. M. C. 57; 1 L. R. C. C. R. 7; *et per* Pollock, C. B.: 'The question is, whether the injury which the statute contemplates must be of a permanent kind. We think it need not. In the case of a gun which has been spiked, the injury would not be permanent, but the gun would be rendered useless for a time until something be done to it; it may be said to need repair. It is said here that the

steam-engine was in no manner injured by what the prisoner did to it, but it needed repair; that is to say, the reversing the plug and loosening the screw, and this would of course take time and labour. It is therefore impossible to say that the machine was not damaged. Indeed, if it had been left in the state in which the prisoner placed it, the evidence is that it would certainly have burst. The several parts of this machine were so misplaced by the prisoner that if the machine had been left to itself it would have been damaged. That in my judgment is doing damage.'

(*n*) *R. v. Mackerel*, 4 C. & P. 448, J. A. Park, J., Bolland, B., and Patteson, J.

(*o*) *R. v. Hutchins*, 2 Deac. Cr. Dig. 1517, Read, Sp. Com. J. A. Park, J., Bolland, B., and Patteson, J.

certain side-boards were wanting to the machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually as if those boards had been made good; it was held, that it was still a threshing machine within the meaning of the statute. (*p*) So also where the owner had removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and had also taken away the legs; and it appeared in evidence, that though the machine could not be conveniently worked without some stage for the man to stand on, yet [that a chair, or table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the Act, notwithstanding the stage and legs were wanting. (*q*)

So where on an indictment for destroying a threshing machine it appeared that the machine was worked by water, and that the prosecutor, expecting a mob would come to break it, had had it taken to pieces and had removed the pieces to a barn at the distance of a quarter of a mile, leaving no part of it standing but the water-wheel and its axis and a brass joint, which was joined to the axis of the water-wheel, and that this water-wheel was broken by the prisoners. The water-wheel had been put up for the sole purpose of working the threshing machine, and had never been used for anything else, except sometimes to work a chaff-cutter, which was appended to the threshing machine; it was held that the wheel was part of the threshing machine, and that the damaging it was damaging a threshing machine within the meaning of the statute, and that it made no difference that the threshing machine was sometimes worked by horses when there was a scarcity of water. (*r*)

But where the prosecutor had not only taken the machine to pieces, but had broken the wheel before the mob came to destroy it, for fear of having it set on fire and endangering his premises; and it was proved that, without the wheel, the engine could not be worked; in this case it was held, that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing machine within the meaning of the statute. (*s*)

Where, on an indictment for destroying a threshing machine, it appeared that the machine was broken by a mob, Patteson, J., allowed the witnesses to be asked whether many persons had not been compelled to join the mob against their will, and whether the mob did not compel each person to give one blow to each threshing machine they broke; and also whether, at the time when the prisoner and a witness called for the prisoner joined the mob, they did not agree together to run away from the mob the first opportunity. (*t*)

A table with a hole in it for water, used in the manufacture of bricks, was held not to be a machine 'prepared for or employed in any manufacture,' within the 7 & 8 Geo. 4, c. 30, s. 4. (*u*)

(*p*) *R. v. Bartlett*, 2 Deac. Cr. Dig. 1517, Salisb. Sp. Com. Vaughan, B., Parke and Alderson, JJ.

(*q*) *R. v. Chubb*, 2 Deac. Cr. Dig. 1518, Salisb. Sp. Com. Vaughan, B., and Parke, J.

(*r*) *R. v. Fidler*, 4 C. & P. 449. J. A. Park, J., Bolland, B., and Patteson, J.

(*s*) *R. v. West*, 2 Deac. Cr. Dig. 1518, Salisb. Sp. Com. Alderson, J.

(*t*) *R. v. Crutchley*, 5 C. & P. 133.

(*u*) *R. v. Penny*, Arch. C. L. 454. Jervis, C. J., after consulting Lord Campbell, C. J.

The prisoner was indicted for damaging a machine employed in the manufacture of iron. The prosecutors were manufacturers of iron, and the prisoner was one of their workmen. Their engineer being at the door of the rolling mill engine-house, and within sight of the puddling furnace and squeezers, saw the prisoner coming down the race (an iron pathway on which the puddling balls are conveyed from the furnace to the squeezers) with a sledge-hammer, which he was drawing along with tongs towards the squeezers, the same way as if he was engaged in drawing a puddling ball. He put the sledge-hammer between the jaws of the squeezers, the engine being then in motion. There is a sort of step in the lower jaw of the squeezers between the narrow and the wide part, and the practice is to hold the puddling ball with the tongs in the wider part of the squeezers against the step until, by the action of the squeezers, it is partially crushed, and then to remove it into the narrower part of the squeezers. By this method the strain on the engine (worked by steam) which would result from forcing the balls at once into the angle of the squeezers, is avoided. The prisoner put the hammer into the upper part of the squeezers, and immediately there was a loud report, as of a blow, shaking the building. The engineer called out, 'There, young man, you have done something now;' he made no reply, but took the hammer from the squeezers with the tongs. The engineer examined the squeezers, but perceived no mark. He went into the squeezers' hole and examined the carriage of the spur-wheel of the engine and the rests; they were displaced; the silling also of the carriage was displaced. These injuries would not have occurred if the sledge-hammer had not been put in. The connecting-rod was displaced and lifted up, but the engine was not so much displaced as to prevent the work from going on; it continued to roll puddled bars; no part of the machinery was broken. The oak silling and the brickwork under it had given way and sunk, and the carriage went down with it. The actual damage done to the squeezers was three shillings, and the total damage to the machine five shillings. The value of the whole machine was five thousand pounds. The millwright included the silling as part of the machine. If the silling had not given way, the probable damage would have been upwards of one thousand pounds. The sledge-hammer was fourteen or fifteen pounds weight. It was objected, 1st, that express malice must be proved, and there was no evidence that the prisoner knew what the consequences of his act would be: but Platt, B., held that everything wilfully done, if injurious, must be inferred to be done with malice. 2nd, that there was no damage to any part of the machine; for the silling was no part of the machine, but only that part which was in motion. 3rd, that there was no damage or injury done within the statute. But Platt, B., after consulting Wightman, J., held that the silling was to be considered a part of the machine, and that a dislocation or disarrangement of a machine was within the statute. (*v*)

An indictment under sec. 15 must allege that the Act was done feloniously. (*w*)

(*v*) *R. v. Foster*, 6 Cox, C. C. 25. See *R. v. Tacey*, *ante*, p. 813.

(*w*) *R. v. Gray*, L. & C. 365. Another question raised in this case, but not deter-

Where an indictment contained counts founded on the 7 & 8 Geo. 4, c. 30, s. 8, for riotously demolishing certain machinery, and also counts founded on the third section for destroying certain looms, and it was objected that the two sets of counts were improperly joined, as the same judgment could not be passed on both; Bayley, J., said, 'I see no difficulty. I do not see that the prisoners will be under any disadvantage; but I will speak to the judges on the subject.' (x)

The provisions contained in the 24 & 25 Vict. c. 97, relating to rioters destroying buildings and machinery, have been introduced in a former part of this work, together with the cases on the subject. (y)

mined, was whether either a patent plough of Bastall or an ordinary plough, or a scarifier, each being commonly in use in agriculture, is a machine for ploughing or performing any other agricultural operation, within sec. 15 of the new Act.

(x) *Kershaw's case*, 1 *Lew.* 218. It is not stated in the report how this case terminated.

(y) See vol. i. p. 565, *et seq.*

## CHAPTER THE FIFTY-SEVENTH.

### OF BURNING AND DAMAGING SHIPS AND OTHER VESSELS, AND ARTICLES THEREUNTO BELONGING.

By the 24 & 25 Vict. c. 97, s. 42, 'Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (b)

Sec. 43. 'Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 42. (c)

Sec. 44. 'Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, *cast away, or destroy* any ship or vessel, *under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof, shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding fourteen [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (d)

Sec. 45. 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any *ship or vessel* any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels,

(a) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (c).

(b) This clause is taken from the 7 Will. 4 & 1 Vict. c. 89, ss. 4, 6. Under sec. 4, the offence of setting fire to a ship or vessel whereby life was endangered was capital, but that punishment is abolished.

The words 'injuries to ships' before this section were accidentally omitted in reprinting the Bill after it passed the Select Committee of the Commons.

(c) This clause is taken from the 7 Will. 4 & 1 Vict. c. 89, s. 6.

(d) This clause is taken from the 9 & 10 Vict. c. 25, s. 7.

The first words in italics are introduced to make this section include all attempts, which, if effectual, would fall within either of the two preceding sections.

As to the words 'under such circumstances,' &c., see the note to sec. 7, *ante*, p. 788.



shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable,' as in sec. 44. (e)

Sec. 46. 'Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete, or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (f) to be kept in penal servitude for any term not exceeding seven years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (g)

Sec. 47. 'Whosoever shall unlawfully mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 42. (h)

Sec. 48. 'Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 46. (i)

Sec. 49. 'Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (f) to be kept in penal servitude for any term not exceeding fourteen [and not less than three years — or to be imprisoned for any

(e) This clause is taken from the 9 & 10 Vict. c. 25, s. 6.

(f) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 50, note (o).

(g) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 10, and 9 Geo. 4, c. 56, s. 10 (1).

The words 'gunpowder or other explosive substance' are introduced to exclude cases which are provided for by the preceding section.

(h) This clause is taken from the 7 Will. 4 & 1 Vict. c. 89, s. 5, and the capital punishment abolished.

The clause is extended to masking, altering, or removing lights or signals, and to boats.

The latter clause was confined, in the

former enactment, to ships or vessels in distress; it is extended to all cases within its terms for which the Act provides no other punishment.

(i) This clause was framed from the 9 & 10 Vict. c. 99, s. 28. That section appears to have been very improvidently repealed by the 17 & 18 Vict. c. 120, in consequence of the passing of the Mercantile Marine Act, 17 & 18 Vict. c. 104. Sec. 414 of that Act imposes only a pecuniary penalty on any person who wilfully or negligently injures any buoy or beacon, or removes, alters, or destroys any light-ship, buoy, or beacon, in addition to the expense of making good the damage done. This is a punishment wholly inadequate to the offences in the 9 & 10 Vict. c. 99, s. 28, and therefore this clause was introduced.

term not exceeding two years, with or without hard labour, and with or without solitary confinement].’ (j)

The 12 Geo. 3, c. 24, relates to the King’s ships of war, arsenals, &c., and enacts, ‘that if any person or persons shall, either within this realm or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying of any of His Majesty’s ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of His Majesty’s dock-yards, or building or repairing by contract in any private yards, for the use of His Majesty, or any of His Majesty’s arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or any of His Majesty’s military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war is, are, or shall be kept, placed, or deposited;’ the person or persons guilty of any such offence shall be adjudged guilty of felony, and suffer death without benefit of clergy. (k) By the second section, persons committing these offences out of the realm, may be indicted and tried for the same either in any county within the realm, or in the place where the offence shall have been actually committed, as His Majesty may deem most expedient for bringing such offender to justice. (l)

Besides the statutes which have been thus cited, there are some others of a more limited and local operation, which may be briefly noticed. The 2 Geo. 3, c. 28, which made provisions against damaging the cordage of vessels on the Thames, was repealed by the 2 & 3 Vict. c. 47, entitled ‘An Act for further improving the police in and near the metropolis;’ but sec. 27 of that Act enacts that ‘every person who shall unlawfully cut, damage, or destroy any of the ropes, cables, cordage, tackle, headfasts, or other the furniture of or belonging to any ship, boat, or vessel lying in the river Thames, or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same or any part thereof, shall be deemed guilty of a misdemeanor.’ The 39 Geo. 3, c. 69 (a Local Act for improving the port of London), s. 4, after providing as to the burning, &c., of ships therein mentioned, enacts, ‘that if any person or persons shall knowingly, wilfully, or maliciously demolish, break down, cut, or destroy any of the works to be made by virtue of this Act, or any ship or vessel lying in the said canal, or in any of the said docks, basins, cuts, or other works; then every such offender, being convicted thereof, shall suffer punishment by fine, imprisonment, or transportation, at the discretion of the judge, &c., before whom such offender shall be tried and convicted.’ And by sec. 105, persons wilfully or maliciously cutting, &c., or in any manner destroying any rope,

(j) This clause is taken from the 7 Will. 4 and 1 Vict. c. 89, s. 8.

(k) See *ante*, p. 791, note (b).

(l) Some offences of a similar nature

may be inquired of and tried by courts-martial by the naval articles of war, secs. 25 & 26, as given in the 24 & 25 Vict. c. 115.

&c., by which any ship, or vessel lying in the said canal, docks, &c., or in any place or places in the river Thames, between London Bridge and the mouth of the river Lee, are moored or fastened, shall forfeit not exceeding £10.

Upon the words 'cast away or destroy,' it may be mentioned that, upon the construction of those words in two statutes, 4 Geo. 1, c. 12, and 11 Geo. 1, c. 29, it appears to have been ruled that if a ship were only run aground or stranded upon a rock, and were afterwards got off in a condition capable of being easily refitted, she could not be said to be cast away or destroyed, and that the case was not therefore within either of those statutes. (*m*)

A question has twice arisen, but has not been expressly decided, as to what vessels are included within the word 'vessel' in the 7 & 8 Geo. 4, c. 30. In the first case the prisoner was indicted for setting fire to a barge, and Alderson, B., would have reserved the question, if the prisoner had been convicted, whether a barge was a vessel within the meaning of this statute. (*n*) In the second case the prisoner was indicted for damaging a certain vessel by beating a hole in the bottom of it. The vessel in question was a small pleasure boat, about eighteen feet long, and two men could have carried it; and it was objected that the Legislature meant to apply the terms 'ship or vessel' only to such vessels as were likely to be underwritten, and not to small boats; and that in the 7 & 8 Geo. 4, c. 29, s. 17, where it was meant to include boats, the words were, 'vessel, barge, or boat,' clearly making a distinction between a vessel and a boat. Patteson, J., 'That the term "vessel" would in common parlance include this boat is clear, but whether in this Act of Parliament it was meant to include such boats is the question.' 'I incline to think that this boat is within the clause in the Act of Parliament; but as the word "vessel" must have the same construction in all other Acts of Parliament, it might lead to inconvenience, and therefore if necessary I will take the opinion of the judges upon it.' (*o*)

We have seen that a part owner might be guilty of the offence of setting fire to a ship within the 7 & 8 Geo. 4, c. 30, s. 9. (*p*)

In one case it was objected that the indictment was bad, because it did not allege that the damage was done 'otherwise than by fire;' but it was held to be sufficient, as it was alleged to be done by beating a hole in the bottom of the boat. (*q*)

One count alleged that E. Loose, a certain vessel on the high seas feloniously did cast away with intent to prejudice A. Howden and another, being part owners of the said vessel, and that the prisoners, within the jurisdiction of the Central Criminal Court, did feloniously

(*m*) *De Londo's case*, 2 East, P. C. c. 22, s. 42, p. 1098.

(*n*) *R. v. Smith*, 4 C. & P. 569. It would now seem to have been decided that a barge is a ship. See *The Mac*, 7 P. D. 126; *Gapp v. Bond*, 19 Q. B. D. 200.

(*o*) *R. v. Bowyer*, 4 C. & P. 559. Verdict, not guilty. Could a coracle be considered a vessel within this statute?

(*p*) *R. v. Philp, R. & M. C. C. R.* 263. See this case also as to the entry in the reg-

istry of vessels, and as to the joint ownership of shares in vessels. *Ibid.*

(*q*) *R. v. Bowyer, supra*. In *Benyon v. Cresswell*, 12 Q. B. 899, it was held that a pleasure-boat of seven tons burthen was not a ship or vessel' within the 8 & 9 Vict. c. 89, s. 34; and in *Morewood v. Pollock*, 1 E. & B. 743, a point was determined as to a lighter; but neither case throws any light on the meaning of the words 'ship' or 'vessel.' See *Mayor of Southport v. Morris* (1893), 1 Q. B. 359.

incite the said E. Loose to commit the said felony. Other counts varied the intent. Howden and one Anistice were owners of one-fourth of the ship, and one of the prisoners of the other three-fourths; the goods, which were put on board by Zuiietta and Co., the charterers of the ship, were insured at Lloyd's, the intent to prejudice the underwriters on that policy being alleged in one of the counts; but in the case of three different policies on goods, which were effected by the prisoners, no part of such goods were ever put on board. The ship was wilfully sunk by Loose, the captain, on the high seas, and there was a total loss (except a very trifling salvage) of both ship and cargo, and the jury found the prisoners guilty of the whole charge. It was objected, 1st, that the indictment was not properly framed as an indictment for a substantive felony within the 7 Geo. 4, c. 64, s. 9, but as an indictment at common law against the principal and accessory before the fact, and, as the principal had not been convicted, the accessory could not be tried or convicted upon it; 2nd, that the Central Criminal Court had no jurisdiction to try an accessory before the fact to a felony on the high seas, unless the principal had been committed to or detained in prison by this court for such felony; 3rd, as the 1 Vict. c. 89, s. 6, described the intent to be 'to prejudice the persons who shall underwrite any policy of insurance upon goods on board the ship,' no evidence was admissible as to the three policies on goods effected by the prisoners, where no goods had been put on board. But, on a case reserved, the judges were of opinion, as to the first objection, that the description of the offence was not altered by the statute. It might have been put in a different shape, but every allegation in this count would have been included in any other. As to the second objection, that the 4 & 5 Will. 4, c. 36, s. 22, must be taken distributively, as to the commission of oyer and terminer and gaol delivery. There was a general power to hear and determine all offences committed on the high seas, though the gaol delivery commission only extended to all persons committed or detained. As to the last objection, that the words in the statute were a mere description of a policy on goods. And they unanimously held the conviction right. (r)

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 220, 'If a master, seaman, or apprentice belonging to a British ship by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of a person belonging to or on board the ship, or refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of the ship from immediate danger to life or limb, he shall in respect of each offence be guilty of a misdemeanor.'

Sec. 607. 'If any pilot, when in charge of a ship, by wilful breach of duty or by neglect of duty, or by reason of drunkenness, either does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of any person on board the ship; or refuses or omits to do any lawful act proper and requisite to be done by him for preserving the

ship from loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from danger to life or limb, that pilot shall in respect of each offence be guilty of a misdemeanor.' (s)

By sec. 457, 'If any person sends or attempts to send, or is party to sending or attempting to send, a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor, unless he proves either that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving that proof he may give evidence in the same manner as any other witness.

'If the master of a British ship knowingly takes the same to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor, unless he proves that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof, he may give evidence in the same manner as any other witness.

'A prosecution under this section shall not be instituted except by or with the consent of the Board of Trade, or of the governor of the British possession in which such prosecution takes place.

'A misdemeanor under this section shall not be punishable upon summary conviction.

'This section shall not apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession.'

Sec. 458. 'In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage. Nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the sending of the ship to sea is reasonable and justifiable, or shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession.'

By sec. 680, any offence by this Act declared to be a misdemeanor shall be punishable by fine or imprisonment, with or without hard labour. (t)

(s) Sec. 608. 'If any person, by wilful misrepresentation of circumstances, upon which the safety of a ship may depend, obtains or endeavors to obtain the charge of that ship, that person, and every other person procuring, abetting, or conniving at the

commission of the offence, shall, in addition to any liability for damages, be liable for each offence to a fine not exceeding one hundred pounds.'

(t) These offences by this section may also be dealt with summarily.

By sec. 684, 'For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.'

On an indictment on the (repealed statute) 17 & 18 Vict. c. 104, s. 239, for doing an act tending to the loss of a ship, it appeared that the prisoner struck a light with a match, and lighted a candle, in a part of the ship forbidden by the ship's regulations, and threw down the match before it was extinguished, but there was no sufficient evidence that a fire which occurred six hours afterwards arose from this act; it was contended that the act charged must be followed by the loss of the ship. Bramwell, B., 'I am of opinion that if the act tended to the loss, destruction, or damage of the ship, though neither result followed, it is a misdemeanor within this section; as if a man should stick a lighted candle in an uncovered barrel of gunpowder, though he put it out immediately, I think that would be an act tending to the damage of the ship. The latter part of the section is, I think, open to the same construction, and both would be illustrated by two persons being together in the immediate neighbourhood of an explosive and unprotected material, and one lighting a candle, and the other omitting to put it out; the first would be guilty under the former clause of the section, and the second under the latter.' And the jury were told that 'to convict upon this indictment you must be satisfied that the act done was dangerous, having regard to the place, or the contents of the place in which it was done; for, if not, it would not be an "act tending to the immediate loss, destruction, or serious damage of the ship;" but you need not be of opinion that what afterwards took place was the result of that act.' (u)

(u) R. v. Gardner, 1 F. & F. 669.

## CHAPTER THE FIFTY-EIGHTH.

### INJURIES TO WORKS OF ART.

By the 24 & 25 Vict. c. 97, s. 39, 'Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art, in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or to any university, or college or hall of any university, or to any inn of court, or in any street, square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed.' (a)

(a) This clause is framed on the 8 & 9 Vict. c. 44, ss. 1, 4, and 17 & 18 Vict. c. 33, s. 6.

The clause is extended to pictures, statues, &c., in public buildings, and in buildings belonging to the universities and inns of court, and to statues, monuments, and other memorials of the dead in churchyards, &c.

As much misapprehension seems to prevail as to the law respecting monuments to the dead, it may be well to state what it appears to be. Lord Coke, 3 Inst. 202, speaking of 'tombs, sepulchres, or monuments in a church, chancel, or churchyard,' expressly lays it down, in general terms and without any limitation whatever, that 'the defacing of them is punishable by the common law,' as it appeareth in the book of 9 Ed. 4, 14 (Lady Wyche's case), and as it was agreed by the whole court in *Corven's case*, 12 Rep.

104. And this position appears to be clearly correct. In *Corven's case* it was held that if a nobleman, knight, esquire, &c., be buried in a church, and a gravestone or tomb be made for his monument, although the freehold of the church be in the parson, yet cannot the ordinary, parson, churchwardens, or any other take them or deface them, but he is subject to an action *on the case* by the person who placed them during his life, and after his death by the heir male, lineal or collateral, of the deceased. Co. Litt. 18 b, 27 a; *Francis v. Ley*, Cro. Jac. 366. The first branch of this passage is equally general with the passage cited from the 3 Inst. 202, and may be considered as explained by it; and, therefore, it ought not to be looked upon as limited by the latter branch to cases where the injury is done by some one other than the person who erected the monument or

the heir of the deceased. But even if it were contended that this passage shewed that such person or the heir could alter or deface a monument, it seems plain that such is not the law. A monument affixed to a church or in a churchyard is just as much in the possession of the incumbent as the church and churchyard, as is shewn by the action by the heir being an action *on the case*; consequently the heir would be guilty of a trespass if he defaced the monument without the leave of the incumbent. But it may be said that the incumbent can give such a consent as will justify the heir in dealing with the monument; it is conceived, however, that he can give no such consent. He is merely tenant for life at the utmost, and cannot lawfully do anything to the detriment of the freehold, or of anything annexed to and parcel of it, and what he cannot lawfully do himself, he cannot lawfully permit another to do. In *Francis v. Ley*, above cited, it was held that 'it is not lawful for any to break or deface any *superstitious* pictures in any church or aisle, but the ordinary only; and if any do so without licence from the ordinary, he shall be bound to his good behaviour, as was done in Prickett's case by Sir C. Wray, chief justice of the King's Bench.' This is a very strong authority to shew that the incumbent cannot break or deface anything annexed to the freehold of the church. If he cannot deface superstitious annexations, *a multo fortiori* he cannot deface monuments lawfully erected.

A little consideration will also prove that the representative of a family for the time being cannot lawfully deface them. When a person erects a monument, he dedicates it *for ever* for every purpose which it may lawfully serve. He intends it to be *in perpetuam memoriam* of every thing stated in it. As soon as it is annexed to the freehold it passes into the possession of the incumbent to be preserved for the purposes for which it was erected. Now, what are those purposes? It becomes *for all future time* legal evidence of all the births, marriages, and deaths mentioned in it in every case where any question may arise relating to any of them. This clearly proves that the representative of the family for the time being can have no right to destroy it; for all other members of the family then living

or thereafter to be born have or will have an interest in it. The present representative may be a peer, the last of his branch of the family, and there may be a monument which alone would prove the descent of the next heir to the title; it is impossible to suppose that he can lawfully destroy such a monument, and thereby prevent the next heir from succeeding to the peerage. So it may be that the present representative is tenant for life of an estate entailed on the heir male of the family; can he lawfully destroy a monument which may prove who is entitled to succeed to the estate on his death? A monument also may be evidence for a person wholly a stranger in blood to the person who erected it. Suppose an estate be entailed on the heirs male of A. with remainder to A.'s right heirs; a monument may shew that C., the son of A., died without issue male, and may thus prove that a female descendant of A. was seised in fee of the estate, and so establish the title of a stranger in blood, to whom the female had devised the estate. These instances, which have occurred in the families of two peers, plainly shew that the representative of a family for the time being cannot lawfully alter or destroy any inscription on a monument erected to a member of his family. In fact, his position is extremely like that of a tenant for life of an estate under lease, who may bring an action on the case against any one who cuts down timber on the estate, but cannot cut it himself, or permit it to be cut by any other person.

It might also be well contended that the public have the same interest in a monument that they have in a register of births, marriages, and deaths, and that an inscription on the one can no more lawfully be defaced by any one than an entry in the other. But amply sufficient has been said to shew that there can be no doubt whatever that no one can lawfully deface any monumental inscription.

Where an aisle in a church belongs to a private individual, it seems clear that he is in the actual possession of it, and of everything in it; and consequently he may maintain an action of trespass against any one who injures any monument in it. See *Burn's Ec. L.*, 'Church, Ile.'



## CHAPTER THE FIFTY-NINTH.

### OF WILFUL OR MALICIOUS DAMAGE TO REAL OR PERSONAL PROPERTY NOT OTHERWISE PROVIDED FOR.

By the 24 & 25 Vict. c. 97, s. 51, 'Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock of the evening and six of the clock in the next morning, shall be liable [at the discretion of the Court] (a) to be kept in penal servitude for any term not exceeding five years [and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labour].' (b)

Sec. 52. 'Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding two months, or else shall forfeit and pay such sum of money not exceeding five pounds as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which last mentioned sum of money shall, in the case of private property, be paid to the party aggrieved; and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in the same manner as every penalty imposed by a justice of the peace under this Act; and if

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 50, note (c).

(b) This clause is new, and a very important amendment of the law. In the present times there are so many very valuable instruments and machines daily invented, that it is impracticable to specify them particularly in any Act; but this general clause will include injuries to all of them, and also any other malicious injuries, exceeding the amount of five pounds, which have not been provided for by the other

parts of the Act. There was originally a clause in this Bill providing for malicious injuries to steam and other engines and machines not otherwise provided for; but it was struck out, and the punishment in this clause fixed with reference to those and other like injuries.

The part of this clause giving a greater punishment for offences committed in the night was introduced principally with reference to Ireland, where malicious injuries seem often to be perpetrated in the night.

such sums of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two months, unless such sums and costs be sooner paid: provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, (c) nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed.' (d)

Sec. 53. 'The provisions in the last preceding section contained shall extend to any person who shall wilfully or maliciously commit any injury to any tree, sapling, shrub, or underwood, for which no punishment is hereinbefore provided.' (e)

An indictment on the 24 & 25 Vict. c. 97, s. 51, alleged that the prisoner committed damage to the amount of five pounds on real and personal property; the evidence was that the damage, exceeding five pounds, was done on two following days, but the damage on either day did not amount to five pounds; it was objected, that the indictment was not sustained, as it was not proved that damage exceeding five pounds was done at any one time; and it was held in Ireland, on a case reserved, that this evidence did not prove an offence within that section. (f)

The words of sec. 52, 'any real or personal property whatsoever' (g) do not apply to a 'right of herbage,' but only to tangible property and not a mere incorporeal right. (h) Actual damage to the realty itself must be proved, and mere damage to mushrooms growing in a wild state is insufficient to justify a conviction under sec. 52. (i)

The word 'maliciously,' in the 24 & 25 Vict. c. 97, s. 51, requires that an act to be criminal within that section should be done wilfully. A conviction under that section, for unlawfully and maliciously com-

(c) See *R. v. The Justices of Richmond*, 8 Cox, C. C. 314, and *R. v. Dodson*, 9 A. & E. 704, that it is a question for the magistrates under all the circumstances, whether the party acted under such fair and reasonable supposition that he had a right to do the act.

(d) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 24. There was a similar clause in the 14 & 15 Vict. c. 92, s. 3 (1.).

The former Act was defective in neither giving the power to award any fine in addition to the amount of the injury done, nor any imprisonment; the latter Act did both; and this clause authorises the justice either to commit the offender or to fine him, in addition to the amount of the injury done.

This clause is altered in accordance with the 18 & 19 Vict. c. 126, s. 22, so that where the owner of the property injured is examined as a witness, he may receive compensation for the injury.

(e) This clause was introduced in consequence of *R. v. Dodgson*, 9 A. & E. 704, and *Chanter v. Greame*, 13 Q. B. 216. In the former case the Court expressed a clear opinion that trees under the value of a shilling were within the 7 & 8 Geo. 4, c. 30, s. 24; in the latter the Court expressed an almost equally clear opinion that they were not. This clause brings them within the preceding section, and it was very expedient that it should; for a malicious individual might destroy a newly planted wood with impunity by destroying a single tree at a time, and several flagrant instances of the kind had occurred.

(f) *R. v. Williams*, 9 Cox, C. C. 338.

(g) The language of sec. 51 is the same.

(h) *Laws v. Eltringham*, 8 Q. B. D. 283.

(i) *Gardner v. Mansbridge*, 19 Q. B. D. 217. See also *Hamilton v. Bone*, 16 Cox, C. C. 437.

mitting damage above the value of £5 to a house, where the defendant, after fighting in a crowd in the street near the window of the house, separated himself from the crowd, picked up a stone, threw it at one of the persons with whom he had been fighting, missed his aim, and hit a plate-glass window above the value of £5 in the house, but did not intend to break the window, was quashed. (j)

It should be noticed that the words in sec. 51 are 'unlawfully and maliciously,' but the words in secs. 52 and 53 are 'wilfully or maliciously,' so that an offence is created 'if a person wilfully commits the act though he has no malice, or, in other words, if he does the act complained of intentionally and on purpose.' (k) But where a surveyor of highways in the *bonâ fide* course of his duty did some damage to a drain, it was held that he could not be convicted under sec. 52, (l) although a private person doing the same act *bonâ fide* would be liable. (m)

In an indictment under 24 & 25 Vict. c. 97, s. 51, for maliciously damaging personal property, the damage exceeding £5, it is not necessary to allege the value of each article injured, but only that the amount of the damage done to the several articles exceeded £5 in the aggregate. (n)

(j) *R. v. Pembliton*, 43 L. J. M. C. 91; *et per* Blackburn, J., 'We have not to consider what may be malice aforethought at common law in cases of murder; the present is a statutory offence created by a statute relating to malicious injuries to property. When a person wilfully does an act to the injury of another without any lawful cause, the act is malicious. Here the act was without lawful excuse, but was it wilful? Upon the facts there was evidence upon which the jury might have found, if they had been so directed, that the act was malicious. If they had found that the prisoner was aware that the window was where it was, and that he was likely to break it, and

was reckless whether he did so or not, the case might have been different, but they were not so directed, and have not so found. They have found that he did not intend to break the window. Therefore, I think the conviction must be quashed.' In accord with the above observations of Blackburn, J., is the decision in *R. v. Latimer*, 17 Q. B. D. 359. See vol. iii. p. 311, and see *R. v. Faulkner*, *ante*, p. 783.

(k) *Gardner v. Mansbridge*, *supra*.  
A. L. Smith & Wills, JJ.

(l) *Denny v. Thwaites*, 2 Ex. D. 21.

(m) *White v. Feast*, L. R. 7 Q. B. 353.

(n) *R. v. Thomas*, 12 Cox, C. C. 54.

## APPENDIX A.

### *Decisions on Repealed Statutes as to meaning of Clerk or Servant.*

It was held that a female servant was within the repealed enactment of 39 Geo. 3, c. 85; (a) and that that enactment was not confined to the servants of persons in trade. (b)

If a person was employed as the servant of a corporation, he was a servant within this statute, although not duly appointed, nor even appointed at all under the common seal of the corporation. (c)

**Where more than one master.**— And a person employed upon commission to travel for orders, and to collect debts, was held to be a *clerk* within that Act, though he was employed by many different houses, on each journey, and paid his own expenses out of his commission each journey, and did not live with any of his employers, nor act in any of their counting-houses. The indictment charged the prisoner with embezzlement, as the servant of one Wand. The prisoner was a clerk in the employ of a railway company at one of their stations; but he was also employed by Wand to sell coal and lime for him; for which service Wand paid him ten shillings weekly. He was also employed by one Gascoigne to sell coals for him. It did not appear that the prisoner devoted any particular portion of his time to the service of Wand or Gascoigne; and, upon a case reserved on the question whether the prisoner was the servant of Wand within the meaning of the 7 & 8 Geo. 4, c. 29, s. 27, the judges held that he was. The wages made the prisoner a servant. (d)

The prisoner was indicted as servant of T. R. Bridson, for embezzling his money. T. R. Bridson and J. Ridgway were partners in trade, and the prisoner was employed by them as their bookkeeper, and whilst he was so employed, received and embezzled some notes, the private property of Bridson; it was objected that he could not be considered the servant of Bridson, being the servant of Bridson and his partner jointly; but Bayley, J., held that he was the servant of both; and said that it had been decided by the judges that where a traveller is employed by several houses to receive money, he is the individual servant of each. (e)

Upon an indictment for embezzlement, it appeared that the railway station at Chester was built on land in part belonging to each of four railway companies, whose lines ran to it, and was maintained at their joint cost out of a fund contributed by them in certain agreed proportions,

(a) R. v. Smith, R. & R. 267.

(b) R. v. Squire, 2 Stark. Ca. 349; R. & R. 349.

(c) R. v. Beacall, 1 C. & P. 457. Park, J. A. J., R. v. Wellings, *ibid.* See Williams v. Stott, 3 Tyrw. 688.

(d) R. v. Batty, 2 M. C. C. R. 257. R. v. Carr, MS. Bayley, J., and R. & R. 198,

and R. v. Leach, 3 Stark. N. P. C. 70. R. v. Tite, L. & C. 29, where it was held that if the control necessary to constitute the relationship of master and servant was shewn to have existed, which was a question of fact for the jury, a commercial traveller paid by commission might clearly be a servant within the meaning of the statute.

(e) R. v. Leach, 3 Stark. N. P. R. 70.

and that it was under the management of a committee of eight directors of the companies, two appointed by each company. This committee appointed, dismissed, and paid out of the said fund the wages of the officers, clerks, and servants employed at the station, and amongst them the delivery clerks, whose duty it was to deliver parcels which arrived by the trains of any of the companies, and to receive the sums charged for the carriage of such parcels, and account for and pay over to the chief clerk in the parcels office the sums so received by them during the day. The chief clerk paid over the money so received to the cashier of the committee to the account of the several companies to whom the same belonged, and he kept a separate account for each company, and paid the money over directly to the company to which it belonged. The prisoner was a delivery clerk, and having delivered several parcels, and received the money for their carriage, due to one of the companies, embezzled part of it; and it was held, upon a case reserved, that the prisoner was properly convicted on counts which alleged him to be the servant of the four companies, or of the committee. (f)

**Where payment by commission.**—The prisoner undertook to do business for the prosecutors, who were wholesale grocers, in 'Birmingham and other towns, for a commission of half per cent. on the amount of invoices, and if at any time he made a bad debt, he agreed that the commission on this account for twelve months back, or from the time of dealing, if for a short period, should be deducted from his first settlement afterwards; commission to cover all expenses.' One of the prosecutors proved that the prisoner sent up every week a list of the receipts, and that he was in the habit of describing him as agent or traveller in his letters. The prisoner was paid a commission on the orders taken by him; a bill was sent to the customer with the goods, and when due, the name of the customer and amount was sent to the prisoner at Birmingham. Nothing was paid him as commission on the amount collected. Lists of accounts for collection were sent him independently of those due for the orders he had obtained, and he received no commission for that work; it was not optional with him; he was bound under the agreement to collect what we asked him; all our debts within his district; that was the nature of his business: the nature of the business of a person employed by us, as an agent in the country, is to collect all our debts, and to get what orders he pleases, and on those orders receive commission. It was left to the jury to decide whether, upon the facts, the prisoner was acting in the capacity of clerk or servant to the prosecutors, or merely as their agent. (g)

The prisoner, who was indicted under 7 & 8 Geo. 4, c. 29, s. 47, was employed in Northumberland to obtain orders there for the sale of iron for the prosecutors, who carried on business in Staffordshire as manufacturers of iron under the name of 'The Shelton Bar Iron Company' at a certain commission upon the orders which he should obtain. This employment took place under the following letter from the manager of the prosecutors' works: 'In reply to your letter, we are not disposed to appoint any agent at Newcastle, but for all business you do for us we shall be happy to pay you a commission. We expected that after your conversation with the writer a good business would result.' The writer

(f) *R. v. Bayley*, D. & B. 121. The case also stated that in cases of loss by negligence, or embezzlement of a station-servant, the usage had been to make good the loss to the particular company by whom it was suffered, out of the funds of the committee. This fund was a different fund

from that which was in the cashier's hands for payment over to the several companies or their bankers. It was in the hands of the bankers of the committee, and was drawn out by cheques signed by the general manager.

(g) *R. v. Chater*, 9 Cox, C. C. 1.

of this letter was not called; but the cashier of the company, who had nothing to do with the employment of such persons as the prisoner, said that a person who, like the prisoner, got orders on commission, was called an agent in their trade, and that he had no doubt but that there was some other letter appointing the prisoner an agent for the prosecutors; but there was no evidence of or of notice to produce such letter: nor did it appear whether the prisoner was employed by any other persons than the prosecutors. It was his duty to account to them for any money which he might receive immediately on the receipt of it. The prisoner had received several sums of money which he had not accounted for. It was held that he could not be convicted of embezzlement, and the grounds seem to have been, 1st, that he was not clerk or servant; for the words clerk or servant implied the existence in some one of the power of control, and here the prisoner was a commission agent and no more; 2ndly, that it did not appear that the prisoner was employed to receive money. (*h*)

Upon an indictment for embezzlement, it appeared that the prisoner kept a refreshment house, and the prosecutors, whilst he was so doing, engaged him to get orders for manure, on which orders they supplied it from the stores. The prisoner was to collect the money and pay it at once to them; he was also to send them weekly accounts, showing what he had sold and what he had received. He was to be paid by commission. It did not appear that he had undertaken to give any definite quantity of time or labour to the business; but he was to act in a particular district, and in the printed forms given to him on which to make his returns he was called agent for the Birkenhead district. The prosecutor said, 'he was to go through the county and see the farmers and get orders. He was to be continually during the season among the farmers.' Subsequently the prosecutor sent large quantities of manure to stores at Birkenhead, which were under the control of the prisoner, who took them in his own name and paid the rent to the owner, but was repaid such rent by the prosecutors when the accounts were adjusted. The prisoner supplied the manure from these stores; but it did not appear that the former mode of supply might not have been resorted to if found convenient. Afterwards the prisoner signed a proposal to a guarantee society to ensure the prosecutors in respect of their connection with him, which stated that his salary was £1 a year besides commission, estimated at £65 a year. This proposal contained a notice that some amount of salary must be payable, or the society would not insure; and the prosecutor swore that he agreed to give the prisoner that salary. The prisoner was allowed to get in arrear, that is, he retained in his hands money he acknowledged he had received, and was treated as a debtor in respect of it. The alleged embezzlement was that he fraudulently returned the names of three persons as having had manure without paying for it, when in fact he had received the sums from them. The question whether or no he was a servant within the statute was left to the jury, who convicted; but, on a case reserved, on the questions whether there was any evidence that he was a servant, or whether the question was not for the judges, and if so, whether it ought not to have been decided in the prisoner's favour, it was held that the evidence did not prove that the prisoner was

(*h*) *R. v. May*, L. & C. 13. On *R. v. Carr*, *supra*, being cited, Cockburn, C. J. said, 'In that case the prisoner was a traveller. Now a traveller, although he travels for more than one person or firm, is to some extent under control, and must go here or there as he is ordered; but in this case the prisoner can, in no sense, be

said to be under control.' A point was also stated as to whether the prisoner could be tried in Staffordshire, but nothing was said on this point. In *R. v. Tite*, *supra*, Williams, J., said, he concurred in the decision in *R. v. May*, 'on the ground that it was not stated that it was the prisoner's duty to receive money.'

a servant of the prosecutors, but that the relation between them was rather that of principals and agent. (i)

**Where a joint interest in money received.** — The prosecutor had a colliery, and barges, and employed the prisoner as captain of one of his barges to carry out and sell coals, and his duty was to bring back the money for which the coals sold, but he was entitled to two-thirds of the difference between such money and the value at the colliery and duties. He received twenty waggon loads to take down the river to the best market, and he sold them at Gainsborough, at eighteen shillings per chaldron, the value, when he received them, having been fourteen shillings the chaldron. He embezzled the money, but it was urged that he was not a servant within the statute, and that he had a joint interest with the prosecutor in the money he received. A majority of the judges held that he was a servant within the statute, and that so much of what he received as equalled the value at the colliery and duties, was received solely for the use of the prosecutor, and that the embezzlement of it was an offence within the statute. (j)

A turner's man received an order on his master's account for six dozen coffee-pot handles, his business being to receive orders, take the necessary materials from his master's stock, work them up, deliver out the articles, receive the money for them, and pay over the whole money to his master; but at the end of the week he was entitled to receive a proportion of the money back for his work upon the articles. In the present case he had taken the materials from his master's stock, made the coffee-pot handles on his premises, delivered them to the customer, and received the money; but he had concealed the transaction from his master, and kept the money, which was three shillings, and of which his share would have been one shilling. Upon an indictment for embezzling the three shillings, Bayley, J., doubted whether it was not rather a fraudulent concealment of the order, and an embezzlement of the master's materials; but, upon a case reserved, all the judges who met thought it was an embezzlement of the money, and that the conviction was right. (k)

Where a clerk to a banking firm was to receive one-third of one of the partner's profits, being the fifteenth share of the whole profits of the house, to which the other partners assented, but they considered the prisoner not liable to them for losses, it was held that the prisoner was not a partner. He was to receive only a sort of percentage, and the agreement was assented to by the partners merely as a private agreement between the one partner and the prisoner. He was to receive a share of the *particular* profits of the one partner, and not of the *general* profits of the firm, and therefore he might be guilty of embezzling money received on behalf of the firm. (l) So where a prisoner was employed by the master of a coal vessel, who sent him with a cargo of coals; and the custom of the trade was for the person who superintended the business to receive two-thirds of the freight, and the owner one-third: the prisoner took the whole; whereupon he was indicted and convicted. It was objected that he and the master were joint proprietors of the freight; but a large majority of the judges held the conviction right. (m)

Upon an indictment for embezzlement it appeared that the prisoner entered into the following agreement with the prosecutor: 'S. Wortley engages to take charge of the glebe land of the Rev. J. B. B. Clarke, his

(i) *R. v. Walker*, D. & B. 600.

(j) *R. v. Hartley*, MS. Bayley, J., and  
R. & R. 139.

(k) *R. v. Hoggins*, MS. Bayley, J., and  
R. & R. 145.

(l) *Holme's case*, 2 Lewin, 256, Cham-  
bre, J.

(m) *Anonymous*, *ibid.*, cited by Cham-  
bre, J.

wife undertaking the dairy, poultry, &c., at fifteen shillings a week, till Michaelmas, and afterwards at a salary of £25 a year, and a third of the clear annual profit, after all expenses of rent, rate, labour, and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. 'Three months' notice on either side to be given; at the expiration of which time the cottage to be vacated by S. Wortley, who occupies it as bailiff, in addition to his salary. March 12th, 1850.

'J. B. B. CLARKE,  
'S. A. WORTLEY.'

The prisoner was convicted of embezzling moneys received in the course of the business carried on under this agreement, and on a case reserved, Lord Campbell, C. J., after argument on the part of the Crown only, thus delivered judgment: 'I am of opinion that this conviction ought to be supported. The question is, did this instrument create a partnership or did it create the relation of master and servant? It did not create a community of profit and loss; *inter se* the prosecutor and the prisoner were not partners; and I am of opinion that the prisoner was a labourer and not a partner.' (n)

The prosecutors carried on business as manufacturers at Bacup and at Manchester as commission agents in cotton cloth and yarn, where they sold their own goods manufactured at Bacup. The prisoner was in their service in the Manchester business as cashier and collector, and one Williamson was their salesman. In 1855 the prisoner and Williamson applied to have their salaries, which were £150 a year each, increased; and at length the prosecutors agreed to allow each of them 12½ per cent. on the profits, in addition to their salaries, and it was stipulated that if the concern should be a losing one in any year, neither of them were to contribute anything towards the loss, but they should be content with their salaries. None of these parties intended to alter, nor up to the time of the prisoner's apprehension did any of them suppose that they had altered by this arrangement the relation of master and servant which had previously existed between the prosecutors and the prisoner and Williamson. After this arrangement the prisoner and Williamson continued to discharge the same duties and to hold the same positions each of them had done before, and neither of them had any control over the management of the business. Amongst the payments which the prisoner as cashier had to make were the wages and salaries of servants, and in his account he credited himself every month with the payment of his own salary among the rest, as he had done before. At the end of the first year after this arrangement the prosecutors proposed to the prisoner and Williamson to leave with them a portion of the profits they had to receive, and that the prosecutors would allow 7 per cent. upon it; and at the end of the next year they each left £70 with the prosecutors, they agreeing to pay them 7 per cent. for it, the men being at liberty to draw it out at any time, if they thought they could lay it out to more advantage. It was afterwards increased, and at the time of the trial the prisoner and Williamson had each £120 in the hands of the prosecutors, for which they were entitled to receive 7 per cent. so long as it remained there. 7 per cent. was the interest with which the prosecutors debited the concern on the capital employed by them in it; there never was an actual loss in any year; but in 1860 a great many bad debts were made, and at the end of that year the profits were very trifling, and the prosecutors, in consideration of that, made to the prisoner and Williamson a present in addition to their salaries. The jury found that the prisoner



was a servant within the meaning of the statute (7 & 8 Geo. 4, c. 29, s. 47), and, on a case reserved on the question whether they were warranted in so finding, it was held that they were: for, although there might be a partnership *quoad* third persons, there was none *inter se* so as to entitle the prisoner to help himself to his masters' property. (o)

The prisoner was indicted for embezzling money received on account of his master, Bricknell, who was part proprietor of a coach from Birmingham to Hereford, and horsed it from Hereford to Malvern, living himself at Worcester, and who had been in the habit of driving the coach himself from Worcester to Hereford, and employed the prisoner to drive for him when he did not go himself. The prisoner had all the gratuities, both when he drove himself, and when Bricknell drove. All the proprietors were interested in the moneys received throughout the line, but Bricknell received and held the money taken on that part of the road between Worcester and Hereford, and was accountable to the other proprietors for it. On arriving at Malvern from Hereford, the prisoner's duty was to inform the book-keeper what money he had received. The book-keeper then used to deliver to the prisoner what money he had received, and the aggregate amount was inserted in a book kept at the Malvern office, and also on the way-bill as a debt against the prisoner. The prisoner's duty was to pay that amount to Bricknell on his arrival at Worcester, (p) but the way-bill went on to Birmingham. On the 23rd of November, the book-keeper at Malvern delivered to the prisoner 8s., and the prisoner stated that he had received 2s. 6d. Accordingly, 10s. 6d. was put down as a debt from him in the book, and on the way-bill. On his arrival at Worcester, he told Bricknell that the sum was 10s., and paid him 10s. only. It was objected that there was a joint interest in the money in Bricknell and the other proprietors, therefore that the money was received to the use of all, and that the prisoner was the servant of all. Patteson, J., thought that, as between the prisoner and Bricknell, the money was received to the use of Bricknell, and that he was his servant. It was also objected that there was no embezzlement, as the debt appeared truly in the books at Malvern and on the way-bill; but the learned judge thought that that made no difference, especially as the entries were not made by the prisoner, but by the book-keeper. And, upon a case reserved, the judges thought the conviction right. (q)

**Employment to receive the money.** — A butcher's apprentice, under eighteen, carried a bill for seventeen shillings and tenpence to a customer, from whom he obtained the money, and embezzled it, but it appeared that he had never been employed to receive money for his master. Upon a case reserved upon the question whether the Act extended to apprentices, the judges seemed to think that it did, there being no exception; but on the ground that the prisoner was never employed to receive money, and therefore did not receive this by virtue of his employment, the conviction was held wrong. (r)

The prisoner applied to a carrier to give him some employment, and the carrier agreed to let him carry out parcels and go with messages when he had nothing else to do. On the fourth day of his employment, the carrier gave him an order on which he was to receive £2, which money he received and embezzled; and the judges, upon a case reserved, held that his conviction was right. (s)

(o) R. v. M'Donald, L. & C. 85.

(p) It is Hereford by mistake in the report in M. C. C. R.

(q) R. v. White, 2 M. C. C. R. 91; 8 C. & P. 742.

(r) R. v. Mellish, MS. Bayley, J., and R. & R. 80.

(s) R. v. Spencer, MS. Bayley, J., and R. & R. 299. R. v. Hughes, 2 Cox, C. C. 104.

The prisoner was a porter employed by a butter factor, and left with the purchasers two firkins of butter, for which he was paid, but never accounted. Each person to whom he delivered butter paid him a small sum for the carriage, according to the custom of the trade. The prisoner never got any regular wages from the prosecutor, but was paid by the job, and did nothing for the prosecutor except leave the butter with the purchaser, and occasionally assist him in small jobs; the prosecutor never paid anything for delivering the butter, and the only occasions on which he paid the prisoner was for bringing it home from the railways; the prisoner did not live in his house; but it was his duty to receive the money and to bring it to the prosecutor. It was held that the prisoner was employed to do two things. He was to bring home parcels to his employer's house and to deliver parcels to his customers for him, and therefore he must be considered as employed by this butter factor. (t)

Upon an indictment for embezzlement, it appeared that the prisoner had been for several years a 'butty collier' or 'charter master' (the two terms being synonymous) at the prosecutor's colliery. He was engaged to raise coal and load it on the carriages of customers, and it was his duty to find and pay for labour, horses, and tools for that purpose; but he had nothing to do with delivering the coal; he was paid 2s. 9d. for every ton raised by him. He had succeeded one Cox, who sold coal to private customers, and was allowed 8s. 6d. for every 20s. so sold; and, although nothing was said to the prisoner on that subject, he continued the practice. These were termed 'land sales,' and his authority to sell and receive the money on such sales was recognised by the prosecutor's agent. It was the prisoner's duty to pay over the gross proceeds of any coal sold by him, to the machine clerk, as he received it. He had no authority to deduct out of any money so received by him either the 8s. 6d. or the 2s. 9d., but he had to pay it over in gross; but he was allowed to draw money from time to time on account of the coal raised to the surface. He was paid for repairs, &c., done in the pit. The prisoner might if he liked have taken pits from other coal masters, and worked them in the same manner and at the same time with the prosecutors. The prisoner had sold coal to three persons, received the money, and not accounted for it. It was urged that the engagement as butty collier did not constitute the relation of master and servant, and that being so, the voluntary sale of coal to customers of his own selection did not make him a servant; there was no authority to compel or any obligation so to do in any instance; but Crompton, J., thought that *R. v. Barker* (u) and *R. v. Spencer* (v) were very like the present case, and held that the prisoner was a servant. (w)

The prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a rounds-man, for a day at a time, and had several times before been sent to the bank for money. The prisoner, however, on the day in question, was not working for the prosecutor, but was to be paid 6d. for fetching this money from the bank; and it was held that the prisoner was not the servant of the prosecutor within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47. (x)

The prisoner was indicted as the servant of J. Hill and others for embezzling two sums of money, their property. The prisoner, a coal and timber merchant, being in difficulties, assigned his goods, effects, and

(t) *R. v. Lynch*, 6 Cox, C. C. 445. Pennefather, B., and Moore, J.

(u) *Dow. & R. N. P. R.* 19.

(v) *Supra*.

(w) *R. v. Thomas*, 6 Cox, C. C. 403. The prisoner was convicted, and Crompton,

J., said he would consult Coleridge, J., and if he had any doubt he would mention it; but the point was not mentioned again.

(x) *R. v. Freeman*, 5 C. & P. 534, Parke & Taunton, JJ.

book-debts to Hill and others as trustees, who employed him at a salary to conduct the business for the benefit of the trustees, and he afterwards received the two sums in question, which had been debts previously due to him, and did not account for them; Byles, J., held that the prisoner was not a clerk or servant, or acting in the capacity of a clerk or servant within the meaning of the Act. (y)

Upon an indictment for embezzling the money of J. Dickinson and E. Gould, it appeared that the prisoner was a carrier; employed, however, only between the glove sewers and manufacturers in carrying the gloves from and to the one and the other. The manufacturers knew nothing of the individuals who made up their gloves; but the prisoner gave the name of, and took out a number for, any woman who desired to be employed, and received a certain number of unsewn gloves from the manufactory; the sewers each had her number, and sent back their gloves, when sewed, in separate parcels, each with their name pinned to the parcel, by the prisoner to the factory. He delivered the parcels, and, if they were found correct, the total amount due was paid to him in one sum, and fresh parcels of unsewn gloves were delivered to him. His duty then was to deliver to each workwoman her money, deducting his charge, and her fresh work. According to this course the prisoner had taken out numbers for Dickinson and Gould, and each of them had given him a parcel of sewed gloves to be taken to the manufacturers, which he duly delivered. Dickinson's work entitled her to receive 2s. 2½d., Gould's entitled her to receive 3s. These sums, with several others, in one sum, were paid to the prisoner in respect of such work; and he fraudulently applied them to his own use, and denied the receipt of them; and, upon a case reserved, it was held that the relation of master and servant did not exist, but the prisoner was a mere bailee, and the non-delivery of the money, which he had received, was merely a breach of trust, and not embezzlement. (z)

The clerk of a chapelry who receives the Sacrament money is not the servant either of the minister, churchwardens, or the poor of the chapelry. The prisoner was charged in different counts as the servant of R. C. Wilmot, who was the curate of a perpetual curacy; of Morley and Goodwin, who were the churchwardens; and of the poor of the township; and it appeared that the prisoner was the clerk of the chapelry, and on a Sacrament Sunday he collected the alms in a plate from the several communicants, and then took the plate to the altar, and delivered it to Mr. Wilmot, who then put in his own donation: and the prisoner purloined two half-crown pieces from the plate, and secreted them in his pocket for his own use; and, upon a case reserved, the judges were of opinion that the prisoner was not the servant of any of the persons alleged in the indictment. (a)

So where a prisoner was charged as the servant of Blades in some counts, and as the servant of Blades 'and others' in other counts, and it appeared that the prisoner was the schoolmaster of a charity school, supported by voluntary contributions. The appointment of the prisoner, and the funds of the charity, were vested in the power and control of a committee, and Blades was the treasurer and a member of the committee. There was a collector appointed to receive the subscriptions of the contributors to the charity; who was paid by a commission upon the total sum collected. The sole duty of the prisoner was confined to the instruction of the charity children; and he had never, in any

(y) *R. v. Barnes*, 8 Cox, C. C. 129.

(z) *R. v. Gibbs*, Dears. C. C. 445. In such a case the prisoner should now be in-

dicted as a bailee under the 24 & 25 Vict. c. 96, s. 3, *ante*, p. 135.

(a) *R. v. Burton*, R. & M. 237.

instance, been employed or requested to receive any of the contributions, and never did apply for or receive any but in this single instance; and was not to have any emolument from this single act of receipt of money; nor was it part of the duty of his office of schoolmaster. The money in question was a voluntary contribution from some charitable fund in the possession of the Ironmongers' Company, applicable to any object they might approve of, and not limited to this charity. Blades had for two or three years received this money with a view to avoid the payment of any commission for collecting it; but being confined to bed by illness, he had left a written direction for the prisoner to go to Ironmongers' Hall to receive the money. The direction was his individual direction, not an order from the committee of management of the funds of the company. The prisoner never stood in the relation of servant to Blades, unless this single act created such relation. And, upon a case reserved, the judges held that the prisoner did not stand in such relation to the treasurer, or committee, as to bring him within the Act, 7 & 8 Geo. 4, c. 29, s. 47. (b)

Where a drover was employed by a grazier to drive some oxen to London, and his instructions were that if he could sell them on the road he might, and those he did not sell on the road he was to take to a salesman in Smithfield, who was to sell them for the grazier; and the drover sold two of the oxen on the road, and instead of taking the remainder to the salesman, drove them into Smithfield and sold them there, and applied the money which he received for them to his own use; it was held that he was not a servant, and could not, therefore, be convicted of embezzlement. (c)

Upon an indictment for embezzlement, it appeared that a farmer had some beasts in Smithfield, which the prisoner was keeping for him as a drover, and he was employed to drive a cow and calf to a person, to whom they were sold, and bring back £16. He was not in the service of the farmer, but merely the drover; he had, however, been employed by the farmer at different times; but it was not proved that he had any extra reward beyond what was his due for driving and delivering the cattle to the purchaser. Upon a case reserved, the judges present were unanimously of opinion that the prisoner was a servant within the meaning of the Act. (d)

So where it appeared on an indictment for embezzlement that the prosecutor employed the prisoner to take some bark to Mr. Morris to be weighed, and he was directed to bring back a written account of the weight, and of the price bark was selling at, and if Mr. Morris offered to pay for the bark the prisoner was to receive the money, and bring it to the prosecutor: the prisoner received 1s. 6d. for his day's work; he had been employed many times before by the prosecutor, but not regularly; and on this occasion he was only employed for this one day, and he had never been employed for the purpose of receiving money before. Littledale, J., held that this case was distinguishable from *R. v. Nettleton*, (e) as in that case the prisoner was not a servant at all, but only employed on a single occasion to receive money. (f) So where

(b) *R. v. Nettleton*, R. & M. 259. The Recorder thought that the prisoner was perfectly free to have refused to receive the money without any violation of duty either to Blades or the committee, and also adverted to there being no remuneration contracted for, or expected or promised to the prisoner.

(c) *R. v. Goodbody*, 8 C. & P. 665, Littledale, J., and Parke, B.

(d) *R. v. Hughes*, R. & M. C. C. R. 370. The Recorder thought *R. v. Nettleton*, *supra*, strongly applied to this case. But see *R. v. Hey*, 1 Den. C. C. 602; 2 C. & K. 983.

(e) *Supra*, note (b).

(f) *R. v. Jones*, Monmouth Spring Ass. 1832. MSS. C. S. G.

the prisoner was not in the regular service of the prosecutor, but had worked for him before, and on the occasion in question the hiring was for a day only; Erle, J., at first doubted whether the relation of master and servant subsisted; but on *R. v. Spencer* (g) and *R. v. Hughes* (h) being cited, held that the case must proceed. (i)

**Constable.**—By the 2 & 3 Vict. c. 93, the justices of a county are empowered to appoint a chief constable, and he, subject to the approval of two justices, has power to appoint constables and superintendent constables; and it was held that a superintendent constable, appointed by a chief constable, under this Act, might be described as the clerk and servant of the chief constable. (j)

**Bank clerk.**—A clerk of a joint stock banking company, established under the 7 Geo. 4, c. 46, may be described as the clerk of the public officer of the company, and alleged to have embezzled the property of such officer, although he is a shareholder in the company. (k)

Upon an indictment for embezzlement, stating the prisoner to be clerk in some counts to all the trustees by name, and in others to one of them by name 'and others,' it appeared that the prisoner was the clerk to a savings' bank, by the regulations of which the institution was to be conducted by managers, a treasurer, and clerk. The managers were to include patrons, presidents, and trustees; the clerk, with one of the managers, was to attend to receive deposits and conduct the business of the institution, and in case the manager of the day was unavoidably prevented from attending, and unable to find a substitute, the clerk might act for him upon the said manager's responsibility to the institution. There were about 200 managers over and above the trustees, patrons, and presidents, who were managers *ex officio*. The clerk was elected every year by ballot at a meeting of the managers, at which meeting, if no trustees attended, the appointment by the other managers would be good; or if no managers attended, the appointment by the trustees would be equally good. The manager of the day was absent at the moment a depositor entered the bank and paid the money, which the prisoner appropriated to his own use. It was objected, 1st, that the prisoner was not clerk to the trustees, but to the managers; 2ndly, if the word 'others' might include the managers, that the money was not received to their use, but to the use of the trustees, in whom alone it was vested by the 9 Geo. 4, c. 92, s. 8; and, lastly, that the clerk had no authority to receive the money, for he and a manager ought to have received it together. But it was held, upon a case reserved, that the prisoner was properly described as clerk to the trustees, and that the conviction was good. (l)

**Clerk to Friendly Society.**—Upon an indictment for embezzling the moneys of Barber, Allport, and Haycock, it appeared that the prisoner was secretary and clerk to a society held at his house, called 'The One Hundred Pounds and Fifty Pounds Society,' and a member of the society. The articles of the society were not enrolled. By the first article the members were to pay their moneys to the stewards for the time being, which were to be paid by the clerk and one of the stewards into the bank of the Messrs. Atwoods, as treasurers to the society. Barber, Allport, and Haycock were the trustees of the society. Two stewards had been regularly appointed from time to time from the commencement of the

(g) *Supra*.

(h) *Supra*.

(i) *R. v. Winnall*, 5 Cox, C. C. 326.

(j) *R. v. Baxter*, Salop Sp. Ass. 1851.

MSS. C. S. G. S. C. 5 Cox, C. C. 302.

Patteson, J. See now the 24 & 25 Vict. c. 96, s. 69, *post*, ch. xxii.

(k) *R. v. Atkinson*, 2 M. C. C. R. 278.

(l) *R. v. Jenson*, R. & M. C. C. R. 434.

society till within a few months before April, 1834; but no stewards had been appointed in the year 1834, the prisoner having neglected to summon the committee as he ought to have done, according to his duty. No money was receivable from the members, according to the regulations of the society, except upon club nights; and when there were stewards, the course of business was for the members to pay their contributions to the junior steward, and for him to hand it over to the secretary, who took an account of it and made an entry, and then carried the money, accompanied by one of the stewards, to the bank; one entry only of the amount was made by the secretary, signifying both the money received from the members and paid into the bank. The only account kept at the bank stood in the names of the trustees. During the time there were no stewards, the secretary had been in the habit of receiving the money from the members on the club nights, and carrying it to the bank. On the 8th of April, 1834, being one of the club nights, the prisoner received from the members of the society the sum of £134 9s. 4d., and made an entry of it in the usual way; of this sum he paid into the bank £73 18s. 6d. only, and embezzled the remainder, £60 10s. 10d. It was objected, 1st, that as no stewards had been appointed, the money had not been received by the prisoner by virtue of his employment; 2ndly, that the trustees were not properly described as his masters and employers; 3rdly, that the property in the money received could not properly be laid as the property of the trustees, especially as the articles had not been enrolled. The objections were overruled, and, upon a case reserved, the judges were of opinion that this case was governed by the preceding case, and that the conviction was right. (m)

An indictment for embezzlement in one count described the prisoner as employed in the capacity of clerk, in another as servant, to W. F. Johnson, W. Sykes, and W. Lewin. The clerk of the peace produced the rules of a friendly society, properly certified as the Friendly Society meeting at the Crown and Horseshoe, duly enrolled January, 1839. The prisoner was clerk to the society held at the Crown and Horseshoe. They had a house in the horse-market occupied by their tenant. The clerk was authorised by the society to receive the rents of that house, and he had received the money specified in the indictment as rent for that house, and appropriated it. The execution of a deed, conveying the house occupied by the tenant to W. F. Johnson, W. Sykes, and W. Lewin, was duly proved. It was contended that by the Act no society shall have the benefit of the Act unless their rules and orders are kept in a book. It appeared that this was not the case, and therefore the society was not within the Act. Lord Abinger, C. B., 'If this be so, it follows perhaps that the society could not compel the trustees to account to them for the rents; but it does not follow that the prisoner was not the agent of the three trustees, because he was either appointed by them, or being appointed by the body at large, was adopted by them. If they had no legal existence as a friendly society, they were at least authorised by the trustees to choose a person to collect the rents due to the trustees. He was, therefore, the agent of the parties, who were the lawful owners of the house.' It was then insisted that the prisoner was not the clerk of the owners of the house; but Lord Abinger, C. B., thought he was their servant within the Act, and, upon a case reserved, the judges were unanimously of opinion that the conviction was right. (n)

The prisoner was a member of a friendly society, of which he was

(m) R. v. Hall, R. & M. C. C. R. 474.  
A. D. 1836.

(n) R. v. Miller, 2 M. C. C. R. 249.  
A. D. 1842.

clerk or secretary; the moneys were first received by a collector, and then handed to the prisoner as clerk, to be paid by him to the bankers of the society. On one occasion the prisoner suggested that the interest allowed at the bank was small, and that he could obtain more for this money from a firm in London, and with the consent of the club, he drew all the money from the bank, for the purpose, as he alleged, of investing it with this firm; it afterwards appeared that he had appropriated the money to his own use, and he was indicted for embezzling the same. Coleridge, J., 'This indictment cannot be maintained. The prisoner was trustee for the whole club; he received the money, with the consent of the club, for the purpose of investing it. He was part owner, and could not be guilty of stealing his own property; and the charge of embezzlement cannot be sustained, because clearly he was neither clerk nor servant of the club, nor did he receive the money as such, but as a partner, and, therefore, as an owner.' (o)

Upon an indictment against the prisoner for embezzling £29 15s. 8d. as clerk to the Rev. T. Matthew and others, it appeared that the prisoner was secretary and treasurer of a friendly society, and, whilst acting in such capacities, received the subscriptions of the members. Mr. Matthew and two others were the trustees, and by a rule of the society all moneys were vested in them as trustees. The accounts were audited and settled quarterly, and the 17th of September was one of the quarter days. A day-book and ledger were kept by the prisoner. The subscriptions were entered in the day-book at the time they were paid, and these, as well as the disbursements thereout, were, at the end of each quarter, transferred to the ledger, and a balance struck at the foot of the account, showing the clear balance in the hands of the prisoner, and £29 15s. 8d. was the clear balance on the 17th of September. The prisoner did not bring forward his receipts between that day and the next quarter day into the ledger. If any surplus remained in the hands of the secretary and treasurer, it was distributable before Christmas in each year, and it was the duty of the prisoner to have such surplus ready to be paid over when required to do so. Shortly after the meeting of the society, on the 18th of December, preparatory to the distribution of the surplus, the prisoner disappeared with the funds of the society. It was contended, 1st, that the prisoner, having fairly accounted on the 17th of September, could not be guilty of embezzlement; 2ndly, that after the 17th of September the money remained in the prisoner's hands as treasurer, and that the relationship of clerk to the trustees did not then exist, (p) and that the accounting changed the character of the possession; 3rdly, that the prisoner was a part owner. But it was held, on a case reserved, that the prisoner was guilty of embezzlement. It was immaterial to consider whether he filled the office of secretary or treasurer, or both, because it appeared that he was employed to collect the subscriptions, and on the face of his account the balance of £29 15s. 8d. remained in his hands, and it was his duty to keep any surplus, and have it ready for distribution when required to do so. That his duties as clerk did not cease when the balance of the account was struck; he was clerk when he received the money, and he was clerk when he absconded; and, lastly, that the prisoner was not entitled to any interest in the funds, so as to prevent him from being guilty of the offence. (q)

(o) *R. v. Waite*, 2 Cox, C. C. 245. A. D. 1847. See now 31 & 32 Vict. c. 116, s. 1.

(p) It was said that the office of secretary was alone mentioned in the rules, and that for the office of treasurer the prisoner received no pay.

(q) *R. v. Murphy*, 4 Cox, C. C. 101, Feb. 1850. It is said that the trustees had no power by the rules to dismiss the prisoner, and as the 10 Geo. 4, c. 56, is referred to, it may be inferred that the society was enrolled; but these are not stated as facts in

The prisoner was indicted as clerk and servant of J. Dean and others for embezzling their money. Dean, the prisoner, and many others were members of 'The United Kentish Brothers Benefit Society, and the prisoner was employed as secretary, and his duties were to receive and pay into the savings' bank, or deposit in the box of the society; all the subscriptions, fines, and other payments of the members: the society was not enrolled, and there were no trustees. Dean was an ordinary member of the society. The prisoner received as a remuneration for doing the work of secretary, 2*d.* per head per quarter on every member, including himself. It was the duty of the prisoner at certain times, and under certain circumstances, to carry the money he received to the savings' bank; but it was discovered that he had not so carried about £50 to the savings' bank. It was objected that he was not the servant of J. Dean 'and others,' for others must include himself, and that the money was his own money, as he was a partner. Maule, J., 'These objections must prevail. The prisoner is alleged to be the servant of J. Dean "and others;" but he is no otherwise servant to J. Dean "and others" than as interested with them in the fund, and as doing something for the benefit of the whole society. Dean "and others" are in no special position as masters to him; he is rather in the nature of a partner, having an advantage over the other partners, by reason of an allowance to him for doing more of the work than the others do. The money is not the money of Dean "and others," except in so far as it is the money of the prisoner, Dean, and some other persons. Before the 7 Geo. 4, c. 64, s. 14, which enabled the person framing an indictment to describe partners as "others," the names of all the members of this society must have been set out. If the name of the prisoner, or of any other member, had been omitted in the enumeration of the members, there would have been a failure in the proof. If the name of the prisoner had been inserted, the indictment would have been bad on its face; for it would have charged the prisoner with embezzling his own money.' (r)

The prisoner was indicted for embezzlement as clerk and servant of three persons who were named. He was a member and secretary of a properly certified friendly society, and as such secretary received a salary of £1 per annum. No treasurer had ever been appointed, and the prisoner for fifteen years had always at the weekly meetings of the society received all moneys due from the members, giving receipts for the same, and punctually made all payments due from the society, placing the balance in the society's box with the books at the lodge-room. The prisoner always gave correct receipts to the members for their weekly payments, but made false entries in the contribution and cash-book kept by him as secretary. By the rules he was to 'attend all meetings of the lodge, take minutes of the proceedings thereof, and keep a correct account of the receipts and expenditure of the lodge,' &c.; but nothing was mentioned as to his receiving any money, and the duty of the treasurer was 'to take charge of the funds of the lodge, and pay all demands,' &c. In consequence of suspicion, an examination of the accounts was made, and it was discovered that the prisoner had not entered in the books a large number of subscriptions; and, being called on for an explanation, he at once admitted that he had received the

the case. This case was decided in Ireland. See *R. v. Tyree*, L. R. 1 C. C. R. 177.

(r) *R. v. Taffs*, 4 Cox, C. C. 169; March, 1850. *R. v. Hall*, *supra*, p. 843, was cited in this case. See *R. v. Diprose*, 11 Cox, C.

C. R. 185, where the Court, following the judgment in *R. v. Taffs*, *supra*, said that such an objection is now removed by 31 & 32 Vict. c. 116, s. 1.



money, and was willing to repay the amount by instalments. It was objected that this was merely a breach of trust, but the objection was overruled; and, on a case reserved, the conviction was held right. (s)

The Doncaster Permanent Benefit Building and Investment Society was duly enrolled, and its rules certified. Its object was to enable members to obtain from it loans by way of mortgage on their real property, each member contributing annually ten shillings for fourteen years, and having credit to the amount subscribed on paying off his mortgage. The prisoner was the secretary, and only paid officer of the society, and the management of the affairs of the society was left almost entirely to him. The course of business as prescribed by the rules had not been strictly adhered to. The subscriptions were not always received by the stewards, but frequently by the prisoner, who also made entries in the stewards' books. The mortgages were always made to the trustees, but when redeemed the money was paid to the prisoner as secretary, but for and upon receipts signed by the trustees. A mortgage for £426 8s. 3d. was paid off, and that sum paid to the prisoner, and he embezzled it. None of the trustees were present at the time. It was no part of the duty of the secretary, as defined by the rules, to receive the sums of money paid to redeem mortgages, but it was the duty of the directors to do so. It was objected that the prisoner could not be said to be the servant of the trustees, as was alleged by the indictment, or to have received the money by virtue of his employment as such; but Keating, J., held that the actual course of business, as proved, though not in strict accordance with the rules, was evidence for the jury that the prisoner received the money by virtue of his employment as servant to the trustees, and the jury found that he did so receive it; and, on a case reserved, it was held that there was evidence from which the jury might infer that the prisoner was employed by the trustees to receive the money; for, although he was secretary, and as such had his duties pointed out by the rules, yet he might also have had other duties as clerk to the trustees; and while the one set of duties would depend on the rules, the other would be ascertained by the actual course of business. The trustees might have employed any other person to receive the money for them, and here there was evidence that the prisoner was so employed by them *ultra* his duties as secretary. (t)

On an indictment for embezzlement it appeared that the prisoner was secretary of a money club, and the rules of the club appointed him secretary, and provided that he 'shall receive for his services a fair remuneration, to be decided by the members,' &c., and 'shall make the promissory notes on demand, and shall always be one of the committee.' 'All cheques or orders upon the treasurer to be countersigned by the secretary.' And one Whiles was to act as trustee, and to sign all orders upon the treasurer for payments, and he was also deputy-treasurer. There were two stewards, and the practice of the club was for the stewards to receive payments of members, and to pay them over to the deputy-treasurer, and for him to retain in his hands all the moneys and securities belonging to the club, the notes being posted in the book called the bond-book, which remained in the custody of Whiles. A promissory note was made by one Brough as principal, and by Starkey and Adecock as co-sureties, for the sum of £50, payable to the order of Whiles, which note, the property of the club, was, by order of the club, taken out of

(s) R. v. Proud, L. & C. 97. See R. v. Tyree, L. R. 1 C. C. R. 177.

(t) R. v. Hastie, L. & C. 269. The indictment was under the 7 & 8 Geo. 4, c. 29, s. 47.

the bond-book and handed to the prisoner by Whiles, and the prisoner was directed by the club then in meeting assembled to sue upon the note, or get better security for the money. Whiles desired that his name should not be made use of in any legal proceedings; but after receiving the note, the prisoner indorsed it with the name of Whiles, and employed an attorney, who issued a writ against the makers of the note at the suit of the prisoner, and, in consequence of this action, Adcock paid the prisoner two sums of £30 and £10, the moneys charged in the indictment. There was also proof of the prisoner's having appropriated the money. The jury were asked — 1. Did the prisoner receive the moneys? 2. Ought he to have paid them over to the club? 3. Did he withhold them from the club fraudulently? The jury found each of these questions against the prisoner; and, on a case reserved, on the questions — 1. Was the prisoner a clerk or servant or a person employed for the purpose of receiving the money in question, or was he a person employed in the capacity of a clerk or servant? 2. Was the money received by the prisoner by virtue of his employment, or in his capacity of clerk or servant? 3. Was the money received by the prisoner for, or in the name, or on account of, his masters? — it was held that the conviction was right. Erle, C. J.: 'The first question put to us is, whether the prisoner received the money as clerk or servant? Now, he was secretary of the club, with a salary. His duties are detailed in the rules; and although he was not specifically charged with the duty of receiving money for the club, he had several duties to perform cognate to the receiving of money [namely, to make applications for interest or instalments due, and for better security or part payment]. (u) If the ordinary duties of a person in the employ of another are proximately connected with the receiving of money, the receipt of money for his employer, and appropriation of it to his own use, would make him liable to the charge of embezzlement. It was so laid down in *Spencer's case* (v), and it is sufficient if there was a specific employment to receive money on one particular occasion. The case, therefore, seems to me to fall within the statute, as far as the employment of a servant is concerned. Then was he within the statute as relates to the receipt of the money? Had he a right to the repayment of the loan, and to hold the money as a collateral security for costs? If this had been a mere loan, and the prisoner had been sent to apply for the money or for better security, I think there would have been no doubt that the receipt would have been to the use of the club. The strength of the argument for the prisoner was that he had a cause of action on the note. (w) Now what passed between the club and the prisoner had not the effect of passing the absolute property in the note to him as against the club. That gave only a limited authority, namely, to sue upon it. As between him and the club there is nothing to shew that they authorised him to receive the money, and become the absolute owner of the note. I take the finding of the jury to have answered in the affirmative the question, "Was the money received by the prisoner for, or in the name of, his masters?" The jury have found that the prisoner had no lien on the money in the capacity of plaintiff, or as making himself liable to the costs of the action.' (x)

(u) These duties are not mentioned in the case.

(v) *Ante*, p. 838.

(w) Hill, J., during the argument, asked, 'Was not the endorsement of Whiles' name necessary to make him owner? The prisoner himself wrote Whiles' name on the note, and as far as appears by the case, without Whiles' authority.'

(x) *R. v. Tongue*, Bell, C. C. 289. Bramwell, B., Channell, B., and Hill, J., concurred; but Crompton, J., doubted whether the money was received by virtue of any of the duties for which the prisoner was employed, and thought they ought to treat the note as properly endorsed to the prisoner.

One set of counts charged the prisoner with embezzlement as the clerk and servant of E. B. Baker and others; another set as the clerk and servant of W. Nicholls. The prisoner was secretary at a yearly salary to the Earl of Uxbridge Lodge of Odd Fellows, which was a lodge within the Manchester Unity, and, according to the rules of the lodges, a member of any lodge within the Manchester Unity could pay his subscriptions to any other lodge within the Unity, if more convenient. In consequence of a change of residence, it became more convenient for a member of the Byron Lodge, which was within the Unity, to pay his contribution of one shilling a fortnight to the Earl of Uxbridge Lodge; and accordingly he paid it on three several occasions to the prisoner, whose duty it was to attend the lodge, receive the money, and enter the payments on a card, which each member kept and produced to the secretary from time to time. It was also the prisoner's duty as secretary, to enter the payments as he received them night by night in the contribution-book, and then to add them up in the book, and pay the total to W. Nicholls, the treasurer of the Earl of Uxbridge Lodge. Nicholls paid all the money he received into a bank in the names of the trustees of the lodge, of whom E. B. Baker was one. The prisoner had not made any entry in the contribution-book of any of the payments so made by the member of the Byron Lodge. Patteson, J., held, 1st, that the prisoner was not servant of Nicholls, the treasurer, but of the trustees; 2ndly, that the prisoner received the money as clerk and servant of the trustees of the Earl of Uxbridge Lodge, who would account for it to the other lodge; for the money was received and carried in the first instance to the use of the trustees of the Earl of Uxbridge Lodge; and, lastly, that *R. v. Hall (y)* was precisely in point to shew that the prisoner was clerk and servant to the trustees, and that the more accurate way was to describe a person in the situation of the prisoner as a clerk and servant, and that the words 'in the capacity of clerk and servant' only applied where the prisoner was employed on temporary occasions, and did not usually fill that situation. (z)

**Rate collector.**—Where the prisoner was appointed under the 10 Geo. 4, c. 68, collector of the poor, church, and improvement rates by the vestry of St. Paul, Covent Garden, it was held that he might be indicted as *servant* of the committee of management of the affairs of the parish for embezzling *their* moneys; for it was no objection that he was appointed under the Act of Parliament, as it was quite immaterial how he was appointed; and sec. 2 provides that the moneys shall be the moneys of the committee; and the Act means that though the collectors are to be appointed by the vestry, yet they are to be clerks or servants to the committee of management; and *R. v. Jenson (a)* shews that a person may be the clerk of one though appointed by another. (b)

(y) *Supra*, p. 843.

(z) *R. v. Woolley*, 7 Cox, C. C. 255. March, 1850. In another case against the same prisoner, where the sums alleged to have been embezzled were paid to him by members of the Earl of Uxbridge Lodge, Platt, B., also ruled that the prisoner was the servant of the trustees and not of the treasurer, and that the case was governed by *R. v. Hall, supra*, p. 843. *R. v. Woolley*, 4 Cox, C. C. 251. In this case, the first count described the prisoner as the servant of Nicholls, and the second of Baker and others, and this count alleged that the prisoner, 'within six calendar months from the time of committing the offence in the first

count mentioned,' &c.; and it was objected that the 7 & 8 Geo. 4, c. 29, s. 48, only authorised the addition of counts for other offences 'against the same master;' but Platt, B., held that this averment was surplusage.

(a) *Supra*, p. 842.

(b) *R. v. Callahan*, 8 C. & P. 154, Vaughan and Patteson, JJ. The indictment also contained counts charging the prisoner as servant to Walker and others the churchwardens, and he had embezzled the rector's rate, and on objection taken the judges held that the prosecutor should elect on which he would proceed, which he did.

Upon an indictment against the prisoner under the 39 Geo. 3, c. 85, for embezzling the property of the churchwardens and overseers of a parish, it appeared that the prisoner was appointed as an extra collector of poor rates by the parish, and that he was paid out of the parish funds; his remuneration, however, was not by a fixed salary, but by a percentage on his collections, and it was contended that he was not a clerk or servant within the meaning of the statute; but the objection was overruled. (c)

The prisoner was indicted for embezzling moneys as servant to the guardians of the poor of the parish of Birmingham. Two questions arose upon the trial. The first was upon the evidence of the prisoner's appointment as treasurer to the guardians. A bond was put in, dated 30th October, 1844, executed by the prisoner, and conditioned for the performance of the duties of his office as treasurer; the condition referred to a meeting of the guardians on November 6th, 1832, when he was first appointed. In order to shew what those duties were, the book of the proceedings of the guardians was produced, and it was proposed to read the entry of his appointment, but this being unstamped was rejected. (d) It was then objected that without this there was no evidence of appointment as treasurer; but Coleridge, J., thought that the case might proceed, on the prisoner's admission contained in the condition that he was in fact appointed to be treasurer, and that the duties of the office might be collected sufficiently for the purposes of this indictment, namely, that he was to receive money on behalf of the guardians, and account to them for his receipts, from the clauses of the statute relating to the office. The 1 & 2 Wm. 4, c. 67, passed for the better regulating the poor within the parish of Birmingham, and by sec. 38, the guardians were authorised to appoint one or more treasurers; by sec. 40 they are required to take a bond from the treasurer for the due execution of his office; by sec. 41 every treasurer, &c., shall from time to time, whenever thereunto required by the guardians, make out and deliver to them or their clerk a true and perfect account in writing under his hand of all moneys which shall have been by him had, collected, or received for the purposes of this Act, and how, and to whom, and for what purposes the same hath been disposed of, and every such treasurer, &c., shall, and is hereby required to pay to the guardians all such moneys, as upon the balance of such account shall appear to be due and owing from him on account of the moneys authorised to be raised by the said Act. In case of refusal or neglect to deliver such account, or to pay the balance when required, two justices, on complaint of the guardians, may hear and determine the matter, and settle the account, if produced, in a summary way; and if it shall appear to them that any of the moneys which shall have been collected or received shall be in the hands of or owing from such treasurer, on non-payment they may be levied by distress and sale of his goods, and if sufficient cannot be found, or if he shall not appear (without sufficient excuse) he may be committed to the house of correction until he shall have paid. The prisoner, as treasurer, had been in the habit of settling accounts with the parish officers or clerks to the boards of guardians of other parishes or unions, he charging them with moneys expended on their account for the relief of their paupers resident in Birmingham, and being charged by them with moneys expended by them for Birmingham paupers resident in their parishes or unions respectively; on these occasions he received or paid the balance, as the

(c) *R. v. Ward*, Gow, N. P. R. 168, Richardson, J.

(d) See now the 17 & 18 Vict. c. 83, s. 27,

which renders unstamped instruments admissible in any criminal proceeding.

case might be. On the three occasions laid in the indictment, the prisoner had received three sums of money as balances, and had made no entry of them in his books, nor rendered any account of them. His accounts had been regularly audited, and on his ceasing to be treasurer, and becoming clerk, he had been called on for a final account, which he rendered, as well as a supplemental one, but without disclosing these receipts. From £60,000 to £100,000 a year would pass through his hands; he was allowed two or three clerks in his office; and it was necessary for him to keep various accounts in various books, having to settle balances with a great many parishes and unions in all parts of England. The transactions were of such magnitude that a banking firm in Birmingham now performed the duties. Upon these facts it was objected that the office was not within the Act; Coleridge, J., overruled the objection, and, upon a case reserved, upon both points, it was contended, 1stly, that there was no sufficient evidence of the prisoner having been appointed to act as treasurer to the guardians. To shew what were the precise duties the prisoner had to perform, the actual appointment ought to have been produced; for although the Act required the treasurer to do certain things, the guardians had a discretion, and might vary the terms of appointment in any way they might think fit. 2ndly, the money embezzled must be the property of the prosecutors at the time of the embezzlement; and here there was no embezzlement, unless it was the prisoner's distinct duty, at the time of the embezzlement, to pay over that particular sum to the guardians; the Act required the treasurer to deliver an account, and to pay over such moneys as should be found due upon the balance of such account. (e) It ought to have been proved that it was the prisoner's duty to pay over the money at a particular time. Here it was impossible to fix any time. By the very clause which fixes the duties, a summary and most stringent remedy is given for their violation. But the judges were unanimously of opinion that the conviction was right. (f)

The indictment charged the prisoner as servant with embezzling the money of H. J. Bracher and R. Futchter, who were the overseers of the poor of the parish of Fisherton Angar, and previously to May, 1849, had appointed and employed the prisoner to collect the poor rate of the said parish in their place at a salary. There were two churchwardens of the said parish. Two poor rates were made on the 10th of May and 12th of July, 1849, respectively. On the 15th of May the prisoner called on one Peavey, the owner of premises No. 260, on the said first rate, whereof T. Fawcett appeared on the said rate as occupier, for which premises Peavey was in the habit of paying the poor rate on behalf of his tenants, and demanded of Peavey five shillings and one penny halfpenny as the sum due under the said rate for the said premises, and received the said amount from him, and gave Peavey a receipt for the same sum as for so much poor rate, signed by himself as such collector of the said poor rate; but the prisoner did not enter such amount in the appropriate column in the said rate-book, under the head 'amount actually collected;' but, on the contrary, entered such amount in the said rate-book opposite the said No. 260, and the name T. Fawcett, as 'uncollected,' under the head 'amount legally excused;' the fact being that such amount never was

(e) *Williams v. Stott*, 1 C. & M. 675. 3 Tyrw. 688, was relied upon.

(f) *R. v. Welch*, 1 Den. C. C. 199. 2 C. & K. 296. Maule, J., at first doubted whether the treasurer could be assumed to be a servant to the guardians, as he might

be a banker or treasurer keeping their money. But Coleridge, J., stated that he did not intend to reserve that question, as, on the evidence, he appeared to be in the character of a servant: and then Maule, J., agreed with the rest of the judges.

legally excused. The prisoner, in October, delivered an account to the overseers, purporting to be an account of all sums received by him as such collector of the said rates, which did not include the said sum so received from Peavey ; but such sum was wholly omitted therefrom, and the prisoner never paid the said sum, or any part of it, to either of the overseers, but appropriated it to his own use. On the 29th of June the prisoner called upon G. Hopkins, the occupier of the premises, No. 218, in the said rate of the 10th of May, but whose name was omitted from the column of occupiers in the said rate, and demanded from him the sum of four shillings and twopence halfpenny as poor rate due from him under the said rate, in respect of the said premises, No. 218, and received the said sum from the said G. Hopkins, and gave him a receipt signed by him as such collector as for so much poor rate, but did not enter the said sum in the appropriate column of the said rate-book, but, on the contrary, entered such amount as uncollected, under the head ‘irrecoverable at balancing this book,’ and made an entry in the said rate-book, opposite No. 218, under the head ‘causes,’ of the word ‘void.’ It was further proved that the prisoner had appropriated the said sum so received from the said G. Hopkins to his own use. On the 13th of October the prisoner demanded and received of the wife of the said G. Hopkins a further sum as poor rate due from him under the said rate of the 12th of July, in respect of the said premises, No. 218, of which the said G. Hopkins was the occupier, but whose name was omitted from the column of occupiers in the said rate. This sum was also appropriated by the prisoner to his own use. It was objected, 1stly, that the prisoner was not the servant of the overseers for the purpose of receiving the money from G. Hopkins, as the name of G. Hopkins not being on the rates, he was not bound to pay the rates, therefore the prisoner had no right to demand or receive the same ; 2ndly, as the name of G. Hopkins was not inserted in the rates, the prisoner did not and could not receive the money by virtue of his employment, and on account of the overseers, as he had no authority to collect from persons whose names did not appear on the rates ; 3rdly, that the money received from G. Hopkins was not and could not be the property of the overseers, as they themselves could not collect or enforce payment from G. Hopkins, his name not appearing on the said rates ; lastly, that all the moneys were the joint property of the churchwardens and overseers, and ought to have been laid as such in the indictment. The objections were overruled, and, upon a case reserved, it was contended that the prisoner was only employed to receive rates from persons legally liable to pay them. Parke, B., ‘It is clear the prisoner had authority to receive the rates from the landlord, who was in the habit of paying them for his tenant ; therefore, on that count, at all events, the conviction is free from objection.’ It was then urged that that count ought to have averred that the prisoner was the servant of the churchwardens and overseers. Parke, B., ‘No ; the churchwardens have nothing to do with it. The overseers take upon themselves the duty of collecting ; they employ the collector as their agent, and the landlord is the agent of the tenant. The overseers are the parties entitled to the property.’ It was then urged that as soon as the money was collected, it became the money of the churchwardens and overseers. Lord Campbell, C. J., ‘As between the prisoner and the overseers the money is the property of the overseers, whether they may be accountable for it to others or no. The Court are unanimously of opinion that the conviction is good.’ (g)

The prisoner was indicted for embezzlement as clerk of the E. C. R.

Co.; he was appointed in writing 'the company's land agent, at a salary after the rate of £200, and that he find security for £300.' The resolution added, 'It is desirable to take steps to secure the services of a person whose knowledge and experience could be brought to bear upon the excessive demands brought against the company by the parish authorities.' His duties were to collect and account for the rents of the company's house and surplus properties, and examine all claims made on the company for all rates and taxes of every description, and to certify as to the correctness of these claims. When he collected rents, it was his duty to account for such moneys as he received, and to pay the money over to the cashiers. The prisoner, who was an attorney, was engaged in consequence of his legal knowledge upon parochial matters. It was objected that he was not a clerk or servant, but one of the attorneys of the company. But it was held that he was a clerk of the company. (*h*)

**Chamberlain.** — In an action for slander the declaration stated that the plaintiff was the servant of the mayor, alderman, and burgesses of the borough of Warwick, and alleged the words uttered by the defendant to mean that the plaintiff had feloniously embezzled money received by virtue of his said employment; it appeared that the plaintiff was one of the four chamberlains of certain commonable lands belonging to the borough of Warwick; the chamberlains are chosen at the court leet, and sworn in by the steward. Their duties consist in keeping the commons in a good state as to sowing, fencing and draining, &c., and generally superintending them. Their funds arise from pounding the commoners' cattle twice a year till a certain rate per head is paid, and from sums paid by proprietors of booths, &c., set up at the races, &c., usually had there. Their accounts are audited annually by two borough magistrates, and any balance in hand is paid over to their successors. Bayley, B., 'The 7 & 8 Geo. 4, c. 29, s. 47, appears to me to apply to ordinary clerks or servants having masters to account to for the discharge of their duties. Now, can this plaintiff be said to be such a clerk or servant? He was not nominated chamberlain by the mayor and corporation, or by the commoners, but by the jury at the court leet held annually by the corporation as lords of the manor, and was sworn in there as many other persons are. Then can the mayor and corporation be said to be his masters within this Act? In the cases cited for the plaintiff (*i*) the parties charged with embezzlement stood in the characters of plain and ordinary servants appointed to collect money for, and to pay it over to, their employers, *e.g.*, the party appointed by the overseers to receive money. The parish clerk who received and misapplied the sacrament money was held not to be within the statute, because it could not be said whose servant he was, or in whom the right to the money was. But I am of opinion that this plaintiff is not a clerk or servant within the fair meaning of the Act; for he filled a distinct office of his own, in respect of which he received money which he was entitled to keep till the year ended, and was not bound to pay over at any time, as a mere clerk or servant would have been.' (*j*)

**Accountant.** — An accountant of Greenwich Hospital, who was sworn into that office, having embezzled money to a great amount, was indicted under the 39 Geo. 3, c. 85 (now repealed), which expressly comprehended servants of bodies corporate and Burrough, J., held that the prisoner did not fall within that statute, on account of its being proved that he was a sworn officer, and not employed as an ordinary servant. (*k*)

(*h*) *R. v. Gibson*, 8 Cox, C. C. 436.

(*j*) *Williams v. Stott*, 3 Tyrw. 688, 1 Cr.

(*i*) *R. v. Squire*, 2 Stark Ca. 349, R. & R. 349. *R. v. Tyers*, R. & R. 402. *R. v. Beacall*, *ante*, p. 833.

& M. 675.

(*k*) Anonymous, stated as in the text by Bolland, B., in *Williams v. Stott*, *supra*.

**Clerk to illegal society.**— Upon an indictment for embezzling the money of a society it appeared that the members of the society, when they were admitted into it, had an oath administered to them, which was clearly an unlawful oath within the 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19, s. 25; and it was held that the prisoner could not be convicted of embezzling the money of this society. (*l*)

(*l*) *R. v. Hunt*, 8 C. & P. 642. *Mirehouse*, C. S., after consulting *Bosanquet* and *Coleridge*, JJ. See *R. v. Stainer*, *ante*, p. 338.



## APPENDIX B.

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### *Decisions on Repealed Statutes as to Receiving on Account of Master.*

UPON an indictment for embezzling moneys received for, in the name, and on account of Charles Hardy, it appeared that Hardy was agent for the Great Northern Railway Company for the purpose of carrying out goods; he employed his own servants, drays, and horses, and was answerable to the company for moneys collected by his servants for carriage of goods. The prisoner was his servant, and it was his duty to go out with a dray, and take goods and a delivery-book handed to him by J. Esplin, a clerk of the company, and to deliver the goods according to the directions contained in that book, and to receive the amount of carriage therein specified as due to the company, and then to account for the sums so received to J. Esplin. He had taken out goods at the time specified in the indictment, and received for the carriage due to the company the sums stated in the said book, which sums were paid to him, and received by him, as due to the company, and the receipts for which were given by the prisoner, and made out in the name of the company. The prisoner appropriated these sums, and Hardy paid the amount to J. Esplin on account of the company, in pursuance of his arrangement with them in that behalf. It was objected that the prisoner received the moneys not for, in the name, and on the account of Hardy, but of the company; but, upon a case reserved, it was held that, although the prisoner received the money in the name of the company, he received it on the account of his master; for the words of the Act are 'for or in the name or on the account of his master.' (a)

Receiving immediately from a customer that which in the ordinary course the servant would have received through the medium of another servant employed to collect from customers, was held to be a receipt by virtue of the employment of the servant, who so received immediately from the customer, in a case where the servant, being entrusted to receive at home from out-door collectors, received abroad from an out-door customer. (b)

It was also decided upon the repealed statute, that where a servant generally employed by his master to receive sums of one description and at one place only, was employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum should be considered as received by him by virtue of his employment, because he filled the character of servant, and it was by being employed as servant that he received the money. (c)

(a) R. v. Thorpe, D. & B. 562.

(c) R. v. Smith, Bayley, J., and R. & R.

(b) R. v. Beechey, MS. Bayley, J., and 516. Crow's case, 1 Lew. 88.  
R. & R. 319.

To constitute embezzlement the prisoner must have received the money by virtue of his employment; and if the money were received contrary to the terms of his employment, it was not embezzlement. (d)

Where upon an indictment for embezzlement the prosecutor stated that he never employed or authorised the prisoner to receive money from any persons who were regular customers, and that the persons from whom he had received the sums embezzled were of that description; it was held that, as the customers made the payment to the prisoner as the servant of the prosecutor, it was sufficient to sustain the allegation that the money was received by the prisoner for and on the account of his master. (e)

Upon an indictment alleging that the prisoner was the servant of E. Wiggins, and received £5 10s. on account of his master, and embezzled the same, being his money, it appeared that Wiggins had contracted with the Great Northern Railway Company to provide them with necessary horses and carmen for the purpose of delivering to their customers the coals of the company, and had also contracted with the company that he or his carmen should, day by day, duly account for and deliver to the company's manager all moneys received in payment for such coals. The delivery notes as well as receipted invoices of the coals were handed to the carmen of Wiggins, and the former were taken to his office to be entered in his books, but the receipted invoices were to be left with the customers on payment of the amount. The prisoner was the servant of Wiggins, and employed by him as his carman in the delivery of coals pursuant to the contract, and it was his duty to pay over direct to the clerks of the company any money he received for such coals. It did not appear that such moneys so received and paid over to the company ever formed items of account between Wiggins and the company. The prisoner had delivered coals to a customer of the company, received payment for them, and converted the money to his own use. It was objected that the money was neither received on account of Wiggins, nor was his property; and, upon a case reserved, Lord Campbell, C. J., delivered judgment as follows: 'This case depends entirely upon whether the evidence shews that the money was received in the name or on the account of his master, and this depends upon whether any privity exists between the carman and the company. If there be such privity as to make the carman the agent of the company in receiving the money, and he agreed to pay it to them, the money in his hands was not the money of the master but of the company. The opinion of the majority of us is, that such privity is established, and therefore that the money was not received on account of the prosecutor, but on account of the company. That being so, this conviction cannot be supported.' (f)

**Marked money provided by master.**—The indictment charged the prisoner, as a servant of one J. Gregory, with receiving the sum of seven shillings from one Hannah Morris, for and on account of his master,

(d) *R. v. Snowley*, 4 C. & P. 390, Parke, J., and *Littledale*, J. *R. v. Aston*, 2 C. & K. 413; *R. v. Arman*, Dears. C. C. 575; *R. v. Thorley*, R. & M. C. C. R. 343; *R. v. Hawton*, 7 C. & P. 281; *R. v. Bearcock*, 1 Cox, C. C. 187.

(e) *R. v. Williams*, 6 C. & P. 626. Arabin, Sergt., after consulting Gaselee, J., Alderson, B., and Gurney, B.

(f) *R. v. Beaumont*, Dears. C. C. 270. By the terms of the contract Wiggins undertook to 'provide a sufficient number of steady and honest carmen, and other persons,

for the delivery of all coals,' &c., 'and also for collecting and receiving, and duly accounting for, the moneys received for the same,' &c., and that 'the parties, whilst in the employment of Wiggins, shall obey, in all things connected with the delivery of coals and the receipt and payment of moneys received by them, the orders of the company's coal manager, or such other person as may be appointed by them.' This contract was not set out in the case, but cited in the argument.

and embezzling the same. It appeared that Gregory, who was a potato-merchant, having reason to suspect the prisoner of dishonesty, procured Morris to come to his shop with a marked seven-shilling piece of his own money, there to purchase potatoes, and to pay for them with the seven-shilling piece. She came accordingly, bought potatoes to the amount of one shilling and threepence, and paid the marked seven-shilling piece to the prisoner, who gave her out of his own pocket five shillings and ninepence in change, though he might have given the change out of moneys belonging to his master which had been left in the counting-house for that purpose. The seven-shilling piece was afterwards found secreted in the prisoner's box. It was contended that the Act applied only to cases where the moneys had been paid to the servant by other persons than the master, and not, as in this case, where the moneys had come intermediately from the hand of the master; but the Court was perfectly satisfied that there was nothing in the objection, and that if a servant received the money, either from the master, or from a third person on the master's account, it was sufficient. (g)

The prisoner was indicted for embezzling three shillings, the property of his masters, J. Clarke and J. Gyles. Messrs. Clarke and Gyles, whom the prisoner served in the capacity of shopman, having reason to suspect that he embezzled some of the moneys received by him in the shop, Mr. Gyles formed a plan for detecting him, and took an account of the money at that time in the till, and marked it; and then went to the house of a neighbour where he took three shillings from his pocket, marked them also, and then gave them to his neighbour's servant, who by his desire, and also by the order of her mistress, went with them to the shop of Messrs. Clark and Gyles, and purchased of the prisoner, who was then serving in the shop, articles exactly amounting to three shillings, and paid for them with the three shillings given her by Mr. Gyles. The prisoner embezzled these three shillings. It was submitted that, as the three marked shillings were the property of the prosecutors, and had been taken out of Mr. Gyles's own pocket for the sole purpose of trying the fidelity of the prisoner, the delivery of them to the servant had not changed the possession of them, which, it was contended, remained constructively with the prosecutors up to the moment when the embezzlement took place; and therefore that the charge should have been for a larceny at common law, and not for an embezzlement under the statute. The Court overruled the objection; and, upon a case reserved, the judges were of opinion that the case was clearly within the statute. Grose, J., who delivered their opinion, referred to *Bull's case* (h) as in point; and said, that from that case it appeared that the present, which was precisely similar in its circumstances, was not a case of larceny at common law, but a breach of trust, and as such within the terms and operation of the statute. (i) So where a licensed victualler, the master of the prisoner, suspecting him, marked a crown piece and two half crowns, and gave them to W. for the purpose of purchasing spirits of the prisoner, and W. purchased some brandy, and paid the prisoner the marked money, and it was his duty to have placed the same in the till, but the two half crowns only were found there, and the crown was found in the prisoner's box; the jury acquitted him of larceny, but found him guilty of embezzlement; and, on a case reserved, it was held that the

(g) Whittingham's case, 2 Leach, 912. *Sed quære* the correctness of this decision. C. S. G.; and see R. v. Hawkins, 1 Den. C. C. 584, where the dictum at the end of this case is questioned.

(h) Cited in Bazely's case, 2 Leach, 841.

(i) Hedge's case, 2 Leach, 1033. R. & R. 160. It seemed to be the opinion of the judges that the statute did not apply to cases which are larceny at common law.

preceding case was expressly in point, and that the Court were bound by it. (j)

**Money obtained by unlawful use of master's property.**—Where an indictment charged Edmund W. with embezzling and Michael W. as accessory after the fact, it appeared that Edmund was the town traveller and collector of the prosecutor, and Michael his carman. Edmund's duty was to go round and take orders from customers, and to enter them, on his return to the shop in the evening, in the day or the order book, and also to receive moneys in payment of such orders, but he had no authority whatever to take, or direct, the delivery of any goods from the shop. A customer gave Edmund an order for two gallons of mixed pickles, and fourteen pounds of treacle, which order was entered by him in the order book as for the pickles only. An invoice for the pickles, pursuant to the entry, was made out by the prosecutor's brother, and given to Michael, but he delivered the pickles and fourteen pounds of treacle. The sum charged for the pickles was 6s. 6d., and Michael entered the treacle at the foot of the invoice at 4s. 6d. Edmund afterwards received the whole amount, but paid the prosecutor 6s. 6d. only. Mr. Recorder Law (after consulting Patteson, J.) held that this was not embezzlement but larceny, saying, 'Edmund does not receive the 4s. 6d. for or on account of his master, but contrary to and in breach of his duty towards that master. I may also liken the case to that of two servants, one of whom has authority to sell, and the other not, but merely to receive money; if the one who has no authority to sell, introduces himself behind the counter, and sells his master's goods, putting the money into his own pocket, that is clearly a stealing, for he sells and receives the money contrary to his authority; and he cannot be said to have been employed or entrusted as clerk and servant, and to have received the money by virtue of such employment, where the act is done contrary to such employment. Here the servant having authority to send out goods to the amount of 6s. 6d. puts up goods to the amount of 11s., his intention being to put 4s. 6d. (k) into his own pocket. The time never arrives when he receives that on account of his master, for all that he does is adverse to, and in fraud of, the interest of the master.' (l)

Upon an indictment for embezzlement, which in some counts alleged the prisoner to be the servant of the inhabitants of the county of Worcester, and in others of the clerk of the peace for that county and others, it appeared that the prisoner was the miller of a mill in the gaol of the county, and it was his duty to direct any person bringing grain to be ground at the mill to obtain at the porter's lodge at the gaol a ticket specifying the quantity of grain brought. The ticket was his order for receiving the grain. It was then his duty to receive the grain with the ticket, to grind it at the mill, to receive the money for the grinding from the person bringing the grain with the ticket, and to account to the governor of the gaol for the money so received. The governor accounted for the same to the treasurer of the county rates. It was a breach of the prisoner's duty to receive or grind grain without such a ticket as above mentioned, and he had no right to grind any grain at the mill for his private benefit. The prisoner was appointed to his situation by the magistrates of the county at a fixed weekly salary, which was paid out of the county rates. The moneys which the prisoner misappropriated

(j) *R. v. Gill*, Dears. C. C. 289. Maule, J., observed that 'There may be a distinction between the cases in which the master parts with the possession, retaining it con-

structively, and those in which he does not.'

(k) The invoice was for the pickles only.

(l) *R. v. Wilson*, 9 C. & P. 27.

he received from persons for grinding their grain at the mill, but none of these persons had obtained a ticket from the porter's lodge, nor had they been directed by the prisoner to obtain such tickets, nor was there, in fact, any ticket at all. It was objected that the prisoner did not receive the money by virtue of his employment, nor for or on account of his master; (m) and, upon a case reserved, Pollock, C. B., delivered the following judgment: 'The only point on which we give our unanimous opinion is, that upon the facts stated it appears that the prisoner had no right to receive and grind any corn on behalf of his masters, except such as was brought to him with a ticket. The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket is, that he intended to make an improper use of the machinery entrusted to him, by using it not for the benefit of his masters, but for the benefit of himself. We think, therefore, that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of embezzlement.' (n)

(m) It was also objected that the County Sessions had no jurisdiction to try the prisoner, as the gaol was within the city; it was answered that the 4 Geo. 4, c. 64, s. 48, placed it in the county; and further that the prisoner was not the servant of the Clerk of the Peace and others, or of the inhabitants of the county; but no opinion was expressed on either of these points.

(n) *R. v. Harris*, Dears. C. C. 344. Pollock, C. B., in the argument said, 'If a workman employed in a blacksmith's shop, who has engaged to give his master his whole services, is asked by some one to do a little work in the shop, which only requires labour, and he does the work, and says to the man, "Pay me twopence for the job, and say nothing about it," the workman could not be indicted for embezzling the twopence, though he might be guilty of a breach of his contract, which was to give his master his entire labour.' The supposed case is plainly distinguishable from this case. There the man's own bodily labour would earn the money. Here the money was earned by the mill of the county, and clearly for any work done by it, the county might

recover payment. The decision itself seems to be erroneous; for the prisoner could only work the mill 'by virtue of his employment;' and it is quite clear that the county might recover from the prisoner any money received by him, as money had and received to their use; for it was earned by their mill, and the prisoner was paid for all the work he contributed towards it; and this plainly proves that the money was in fact received for and on the account of his masters, though by a fraudulent juggle he attempted to shew that it was not so received. *R. v. Snowley*, 4 C. & P. 390, was approved of by Parke, B., in this case; but in the Committee of the Lords on the Criminal Bills of 1860, on my reading that case, Lord Wensleydale and all the law Lords greatly disapproved of it, and unanimously agreed to the propriety of preventing such a failure of justice in future by altering the clause as it now stands, and there is no doubt that it will meet such a case as the present. C. S. G.; but see *R. v. Cullum*, 12 Cox, C. C. 469, where Mr. Greaves' note was referred to in the argument, but was not followed.

## APPENDIX C.

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### *Decisions on Repealed Statutes as to what Amounts to an Embezzlement.*

If a person duly enters in his books all sums of money that he has received, the mere fact of not paying over the money does not amount to embezzlement. (a)

**Neglect to account for money.** — Upon an indictment charging the prisoner with having embezzled the sum of £3 9s. 6d. on the 4th of November, the sum of £4 9s. 8d. on the 29th of September, and the sum of £1 on the 18th of December, it appeared that the prisoner was the servant of a baker, and authorised to receive money due for bread, and that he had received the three sums in question on the three different days mentioned in the indictment in payment for bread, and had never accounted for either of these sums or any part of them, and had never paid any part of them over to the prosecutrix; the prisoner, however, had never denied the receipt of either of these sums, and had never delivered any account in writing in which they were omitted; but it was not the duty of the prisoner to deliver written accounts of what he received; it was, however, his duty, on the evening of every day, to render an account to the prosecutrix of all moneys that he had received on her account in the course of that day, and immediately to pay over the amount. It was submitted that there was no embezzlement, as there was no denial of the receipt of either of the sums, and the mere omission to pay over the moneys was not embezzlement. But Coleridge, J., held that, as it was the duty of the prisoner every evening to account for and pay over all moneys received by him in the course of the day, if he wilfully omitted to do that, that was clearly quite equivalent to a denial of the receipt of the money. (b)

The prosecutor, a market gardener, employed the prisoner, who was in his service, to take a quantity of potatoes and cabbages to sell at Dudley, and on his return asked him for the money. The prisoner said he would settle for the potatoes and cabbages on the following Tuesday, as he had not received the money. He mentioned the sum he had sold the potatoes for, and one Thomas as having bought them, but no other name. He said he should have to deduct 3s. 6d. for some payments on the prosecutor's account, which was a correct deduction. A fortnight afterwards the prosecutor again asked him to settle for the potatoes; he replied he could not do so then, but would on the following day. He said he had not seen Thomas, or received for the goods, but would do so. The prosecutor told him that if the money was not paid on the following day, he would give him into custody. The prisoner did not pay, and he was apprehended. He had sold some of the potatoes to Thomas, who had not paid for them; but he had sold potatoes to another person, who

(a) *R. v. Hodgson*, 3 C. & P. 422.  
Vaughan, B.

(b) *R. v. Jackson*, 1 C. & K. 384, A. D.  
1844.

paid him 25s. for them at the time. Erle, J., told the jury, 'This case seems to me much more like an accounting for money, and a default in payment, than a false accounting and embezzlement. It depends entirely on the construction you put on the statement of the prisoner, that he had not received the money. It appears that, as a fact, he had received the produce of part of the vegetables, but not for the other part, which remains unpaid now. When he told the prosecutor that he had not received the money, that statement was true if he meant to say that he had not received the money for the whole, but it was false if he meant to say that he had not received any part of it. The guilt of the prisoner depends upon that; for if he meant to embezzle and steal part of the money, he is guilty; if not, then you will acquit him.' (c)

Upon an indictment for embezzling the sum of £10, it appeared that the prisoner was employed by the prosecutors to receive remittances from their customers, and it was his duty to enter them to the credit of the customers in a day or cash-book, and it was his duty to make an extract from this book of all remittances received by him, and to take it to the prosecutor's cashier to be compared with the book, and then it became his duty to enter the whole amount contained in such extract on the credit side of the banker's deposit account, and to pay such amount to the credit of the prosecutors with their bankers. The prisoner afterwards, at his own convenience, posted the amounts of money remitted by customers into a ledger, which contained the accounts of the customers. Having received the £10, the prisoner never entered it in the cash or day-book; and he omitted to include it in the amount which he paid on the next occasion to the credit of the prosecutors with their bankers, nor was it entered in any subsequent account. It was, however, entered by the prisoner to the credit of the customers in the ledger. The money was applied by the prisoner to his own use; and, upon a case reserved upon the question whether the entry made in the ledger exempted the prisoner from the operation of the statute, it was urged that by making the entry in the ledger, the prisoner had accounted to his masters, and was not guilty of embezzlement, which necessarily involved secrecy and concealment; but it was held that the conviction was right, and it was said that the entry might have been made in order to deceive. (d)

(c) *R. v. Winnall*, 5 Cox, C. C. 326, A. D. 1851. With all possible deference, this case appears to have been erroneously left to the jury. It should never be lost sight of in these cases that the main question is, what has the prisoner done with the thing alleged to be embezzled? In this case the prisoner had actually converted the money he had received to his own use. It is a fallacy in such a case to treat the question as turning on the truth or falsehood of any statement made or written by him. Such statements are merely evidence, and are to be taken into consideration with the rest of the facts; and if the facts shew that the prisoner has, in fact, wrongfully converted the thing to his own use with intent to deprive the owner of it, he ought to be convicted. Where anything is received by a servant for his master, the correct view of his conduct is to treat it just in the same way as if he had taken that thing out of his master's house, and had afterwards wrongfully dealt with it, and then to consider whether such dealing with it was felonious. See particularly *R. v. Davison*, 7 Cox, C. C. 158; there a

bankrupt changed money abroad, and Coleridge, J., said, 'Suppose a person after adjudication of bankruptcy against him in London embezzles in Yorkshire, and does not account in London, could he be tried in the C. C. Court? He would no doubt be triable in Yorkshire, because the offence is committed there.' 'If what was proved to have been done abroad had been done in this country, the crime would have been complete at once, and it would not have been necessary for the prosecutor to give any evidence of non-accounting. The case would have been perfect without that. The accounting would only have come in on the part of the prisoners to show *quo animo* the acts charged against them were done. When the act is incomplete or indifferent in itself, it may be necessary afterwards to make up the deficiency by shewing a non-accounting; but where the misappropriation is once clearly established, the non-accounting could not in any way strengthen the charge.' Alderson, B., was present. C. S. G.

(d) *R. v. Lister*, D. & B. 118. This case it seems overrules *R. v. Cread*, 1 C. & K. 63.

The prisoner was assistant overseer of a township, and such servant as stated in the indictment, and it was his duty to collect the rates from the ratepayers of the township, and the course was for the prisoner, on receiving the rates, to pay them into a bank to the account of the overseers, and then to obtain from the overseers a receipt for such sum so paid to their account. The prisoner also kept a book in which it was his duty to enter from time to time the sums received by him. At the half-yearly audit the accounts thus entered were contrasted with the receipts given to him by the overseers. He charged himself by the book, and discharged himself again by the overseers' receipts. The prisoner just before an audit went to the overseers, and fraudulently obtained from them several receipts for various sums, by stating that he had paid these sums into the bank to the overseers' account, which in truth he had not. He had, in fact, previously appropriated these sums to his own purposes, and he obtained the receipts with the view of deceiving the auditor as to his having handed the money to the overseers; he produced the receipts at the audit, and was successful. But he had duly entered the said sums when received in the said book, and had thus openly charged himself with the receipt of them. It was contended that, having thus charged himself, he could not be guilty of embezzlement. But on a case reserved on the question whether the prisoner, on the above facts, could be lawfully convicted of embezzlement, the conviction was affirmed. It was clear that the money was embezzled with one of the ordinary concomitants of fraud, fraudulently accounting. The question was whether the prisoner was entitled to be acquitted, because he made a correct entry of the sums when received in the book, and he was not so entitled. Those entries were probably made with forethought, and a view to this defence. (e)

On an indictment for embezzlement, it appeared that the prosecutors were owners of a vessel, and the prisoner was in their service as master. The vessel carried culm from Swansea to Plymouth, which, when weighed at Plymouth, weighed two hundred and fifteen tons, and the prisoner received payment of the freight accordingly. When he was asked for his account by the owners, he delivered a statement, admitting the delivery of two hundred and ten tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he said there was a difference of five tons between the weighing at Swansea and at Plymouth, and that he had retained the balance for his own use, according to a recognised custom between owners and captains in the course of business. But there was no evidence of the alleged difference of weight or of the custom. Cresswell, J., 'I think that this does not amount to embezzlement. Embezzlement necessarily involves secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owns it, alleging a right or an excuse for retaining the sum detained, no matter how frivolous the allegation, and although the fact itself on which the allegation rests were a mere falsification; as if in the present

A fallacy is perpetually put forward in cases of embezzlement. The offence consists in the conversion of the *thing* received: no entry or statement is anything more than *evidence* bearing on the character of the disposal of the thing; and yet entries are constantly treated as the offence itself. If a man made every entry in due course, it would only at most amount to evidence that he did not, when he made them, intend to convert the money; and yet he might have

converted it before, or might do so afterwards. If he were proved to have converted it before he made the entries, the offence would be complete, and no entry afterwards made could alter it. So, on the other hand, if he made no entries or false entries, but actually paid the money to his master, he would be innocent. C. S. G.

(e) *R. v. Guelder*, Bell, C. C. 284. The indictment was not described in the case.



case, although it should turn out that there was no such difference as that asserted by the defendant between the tonnage as measured at Swansea and at Plymouth, or that there was no such custom as that set up. I do not say to what species of offence this may amount, but in my opinion not to embezzlement.' (f)

**Denial of receipt of money.** — So it is not enough in all cases to prove that a clerk has received a sum of money, and not entered it in his book, unless there be also evidence that he has denied the receipt of it or the like. Upon an indictment for embezzlement it appeared that Mr. Bettis, a slate merchant, by means of the prisoner as his clerk, carried on the slate trade at a wharf at Gloucester: the course of business was for the prisoner to sell the slates and to convey them to the customers in his own boats, as Mr. Bettis had no boats, the prisoner being also a coal merchant on his own account; the prisoner had received the sums in question, but he and the prosecutor had had no adjustment of accounts for two years, and on Mr. Bettis calling for the prisoner's books, he could not find three sums entered; he had never specifically asked the prisoner to account for either of the sums, and the accounts of the prisoner amounted to ten or twelve thousand pounds. Bolland, B., 'There is not a felonious conversion; I will take it that the prisoner put the money into his own pocket, and has made no entry; that is not sufficient. Had he denied the receipt of the money the case might have been different. If the mere fact of not entering a sum was enough to support an indictment for embezzlement, every clerk who, through carelessness, omitted an entry, would be liable to be convicted of felony. The prisoner must be acquitted.' (g)

Upon a second indictment against the same prisoner the evidence of the mode of dealing was the same as in the last case, and it appeared that Mr. Ellis owed £5 to Mr. Bettis for slates, and paid £3 14s. 6d. in cash, 1s. 6d. being allowed to Ellis as discount, and the remaining £1 4s. being set against a cyder account due from the prisoner to Ellis, and the prisoner had credited Ellis in his ledger to the amount of £5, and had entered £3 14s. 6d. in the cash-book. Mr. Bettis had never called upon the prisoner to account as to this sum of £5. Bolland, B., 'It appears to me that this does not amount to embezzlement. In cases of this sort the thing alleged to be embezzled should not be laid out of the question. If goods are taken an intent may more clearly appear than in the case of money, as the same pieces of coin may, in many cases, not be paid over. There is nothing in this case to bring the prisoner within the statute. He never denied the receipt of the money, and was never called upon for it. I think it essential that there should be a denial of having received the money, or else that some false account should be given. The prisoner must be acquitted.' (g)

**Constructive receipt.** — In the preceding case it was objected that there was no embezzlement, as the prisoner had accounted for all the money he had actually received; if no money at all had passed, and it had been entirely a credit transaction on both sides, it would not have been embezzlement, for that crime is merely a statutory larceny, and could only be proved by shewing the actual receipt of the money, and the actual embezzlement of the money itself; and as all that was received was accounted for, the case was the same as if it had been entirely a credit transaction: and this seems to have been a good objection, but this point was not decided, as the prisoner was acquitted on the ground above stated. And where on a similar indictment the same question

(f) *R. v. Norman, C. & M. 501. Sed quare, whether any such claim must not have some such colour of right, as in cases of larceny.*

(g) *R. v. E. O. Jones, 7 C. & P. 833.*

arose, Coltman, J., after reading the note to the 3d edition, which contained the preceding paragraph, held that as no money had actually passed, the offence of embezzlement had not been committed. (*h*)

But where on an indictment for embezzlement it appeared that the prisoner as a superintendent of police ought to have received certain fines from a police constable, but having to pay him his wages, he did not receive these fines, but they were kept by the police constable, and if they amounted to more than a week's wages in any week, the balance stood over and formed part of the wages for the next week, and if they formed less than the week's wages, the prisoner paid him so much as made up the amount of his wages for that week. The sums were entered in a book as having been received by the prisoner, and the account was signed by the prisoner. It was objected that the prisoner had never received the money he was charged with embezzling. But Patteson, J., held that this was a constructive receipt of the money, as the prisoner had signed the book as having received the fines. (*i*)

A case was decided which would seem to shew that an indictment for embezzlement may be supported by proof of a general deficiency of money, without shewing any particular sum received and not accounted for. The 1st count charged the prisoner with embezzling £500 on the 28th of August; the 2nd, £10 on the 29th; the 3rd, with stealing a note, a sovereign, a half sovereign, &c., as clerk; and the 4th, like the 3rd, omitting to state that he was clerk. The prisoner was cashier in the bank of Messrs. Masterman, and his duty as cashier was to take charge of the cash when any payment was made into the bank, in money and paper, and the course was for the cashier to hand over the paper to a clerk, and to enter the cash received in a book kept by him (the cashier) called the money-book. It was the duty of the cashier, at the close of the business of each day, to see that the cash in hand agreed with the money-book, and to strike a balance, denoting the sum in cash which the cashier had in his charge, and which ought to have been kept either in the drawer in the counter, of which he had the key, or in a box in the banking-house, of which he had the key and charge. On the 28th of August, 1835, the cash in the money-book at the close of business was £1762 and a fraction, which sum was by the prisoner carried forward, as in due course it ought to have been, and formed the first item of the account in the book for the 29th. On the latter day, at the close of business, the prisoner, after crediting himself with money paid by him (it being part of his duty to pay away money), and debiting himself with cash received, made the balance in the money-book, £1309 and a fraction, and that sum the prisoner ought to have had in one or the other of the above-mentioned places of deposit on the same day (29th

(*h*) *R. v. Gaskins*, MSS. C. S. G. Gloucester Winter Ass. 1845.

(*i*) *R. v. Baxter*, Salop Spring Ass. 1850, MSS. C. S. G. S. C. 5 Cox, C. C. 302. The prisoner pleaded guilty to another indictment, or the point would have been reserved. There is no doubt that such an accounting and striking a balance amounts to payment in point of law; but it is a very different question whether it amounts to an actual receipt of the money so that the money can be said to have been received and afterwards embezzled; for how can a prisoner embezzle money which he has never had in his possession? The only answer which occurs is, that the prisoner shall not

be permitted to prove that he did not receive what it was his duty to receive, and what he has admitted in writing that he did receive; but in this case the truth was disclosed on the part of the prosecution. Under the 39 Geo. 3, c. 85, it was necessary to allege and prove the particular money embezzled, and it is clear that under that Act the case in question would not have been embezzlement, and the power to prove the receipt of any money without proving the particular coin does not alter the offence, but rather assumes the receipt of some money to be necessary. See *R. v. Wavell*, R. & M. 224, C. S. G.

of August). Soon after the close of business Mr. Oxley, one of the partners, sent for the prisoner, and after intimating his suspicions, required him to produce the money. The prisoner thereupon said that he was short, and being asked how much, replied about £900, and threw himself upon the mercy of his employers. Upon examination, it was found that the prisoner, instead of £1309 in his hands, had only £345 and a fraction, leaving the actual deficiency £964 and a fraction. Mr. Oxley, who proved the whole case, had no knowledge of the facts whatever, except what has been above stated, and could not say when the money, or any part of it, had been purloined, from what person or persons it had been received, what sort of money had been abstracted, and whether from the till, or upon its receipt from customers. There were two or three other cashiers besides the prisoner, who were stationed close to him, and there must be at least two cashiers present during the hours of business. It was objected that there was no case to go to the jury, 1st, because the evidence applied equally to the charges of embezzlement and larceny, and not particularly to either; 2ndly, that there ought to have been some proof of some sum or sums of money having been abstracted, when, from whom, and what sort of money. The objections were overruled, and the jury were told that taking money from the till would amount to larceny, and that abstracting money paid to him (the prisoner), before it reached the till or possession of his masters, would be embezzlement, and it was left to them to say whether both, or either of the charges which were stated to them, were established by the proof. The jury found the prisoner guilty of embezzlement to the amount charged, and not guilty of stealing. Upon a case reserved, it was contended that in order to enable the jury to convict either of larceny or embezzlement, there must be proof of some specific sum abstracted, and the time when. That the only evidence in this case was of a deficiency in accounts, but how that arose was not shewn. There was considerable difference of opinion amongst the learned judges, and the case was discussed at different meetings, and ultimately eight of the learned judges (*j*) were of opinion that the conviction was good, but the other seven (*k*) were of opinion that the conviction was wrong. (*l*)

**Specific sum must be proved.**— But it should seem that it is not to be inferred from the preceding case that proof of a general deficiency will be sufficient, but there must be proof that some specific sum has been embezzled. Upon an indictment for embezzlement it was opened that the prisoner had been shopman to the prosecutrix, and that it would be proved that there was a deficiency in the prisoner's accounts, but that there was no proof of the embezzlement of any particular sum. Alderson, B., 'Whatever difference of opinion there might be in the case of *R. v. Grove*, (*l*) that proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen. (*m*)

Upon an indictment for embezzlement it was opened that the prisoner was clerk and traveller to the prosecutor, and that his duty was to receive from the customers moneys paid by them for goods supplied, and

(*j*) Lord Denman, C. J., Tindal, C. J., Lord Abinger, C. B., J. A. Park, J., Vaughan, B., Bosanquet, J., Gurney, B., and Williams, J.

(*k*) Littledale, J., Gaselee, J., Parke, B., Bolland, B., Alderson, B., Patteson, J., and Coleridge, J.

(*l*) *R. v. Grove*, R. & M. C. C. R. 447.

(*m*) *R. v. Lloyd Jones*, 8 C & P. 288; and see *R. v. Wolstenholm*, 11 Cox, C. C. G. 313; and *R. v. Balls*, L. R. 2 C. C. R. 328.

also to pay out of such moneys the wages and other outgoings of the establishment; the payments so made being entered in a small book kept by the prisoner, and their weekly total carried into a larger book, which shewed the general debtor and creditor account between the prisoner and his master; and the balance shewn in this last account was from time to time struck, and sometimes paid over, and sometimes brought forward as the commencement of a new account. In September one of the weekly totals, as it appeared in the smaller book, shewed an aggregate of payments to the amount of £25. In the account for that week it was entered in the larger book as £35, and this false entry appeared to have been written on an erasure. In October a balance was struck on the general account; and the sum found to be due upon that balance was carried forward as the first item of a new account, which was settled in December, and the balance at that time paid over to the prosecutor, it being £10 less than it ought to have been by reason of the sum of £35 being inserted as before mentioned instead of £25; there was no evidence to shew any precise sum received by the prisoner on account of his master, and the whole or any part of that very sum appropriated by him to his own use; and Williams, J., held that in the absence of such evidence the prosecution could not be sustained. (n)

The prisoner was indicted for embezzling £270. He was assistant teller to the customs, and it was his duty to receive money from those persons who had to pay sums into the receiver general's office, and enter such receipts in a cash-book. He had also to make certain payments, and these it was his duty to enter on the other side of the same book, and balance the amounts each day; paying over so much of the surplus as was in notes to a superior officer, and retaining the cash, which was carried to the next day's account. One day he was ordered, about eleven o'clock, to make up his accounts. He continued, however, to receive money until two o'clock, when he left the office and did not return. His desks and books were then examined, and in the books were found entered, as having been received, several sums, amounting in the whole to £2783 7s. 9d., and on the other side were payments amounting to £130 13s. 3d. The balance found, which ought to have been £2652 14s. 6d., was £270 less than that sum. The whole of the money was received between ten and two o'clock of that day. It was contended that the evidence failed to prove the appropriation of any particular sum received from any one person, which was necessary to support the charge. Erle, J., 'I think the offence is sufficiently made out, within the meaning of the statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be constant failure of justice if I were to decide otherwise, since it is impossible, in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums, or the parts of which sum or sums, have been embezzled.' (o)

(n) *R. v. Chapman*, 1 C. & K. 119. This decision was made on the mere opening statement of counsel.

(o) *R. v. Lambert*, 2 Cox, C. C. 309. The prisoner must have been indicted under the 2 Wm. 4, c. 4, s. 1, but the terms in that Act did not so far differ from the 7 & 8 Geo. 4, c. 29, s. 47, as to make any difference as to the point here decided. The plain answer to the objection in this case is that the prisoner was shewn to have received all the money that morning, and that he must

have actually taken away the £270 when he left the office; and that that was the embezzlement of the whole of that sum at that time. As a servant may steal at one time any number of sums received from different persons and put in a till together, so a servant may receive any number of sums from different persons, and embezzle them all at the same time; for till the moment of converting them he may have held them all with an honest intention. C. S. G.

A count alleged that the prisoner being employed in the public service of the Queen, did by virtue of his employment receive certain money, to wit, £5000 on account of the public service, and feloniously applied it to his own use. The prisoner had for several years been an officer of receipts of inland revenue for the Chester district. In that capacity he received income tax, land and assessed taxes, and duties of excise. On each of these accounts he was allowed by the Board of Inland Revenue to retain in his hands a balance of £100 to meet contingent expenses. There were two inspectors of taxes for different portions of the prisoner's district, and it was his duty to send them returns shewing the amounts received and remitted by him, and the balance remaining in his hands, according to the accounts so rendered. In July and August, 1855, the balance remaining in his hands under each head much exceeded what he was allowed to retain; and in September the balance in the whole amounted to more than £5000. In that month the general surveyor of Inland Revenue, after examining the prisoner's accounts, produced to him a statement, extracted from his own accounts, making the balance in his hands £5214 and a fraction. He said he knew the balance was about that sum, as he had gone through the accounts a few days before. The surveyor then asked if he was prepared to hand over that balance, or any part of it; he said he was not. The surveyor then reminded him that there was a balance of excise duties alone of about £300 standing against him from the previous Monday, which was a receipt day at Tarforley. The prisoner then took out £255 in Bank of England notes, a cheque for £25 8s. 4d., and a money order for 14s., and said that was all the money he had in the world. The surveyor asked him what he had done with all the rest. He said he had spent it in an unfortunate speculation. It was objected that as no evidence was given of the receipt and misapplication of any particular sums, but only a general deficiency in account proved, the prisoner could not be convicted; but, upon a case reserved, after a verdict of guilty, the conviction was held right; for whatever difficulty there might be as to the larger sum, there was none as to the £300, and the evidence with respect to that sum clearly brought the case within the statute. It was proved, out of the prisoner's own mouth, that he had received, no matter from how many different persons, various sums amounting to £300, which formed a fund in his hands belonging to the Crown for which he was bound to account; and the question was whether he had fraudulently applied all or any part of it. He himself produced a sum of money, and said, 'I have spent the rest in an unfortunate speculation.' It is not material whether the sum produced was part of the £300 or not; because 'the rest,' which must include part or all of the £300, he had, according to his own statement, expended in an unfortunate speculation. (p) As to the £300, therefore, it appeared that the prisoner had received that sum on behalf of the Crown, and had fraudulently applied part of it to his own use. There therefore was a specific transaction pointed out, as to which the conviction was clearly sustained, and it became unnecessary to decide whether a general deficiency would suffice. (q)

(p) As the prisoner produced only £281 2s. 4d., there was the difference between that sum and £300, *i. e.* £18 17s. 8d., at all events, unaccounted for.

(q) *R. v. Moah*, Dears. C. C. 626. Cresswell, J., said, 'I by no means say that the indictment is not sustainable as to the £5000.' 'As at present advised, I should say that the prisoner, being shewn by his

own accounts to have a balance in hand of £5000, due to the Crown, and he making no attempt to explain it, on the ground of error or loss of the money, merely says that he has expended it for his own purposes, he may, upon that evidence, be convicted of embezzling the money, and that having been once indicted for embezzling the whole amount, and either convicted or acquitted,

**Intention to appropriate money.**—Upon an indictment for embezzlement it appeared that the prisoner was sent by her master's daughter to receive rent due to him from a tenant, and that having received the rent she went off to Ireland, and never returned to her master's service. Coleridge, J., said, in summing up, 'I think that the circumstance of the prisoner having quitted her place and gone off to Ireland is evidence from which you may infer that she intended to appropriate the money; and if you think that she did so intend, she is guilty of embezzlement. (r)

Where the prisoner, having received two sums for his master, absconded without accounting for them, and there seems to have been no fixed time for accounting, and it was urged that it was merely a neglect to account; Moore, J., said, 'Certainly receiving money and not forthwith accounting for it does not amount to embezzlement. You are to get from all the facts of the case whether or not there has been an appropriation of the money. You may come to the conclusion from the lapse of time that it was not a mere neglecting to account, but you have further the fact that, after getting the money, he absconded, and did not come back till he was in custody. You may infer that he intended to appropriate this money, and if so, he is guilty of embezzlement. (s)

And where the prisoner, a farm labourer, was sent by his master to deliver two sacks of potatoes, and to receive the price of them, and having delivered the potatoes and received the money, he never returned to his master or accounted for the money, and six months afterwards, having in the meantime kept out of the way, he was apprehended on this charge, and he then said that he had received the money and spent it: Erle, J., doubted whether this was sufficient evidence of embezzlement, as it did not appear that the prisoner had ever denied the receipt of the money, or made any false statement respecting it. *R. v. Williams* (t) and *R. v. Norman* (u) in which Coleridge, J., had acted on his previous decision, were then cited. Erle, J., however, still thought the offence as proved did not clearly amount to a felony; but on the authority of these cases he left the case to the jury. (v)

**Embezzlement after termination of service.**—The prisoner had formerly been in the prosecutor's employ as farm bailiff; the prosecutor determined to go to America, and promised that if the prisoner would go too, he would pay his passage money, and set him up in business on his arrival; the farm was given up, and in the mean time the prisoner was employed by the prosecutor to collect his outstanding debts, but it did not appear that the prisoner was to be paid anything for so doing. In the course of this employment the prisoner received certain sums which he appropriated. It was held that he was not a servant when he received the money: his service ended when the farm was given up, and no new service was created. (w)

In a case upon the 2 Wm. 4, c. 4, where it was objected that the

he never could be indicted again for embezzling any part of it.' Pollock, C. B., seems to have considered the law as to embezzlement not applicable to the case, because the terms of the 2 Wm. 4, c. 4, were larger than those of the 7 & 8 Geo. 4, c. 29. But the facts seem clearly to have brought the case within the latter Act. *R. v. Lambert, supra*, was recognised as in point.

(r) *R. v. Williams*, 7 C. & P. 338.

(s) *R. v. Lynch*, 6 Cox, C. C. 445.

(t) *Supra*.

(u) Mentioned at the Bar.

(v) *R. v. Tucker*, 1 Cox, C. C. 235.

There was an acquittal. The offence of embezzlement may be committed in respect of a chattel as well as money; now, if a man received a horse for his master, and disposed of it, and kept out of the way, it is clear that he would commit the offence; and why not if he receive money and dispose of it, as in this case? The offence is the fraudulent misappropriation of the money, and where the prisoner is proved to have disposed of it, the only question is *quo animo* he did it.

(w) *R. v. Hoare*, 1 F. & F. 647.

indictment did not allege that the prisoner embezzled whilst he was the clerk; Coleridge, J., said, 'It is by no means clear that an embezzlement (if such a case be possible) after a person ceased to be clerk or servant, of money received whilst he was such, would not be within the Act.' (x)

The prisoner used to attend markets and purchase barley for his employers, and he received on each market day as much money as, with the moneys he had to receive on account of his employers, was estimated to be sufficient to pay for previous purchases. The custom was to deliver the corn before, and to pay for it at the market. There was a book in which the prisoner entered his receipts and payments, and which was balanced weekly. The prisoner purchased 158 coombs 3 bushels of barley, and had entered the price in the weekly account book as £174 12s. 6d., which would be at the rate of 22s. per coomb: whilst in fact the price paid by him was 21s. 6d. per coomb. He had truly entered £380 as received from his employers, and had balanced the accounts, shewing a small balance due to them. Wightman, J., held that there was no case of larceny; as it was impossible to distinguish the moneys which the prisoner received of his employers from those that he received for them; but that there was a case for the jury as to embezzlement. (y)

(x) *R. v. Lovell*, 2 M. & Rob. 236. See this case, *post*, ch. xxii.

(y) *R. v. Lyon*, 1 F. & F. 54. The indictment alleged three embezzlements; viz., of £3 19s. 4d., £3 15s. 0d., and £1 8s. 6d.; the statement in the case only applies to the first sum. There is no statement as to what sum the prisoner received on behalf of his employers, on the day when the 158 coombs

were paid for, and it is not clear whether the £380 includes that sum or not. This report, therefore, is entitled to little weight as to the embezzlement. It seems clear that, if it was left wholly in doubt whether the prisoner appropriated money received from his employers, or money received from their debtors, there was no sufficient evidence either of larceny or embezzlement.

## APPENDIX D.

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### *Decisions on Repealed Statutes as to Indictment, Trial, &c., in Cases of Embezzlement.*

IN a case upon the 39 Geo. 3, an indictment was holden to be defective, because it did not expressly aver that the money alleged to have been stolen was the money of any particular person. It was contended, on a case reserved, that as the statute had not made embezzlement *eo nomine* a substantive felony, but had only enacted, that the property received into the possession of the servant, and feloniously converted by him, should be considered as having been by such conversion feloniously taken from the possession of the master, the offence still continued a common law larceny; and that consequently an indictment framed upon the statute must contain all the requisites of an indictment for larceny at common law. For the Crown it was argued, that the statute made the embezzling by servants a substantive felony, which before was only a misdemeanor, or breach of trust, for which the master had a civil remedy. That it was therefore sufficient to follow the words of the Act, as in other instances where new offences were created; which differed from indictments on statutes merely ousting the offender from clergy in cases which were before larcenies at common law. The judges at first doubted much upon this case, but ultimately a majority of them were of opinion that the indictment was defective, as it did not aver that the money alleged to have been stolen was the money of the prosecutors; that the statute made the offence a larceny, and made the possession of the servant, under such circumstances, the possession of the master. (a)

An indictment under the 39 Geo. 3, c. 85, stated that the prisoner received £1 2s. 6d. in moneys numbered, and £6 in one pound notes, and embezzled part thereof, namely, fifteen shillings and seven pence in moneys numbered, and one £1 note: the evidence was that he received at the same time much other money, and many other notes, but that instead of giving credit for £7 2s. 6d., he only gave credit for £5 6s. 10d. Upon a case reserved the judges held, that as he might have paid over the whole of what he received for the £7 2s. 6d., and have taken the £1 15s. 7d. from the other moneys he received, he was improperly convicted, there being nothing to shew that he had stolen any part of that money which he was charged with stealing. (b) But when the prisoner

(a) M'Gregor's case, 2 Leach, 932. 3 B. & P. 106. 2 East, P. C. c. 16, s. 18, p. 576. R. & R. 23.

(b) R. v. Tyers, MS. Bayley, J., and R. & R. 402. The notes had been in the master's possession, who took them and placed them on a heap with others before the prisoner, and this objection was made by

the prisoner's counsel, and seemed to be acquiesced in, and the case confined to the £1 2s. 6d. only, which was in silver. It also appeared that the prisoner at first gave credit for the £7 2s. 6d., and entered it in the proper book in his own hand, but he afterwards erased that sum, and substituted the £5 6s. 10d., and as he might have paid over



received for his master from Mrs. W. eighteen one pound notes, and immediately entered in his master's books £12 only: in the course of the day he received, for his master, £104 more, and after that time paid him £116. The indictment charged him under the above statute, 39 Geo. 3, c. 85, with embezzling six of the notes which he had received from Mrs. W., and it was urged, that he might have paid over in the £116 every one of the notes which he received from Mrs. W.; and if so, that he could not be said to have embezzled any of those specific notes. Bayley, J., told the jury that as in what he paid, he paid only £12 as and for all he had received from Mrs. W., and paid the other £104 as and for moneys received of other persons, he ought to be considered as having embezzled six of the notes he received from Mrs. W., because he would then have misapplied six of those specific notes to his own benefit, and to his master's prejudice. And, upon a case reserved, nine judges (Best, J., being absent), thought it an embezzlement from the time of making the false entry. Wood, B., rather thought otherwise; and Abbott, C. J., thought that the point should have been left to the consideration of the jury. (c)

Where an indictment upon the 39 Geo. 3, c. 85, charged that the prisoner was employed as a clerk to A., and that, by virtue of his employment, he received from B., on account of his master, £9 18s. 9d., without shewing of what moneys that sum was made up, and that he fraudulently embezzled the same, omitting the word *feloniously*; and it concluded; and so the jurors say that he did '*feloniously* embezzle, steal, take, and carry away, &c.;' objection was made, that in the introductory part of the indictment it was not alleged that he did feloniously embezzle, &c. and that therefore the indictment failed to shew that he had committed a felony, and that, unless it was so shewn in the body of the indictment, it was not enough that it was so alleged in the conclusion of it. The judges, however, held it to be sufficient that it was stated in the conclusion. (d)

The indictment alleged that the prisoner, on the 15th day of November, was servant to H. Hodges, and did then and there by virtue, &c., receive £2 1s. 6d. on account of his master; and that the prisoner afterwards and within the space of six calendar months, to wit, on the 16th day of November, in the year aforesaid, did receive the further sum of £2 3s. on account, &c.; and that the prisoner, afterwards and within the space of six calendar months from the day first aforesaid, to wit, on the 17th of November in the year aforesaid, did receive the further sum of £2 1s. on account, &c.; and that the prisoner on the several days aforesaid, in the year aforesaid, the said several sums of money respectively received by him on each of those days as aforesaid, feloniously did embezzle; and so the jurors do say that the prisoner, in manner and form aforesaid, feloniously did steal the said several sums of money, against the form of the statute. Upon demurrer, it was objected that the indictment was bad; 1st, because it contained three offences in one count; whereas the statute only authorised the inserting three offences in three different counts. 2ndly, that it did not shew that the three offences were committed within six calendar months; for although the receipt of the money might be within six calendar months, the embezzlement might not be within that period. 3rdly, that the indictment

every note in question, and either paid over or passed away in change every piece of silver in question, the judges thought *R. v. Furneaux*, R. & R. 335, in point. See 24 & 25 Vict. c. 96, s. 71.

(c) *R. v. Hall*, MS. Bayley, J., and R.

& R. 463. See *R. v. Keena*, L. R. 1 C. C. R. 113.

(d) *R. v. Crighton*, MS. Bayley, J., and R. & R. 62. *R. v. Johnson*, 3 M. & S. 540.

charged a joint stealing on three different days. And lastly, that there was only one *contra pacem* to three different offences. And the indictment was held bad. At common law it would have been bad, because the *contra pacem* could not be applied to one more than to another of the offences charged; and it was not rendered good by the 7 & 8 Geo. 4, c. 29, s. 48. Under that section it was necessary to allege that the embezzlements were within six calendar months; now the offence is not the receipt of the money, but the embezzlement of it, and in this case, although there was an averment that the moneys were received within six calendar months, there was no allegation that they were embezzled within that period; and therefore the indictment was bad. (e)

An indictment for embezzlement contained three counts: the first in the usual form; the second alleged that 'afterwards and within six calendar months from the day mentioned in the first count of this indictment, to wit, &c., the prisoner did by virtue of his employment receive, &c., and the said last mentioned money, to wit, on the day and year last aforesaid, feloniously did embezzle.' The third count was in the same form as the second. It was objected that the second and third counts were bad; as there was no allegation that the money was embezzled within six calendar months from the offence charged in the first count, and Cresswell, J., held the second and third counts bad, and confined the counsel for the prosecution to evidence on the first count only. (f)

Where the prisoner had been convicted upon the 39 Geo. 3, c. 85 (now repealed), upon an indictment, several counts of which charged him with embezzling bank-notes, and others with stealing bank-notes, in the common form of counts for larceny, it was assigned for error that this was a misjoinder, the counts for embezzlement on the statute and the counts for grand larceny being counts upon which a different judgment ought by law to be given. But the Court of King's Bench were of opinion that the counts for embezzlement might well be joined with the counts for larceny, considering that the statute had in fact made the offence of embezzlement described in it a larceny; and that, having so done, it had attached upon it all the properties and consequences attaching upon the crime of larceny. And Lord Ellenborough, C. J., said, 'If this were an offence of a perfectly different nature, I should have been of opinion that the judgment could not have been sustained. But the Act says, that the offender shall be deemed to have feloniously stolen, which is expressly constituting it a felony, and having so done the offender must, as in the like cases of felony, pray the benefit of clergy. But inasmuch as it is larceny, and therefore liable only to the punishment of seven years' transportation, this Act goes further, and gives power to transport for fourteen years. The Act does not alter the quality of the offence; he is to be deemed a felon, and as such must pray the benefit of clergy, just the same as if this enactment for an extended term of transportation had not been found in the statute. It makes no alteration in the judgment; the judgment is to pass against him as a felon; if he does not pray the benefit of clergy, it must be a judgment of death. And in a variety of cases, though the punishment

(e) *R. v. Purchase*, Gloucester Spr. Ass. 1842, MSS. C. S. G. S. C. C. & M. 617, Patteson, J., after consulting Cresswell, J. The judge expressed no decided opinion whether or not three offences could be included in one count, but said that the safer course was to have three separate counts. His Lordship cited a case of *R. v. Jeyes*,

where an indictment, exactly the same as the one in this case, except that the words 'within six calendar months' were not introduced, had been held bad by Lord Abinger, C. B., and himself, at Warwick. C. S. G.

(f) *R. v. Noake*, 2 C. & K. 620.

be different, yet counts may be joined.' And he further added, 'Here I think it does not appear that there is a misjoinder; because both are clergyable felonies; and the defendant is liable to the punishment incident to such a felony with an extension of it to the term of fourteen years.' (g)

As an indictment for embezzlement is so general as to afford no information to the prisoner of the precise sums embezzled, or of the persons from whom they were received, the prisoner is entitled to be furnished by the prosecutor with a particular of the charges intended to be made; and if the prosecutor refuse to give such particular, the court on motion, founded upon affidavit, will order a particular to be given, and such particular should contain the names of the persons from whom the sums of money are alleged to have been received. (h)

Upon an indictment containing one count for embezzling 11s. 10d., it appeared that the prisoner had received money in different sums, upon different days, amounting in the whole to the sum mentioned in the indictment, and it was held that the prosecutor must select one sum received on one particular day, and confine his evidence to that sum. (i)

**Evidence.** — Where on an indictment for embezzling three sums of money against a secretary of a friendly society, the books of the society kept by the prisoner were tendered generally in evidence by the prosecution; and it was objected that the evidence must be confined to the three entries relating to the three charges in the indictment, and the court overruled the objection, the conviction was affirmed. (j) So where an indictment for embezzlement charged three offences, and it appeared that the prisoner had made correct entries of a number of payments made by him in one week, but had cast up the whole £2 less than the correct amount; and in another week there was a precisely similar error of the same amount, and the same in a third week, and these were the cases charged in the indictment; Williams, J., held that a series of similar errors both before and after those which formed the subject of the indictment were admissible. It was clear that the defence to the three charges would be that these were mere errors in casting up the accounts, and such defence naturally arising, any lawful means might be resorted to whereby such defence might be anticipated, and proved to be ill-founded; and evidence which was admissible for such a purpose was not the less so because it tends to prove the commission of other felonies by the prisoner. (k)

On an indictment for embezzlement it appeared that the nature of the prisoner's employment had been inserted in a memorandum which was signed by both parties, and the prisoner took it away, and no notice to produce it had been given. Patteson, J., 'To substantiate this charge it is essential that the money should have been received by the prisoner by virtue of his employment. It appears there has been an agreement between these parties, in which the prisoner's duty was defined. If so, he received the money by virtue of an employment, the nature of which is contained in a written instrument. That instrument ought to have

(g) *R. v. Johnson*, 3 M. & S. 540.

(h) *R. v. Hodgson*, 3 C. & P. 422, Vaughan, B. *R. v. Bootyman*, 5 C. & P. 300, Littledale, J. The affidavit should state that the prisoner did not know the charges intended to be brought against him, that it was necessary for his defence to be furnished with the particular charges, and that he had applied to the prosecutor for a particular and been refused.

(i) *R. v. Williams*, 6 C. & P. 626, Arabin, Sergt., after consulting Gaselee, J., Alderson, B., and Gurney, B.

(j) *R. v. Proud*, L. & C. 97.

(k) *R. v. Richardson*, 2 F. & F. 343. Williams, J., had previously consulted Pollock, C. B., and refused to reserve the point.

been produced, or notice to produce it should have been given. There is nothing to take the case out of the general rule that you cannot give parol evidence of the contents of any written agreement, otherwise we should fall into that great difficulty, the fallacy of human recollection.' (l)

**Venue.** — Two cases occurred upon the 39 Geo. 3, c. 85, in which questions were raised as to the *county* in which the offence within that statute might be considered as having been so completed as to authorise a trial in such county.

In the first of these cases the prisoner was indicted in the county of Salop. The residence of the master was at Lichfield, in Staffordshire, where the prisoner served him in his trade. On a Saturday, both of them were at Shrewsbury; and the master having authorised a person named Beaumont to collect some debts for him at that place, returned home the same morning, leaving the prisoner at Shrewsbury to receive the money from Beaumont, and bring it to him at Lichfield the same night. The prisoner received the money from Beaumont about noon, and also a letter for his master which had been left at Beaumont's, but which did not relate to the money transaction. He left Shrewsbury soon after, but did not go to his master at Lichfield till the following evening. He then delivered the letter; and being asked about the money, he said he had not received any. A few days after, the master, in consequence of the information he had received by letter, charged the prisoner with having received the money, and another servant who had been at Shrewsbury on the Saturday, being present, told the prisoner that he had seen him receive money, but the prisoner persisted in denying that he had received any. Some time afterwards, the master, having received further intelligence, bid the prisoner go to Shrewsbury to clear himself. On the Saturday following the prisoner went to Beaumont, at his house in Shrewsbury, and desired him to make a search on the left-hand side of the room in which they had been; but no search was made, Beaumont telling him it was of no use to search, as he had received the money from him. The jury having found the prisoner guilty, a case was reserved upon two questions: first, whether, under this statute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county? and, secondly, whether, if further local proof were necessary, the subsequent conduct of the prisoner at Shrewsbury were not sufficient to obviate the objection, as being an Act in furtherance of the purpose of secreting or embezzling? A majority of the judges were of opinion that the conviction was right. Lawrence, J., thought, that embezzling being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire where he embezzled it by not accounting for it to his master; that the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the property. (m)

In the other case, the indictment charged the prisoner with embezzling

(l) *R. v. Clapton*, 3 Cox, C. C. 126. Patteson, J., said that Coleridge, J., had ruled in the same way several cases at Warwick.

(m) *Hobson's case*, 1 East, P. C. *Adenda*, xxiv., and R. & R. 56.

the sum of ten shillings, the property of his master, J. Barker. The prosecutor, who was a fishmonger in Drury-lane, in the county of Middlesex, sent his servant, the prisoner, with some herrings to a street in Black-friars road, in the county of Surrey, to a Mr. Stevens; telling him that he was to receive the sum of ten shillings for them. He went with the herrings about six o'clock in the evening, and delivered them to Mrs. Stevens, who paid him the ten shillings; after which he returned to his master, who asked him if he had brought the money; to which he replied, that he had not, for that Mrs. Stevens had not paid him. His master then paid him his weekly wages (it being on a Saturday), and he went away, being to return on Monday morning as usual; but he did not return, nor did he ever account for the money. It was contended that the prisoner was only liable to be indicted in Surrey, where the money was received; and the jury having found him guilty, this point was reserved for the consideration of the judges. The opinion of the judges was afterwards delivered by Lord Alvanley, C. J., who first referred to the foregoing case of *Hobson*, and then proceeded, 'In the present case no doubt can be entertained. The prisoner, being sent over Blackfriars-bridge into the county of Surrey, there received ten shillings for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars-bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, until he refused to account to his master. We are, therefore, of opinion that the prisoner was properly indicted in the county of Middlesex. (u)

Upon the trial of an indictment for embezzlement at the assizes for the town of Nottingham, it appeared that the prisoner was a travelling salesman, and his duty was to go into Derbyshire every Monday, and to sell goods and receive the money for them there, and to return with it to his master on a Saturday in Nottingham (where both he and his master lived). (o) The prisoner received the moneys mentioned in the indict-

(u) *Taylor's case*, 3 Bos. & Bul. 596.  
2 Leach, 974, R. & R. 63.

(o) This was stated in the argument.

ment on the 6th of May in Derbyshire, and did not return the following Saturday, nor at all to his master's. There was no evidence of what became of him till two months after, when he was met in Nottingham by his master, who asked him what he had done with the money, and he said he was sorry for what he had done; he had spent it; and, upon a case reserved upon the question whether the prisoner could be properly convicted on this evidence of embezzlement in the town of Nottingham, the judges held that there was evidence to go to the jury that the embezzlement was committed in the town of Nottingham. (*p*)

It should be observed that by the 7 Geo. 4, c. 64, s. 12, where a felony is begun in one county, and completed in another, such felony may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

(*p*) *R. v. Murdock*, 2 Den. C. C. 298. Lord Campbell, C. J., thought there was evidence that the prisoner had spent the money in Nottingham. Parke, B., was of opinion 'that the prisoner's not returning and accounting to his master in Nottingham, as it was his duty to do, was equivalent to embezzlement in Nottingham. The mere fact of his spending the money does not itself constitute embezzlement. There must be a refusal to account, or a non-accounting,' citing *R. v. Taylor*, *supra*. Maule, J., differed from Parke, B., in the reasons given by him, and thought 'that the offence was committed when, two months after the receipt of the money, the prisoner met his master in Nottingham, and being asked by his master respecting the money did not account to him for it. The offence was then complete, and the prisoner became liable to be indicted in Nottingham. The mere omission to account, if the prisoner had never returned to Nottingham, would not have rendered him liable to be tried in Nottingham. Suppose that he had gone to Derbyshire,

and stayed there six months, and never returned to Nottingham, he would, according to my Brother Parke's view, if apprehended in Derbyshire, have been indictable in Nottingham. I cannot think that can be so. Some of the cases say that non-accounting is sufficient evidence of embezzlement; but in all these cases the prisoner is in the county where he breaks his duty, and completes the offence of embezzlement by omitting or refusing to account.' Talfourd, J., was of opinion 'that the offence was completed when the prisoner refused to account to his master in Nottingham.' The case was argued for the Crown, but not for the prisoner. In *R. v. Davison*, 7 Cox, C. C. 159, on this case being cited, Alderson, B., said, 'Where there is no evidence of fraudulent embezzlement, except non-accounting, the *venue* may be laid in the place where the non-accounting occurred; because the jury may presume that there the fraudulent misappropriation was made; but this cannot apply where there is a distinct evidence of the misappropriation elsewhere.'

## APPENDIX E.

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### *Decisions on Repealed Statutes, relating to Embezzlement by Bankers, Brokers, etc.*

**Agency.** — The defendant was indicted under the 52 Geo. 3, c. 63 (now repealed), for unlawfully negotiating and applying to his own use a bill of exchange deposited with him as agent for the owners without any authority to pledge, for the purpose of getting it discounted. The defendant was not a bill-broker, and was to receive no commission for discounting the bill; but was in the habit of discounting bills for the owners of the bill, and they were in the habit of doing so for him. The bill had been drawn by the owners by the advice of the defendant, who informed them that he had the means of getting it discounted: and it was delivered to him for that purpose, and he deposited it with a creditor of his own as a collateral security. It was objected that the defendant was not an agent within the meaning of the statute; that his offices were gratuitous, and not performed in his regular business; it was replied that the words included agents of any description whatsoever, and that a gratuitous agency was an agency of some description. Abbott, C. J., ‘We must endeavour to ascertain the intention and object of the statute; and that appears to have been the punishment of persons who, in the exercise of their functions, receive securities and afterwards embezzle them. It is true that, for certain purposes, a friend is an agent, but can he be called such an agent as the Legislature had here in view? Now here the parties are merely friends, accustomed to accommodate each other, and taking the transaction as one between such friends mutually aiding each other, can it be said to fall within the operation of an Act passed with such an intention and object? The words, “any description whatsoever,” are certainly very comprehensive, but if it had been intended to comprehend within the enactments of the statute deposits for any purposes (such, for instance, as safe custody), all the preceding words, “banker, merchant,” &c., would have been unnecessary, and might have been omitted. It was, therefore, intended to confine the operation of the statute to persons acting in the discharge of their functions. I entertain a very clear opinion on the point.’ (a)

An indictment on the same statute alleged that the defendant had received the sum of £10 8s. as an agent for safe custody, and had embezzled the same. The defendant was the proprietor of a weekly saving bank, in which there were 130 members; each member paid in weekly the sum of 2s. 1d., the penny being allowed to the defendant as a remuneration for her trouble; at the end of each week a lottery took place, in which there were 129 blanks and one prize, the holder of which prize received the sum of £13, the total amount of each week’s subscription; all parties then went on with their subscriptions until 130

(a) R. v. Prince, M. & M. 21, S. C. 2 C. & P. 517.

weeks had gone round, and each member had received the £13 prize. The prosecutrix was one of the members, and had paid in subscriptions to the amount of £10 8s., without ever obtaining the prize, when the defendant suddenly absconded, and the deposit had never been forthcoming. It was objected, first, that the defendant could not be considered as an 'agent' within the meaning of the Act, no such establishment as the one managed by the defendant being in existence at the time of the passing of the law; second, that the money mentioned in the indictment was not in the keeping of the defendant 'for safe custody,' within the meaning of the Act; third, that the indictment averred that the defendant had received the sum of £10 8s. of the prosecutrix, whereas the evidence proved that she never had at one time received or had in her possession more than 2s. 1d. belonging to the prosecutrix. J. A. Park, J., said, that 'the three objections were, in his opinion, clearly fatal to this indictment; there did not seem to be any such agency or keeping for safe custody on the part of the defendant, as was contemplated by the statute; and with regard to the receipt of the money, the evidence was decidedly at variance with the averment upon that point.' (b)

**Conditional authority.** — An indictment on the same repealed statute alleged that A. Hubert deposited with the defendant two exchequer bills for £500 each, with an order in writing for the defendant to invest the sums of money, to which the said bills related, in the purchase of government funds, and that the defendant unlawfully applied the said bills to his own use. (c) The written order was in terms 'for the purpose and with the intent of your investing it or the proceeds, in case of any unexpected accident, in the government funds, at a time when you shall judge it desirable to buy in.' Lord Tenterden, C. J., 'This direction in writing does not sustain the allegation in the indictment, for the allegation is that the defendant was directed to invest absolutely and unconditionally; and the direction proved is only to invest, in case of any accident happening to Mrs. Hubert. Now no accident has happened, and under these circumstances the defendant cannot be liable to punishment for not investing. The defendant must be acquitted.' (d)

**Cessation of authority.** — On an indictment under the second clause of the 7 & 8 Geo. 4, c. 29, s. 49, it appeared that the prosecutor, a miller, and the defendant, a corn-factor, had had dealings for many years, in the course of which the prosecutor had been in the habit of consigning goods to the defendant for sale on commission. On the 1st of January the prosecutor consigned to the defendant eighty-eight bags of beans for sale on commission; and they were received by the defendant on the 4th, and a delivery order signed: on the 7th the prosecutor verbally ordered the defendant not to sell any of the stock, and on the 14th repeated the same order. On both occasions he went to the defendant's warehouse, took samples, and was furnished by the defendant with an account of the stock at the wharf, which included all the beans, except six bags which had been sold on the 6th. On the 21st the prosecutor sold the whole of the stock to a third person, and on going to the defendant's warehouse with a delivery order, he was informed that the defendant had sold twenty bags on the 18th, but no account of that sale had been rendered. Maule, J., held that, although originally the defendant had authority to sell, yet if the jury were satisfied that that authority had

(b) R. v. Mason, D. & R., N. P. 22.

(c) There was another count stating

the order to be to invest in 'government securities.'

(d) R. v. White, 4 C. & P. 46.



been distinctly countermanded before the sale, the offence was complete. (f)

**Valuable security.**—Where an indictment alleged that the prisoner was intrusted with a certain valuable security, to wit, a certain amount of government stock, to wit, the sum of £9000 in the new three per cent. annuities, placed in the Bank of Ireland, and transferable in the books of the governor and company of the said bank, for the special purpose that the said stock should be exchanged for two portions of two other stocks; it was held that the case was not within the 9 Geo. 4, c. 55, s. 42, as such stock was not a valuable security within that clause. (g)

The prisoner was indicted, under the 20 & 21 Vict. c. 54, s. 1, for misappropriation as trustee of certain moneys, which in some counts were alleged to be held for a public purpose, and in others for the benefit of certain persons who had deposited them in the Bilston Savings' Bank. The prisoner had for several years acted as one of the trustees of the said savings' bank. In 1849 he was appointed the treasurer of the said savings' bank, and continued to act as such till 1861: on this appointment he executed a bond with sureties to the Comptroller-General of the National Debt Office. The prisoner was secretary to the bank during the same period. In 1844 certain rules for the management of the bank were duly certified. (h) The prisoner whilst he was trustee, treasurer, and secretary of the said bank, signed five several weekly accounts; they were all signed by him as treasurer and secretary. The jury found that the prisoner was a trustee of the said savings' bank in the years 1859 and 1861, and that whilst he was such trustee of the said bank he appropriated to his own use certain sums which in those years had been paid into the said bank whilst he was such trustee with the intent to defraud, as stated in the indictment; and the question was reserved whether, upon the facts so found and those stated in the case taken together with the said rules, the prisoner was a trustee within the meaning of the 20 & 21 Vict. c. 54, s. 1, as described in any count of the indictment; and it was contended that the prisoner was not a trustee within the meaning of the Act; for, although he was called a trustee, yet the real relation existing between him and the depositors was that of debtor and creditor only; but it was held that there was a trust to receive the money and hold it for the benefit of the institution, and so long as it remained in his hands he held it entirely for the benefit of the depositors. It was further contended that it was not a trust for a public purpose; and the Court inclined to that opinion; for the word 'public' must be understood to mean such a purpose as would be recognised as public in a court of law; but the trust here was for 'other persons.' From the whole scope of the rules it was plain that the trustees did not hold the funds in their hands for their own individual benefit, but for the benefit of the depositors. Only trustees and depositors were spoken of in the rules as composing the institution. The money, however, did not belong, except in a legal sense, to the trustees; it belonged to the institution,

(f) *R. v. Gomm*, 3 Cox, C. C. 64.

(g) *R. v. Lanauze*, 2 Cox, C. C. 362.

(h) These rules, so far as they were material, were made part of the case. By rule 8, 'The several sums of money belonging to this institution, which the trustees thereof are authorised to invest, under the 9 Geo. 4, c. 92, or under the rules of this institution, shall be paid into and invested in the Bank of England, in the names of the Commissioners for the reduction of the

National Debt, according to the provisions of the said Act, enabling the trustees to make investments in the names of the said Commissioners, and no such sum of money shall be paid or laid out by the trustees in any other manner, or upon any other security whatever, except such sums of money as from time to time shall necessarily remain in the hands of the treasurer, to answer the exigencies thereof.'

and by the operation of the rules the trustees held it for the benefit of the institution as distinguished from themselves, that is, for the benefit of the depositors. It was further contended that the trust was not created by such an instrument in writing as was contemplated by the Act; but the Court were clearly of opinion that it was. These rules were *ejusdem generis* with a deed or will. They gave authority to receive the money, and pointed out how it was to be invested and applied. Whatever shape an instrument may assume, if it authorise a trustee to receive money upon certain trusts, and points out the mode of investment, and generally declares the purposes to which the property is to be applied, it is an instrument *ejusdem generis*, that is, having the same effect, as a deed or will. If these trusts had been declared by a deed instead of by these rules, no one could have doubted that such a breach of them as has occurred here would have been within the Act. In this case, instead of executing a deed, the prisoner accepted the office of trustee under the rules. There must be an express trust created by some writing; but where that exists the case is brought within the Act. It was further urged that the prisoner held the money as secretary only; the Court thought that question of little moment; for as secretary he was bound to hand over the money to the treasurer. But the jury had found that he held it as trustee, and seeing that he was secretary, treasurer, and trustee, there was good ground for saying that their finding was right. (i)

(i) *R. v. Fletcher*, L. & C. 180. 31 L. J. M. C. 206.

## APPENDIX F.

### *Decisions on Statutes relating to Embezzlement and Frauds by Bankrupts.*

**Married woman.** — A *feme covert* on her own petition, in which she stated herself to be a widow, was adjudicated bankrupt, and she was afterwards indicted for concealment and embezzlement of her property with intent to defraud her creditors (24 & 25 Vict. c. 134, s. 221, par. 3, now repealed), and two other persons were also indicted for aiding her. The examinations and answers of the three defendants in bankruptcy were given in evidence in support of the prosecution. No caution was given to them by the commissioner on such examination, and they did not object to answer on the ground that their answers might tend to criminate them. Held, that, although the wife was adjudicated a bankrupt, the property belonged to her husband, and that the property was not proved as laid in the indictment. (a)

**Infant.** — Where, a defendant was indicted for refusing to give the commissioners an account of his effects, he was acquitted on the ground that he was an infant at the time the debts were contracted, and could not, therefore, be a bankrupt for debts which he was not obliged to pay. (b)

The following points were understood to have been decided in a case in which the defendant was charged by the indictment with concealing his effects to the amount of £20 with intent to defraud his creditors: first, that an averment in an indictment for felony, that a commission issued under the great seal of *Great Britain*, was sufficiently proved by evidence that it issued under the great seal of Great Britain and Ireland; secondly, that a bankrupt could not set up a prior secret act of bankruptcy to invalidate his commission; and, thirdly, that a creditor might prove the act of bankruptcy before the commissioners. (c)

**Locus pœnitentiæ.** — A bankrupt was indicted for not delivering up certain account books, and it appeared that the final examination had never been completed, but that it had been adjourned *sine die*; it was held that he must be acquitted, for until the final examination was concluded, he had a *locus pœnitentiæ*, and might deliver up all his books correctly. (d) But this case was overruled. In defence to an action the defendant proved his bankruptcy in August, and that he had obtained his certificate; and the plaintiffs, in order to shew that the certificate was void, proved that in September the bankrupt had concealed a large quantity of his goods; but the matter got known, and the bankrupt disclosed all the facts to the commissioners before his last examination was passed; and it was held that the bankrupt had been guilty of concealing

(a) *R. v. Robinson*, 10 Cox, C. C. 467, 36 L. J. M. C. 78.

(b) *R. v. Cole*, 1 Ld. Raym. 443. *Belton v. Hodges*, 9 Bing. 365. 1 Hawk. P. C. c. 49. *Fraudulent Bankruptcy*, s. 7.

(c) *R. v. Bullock*, 2 Leach, 996. 1 Taunt. 71. 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

(d) *R. v. Walters*, 5 C. & P. 138. J. A. Park, J.

his goods within the 5 & 6 Vict. c. 122, s. 32 (now repealed); for under that section 'the bankrupt would be punishable as a felon, if, with intent to defraud and before his final examination, he does an act of concealment, and there would be no *locus pœnitentiæ*. (e) 'If the words "remove" and "embezzle" be read in conjunction with the word "conceal," the idea of a *locus pœnitentiæ* would never occur; for though a person may continue to conceal, it is difficult to see how he can continue to remove or continue to embezzle.' (f) And the preceding case was overruled. (g)

**Indictment.**—An indictment under 24 & 25 Vict. c. 134, alleged that the prisoner was duly adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, and that, having been so adjudged bankrupt, he, upon his examination in the said Court, with intent to defeat the rights of his creditors, did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods, and did not as part of his said property (not being part fully and *bonâ fide* sold, &c.) fully and truly discover, to the best of his knowledge and belief, how and to whom, and for what consideration, and when he had disposed of, assigned or transferred such part thereof, to wit, £1000 sterling, 1000 sacks of corn, 1000 sacks of flour, ten horses, &c., being part of his said property; and upon error it was objected, 1, that if the 24 & 25 Vict. c. 134, s. 221, No. (2) created two offences, the count was bad for duplicity. If the count proceeded on the first part of the clause, it was bad for not describing the offence, with the certainties of number, time, and value. 2. The second part of the count was bad for not alleging that the prisoner disposed of any part of his property. Lastly, the indictment did not shew that the examination of the prisoner had terminated, and until then the offence was not complete. But it was held that the indictment was good. Supposing the indictment charged two offences, this was no objection upon error; and supposing there was a want of certainty, the objection was cured after verdict by the 7 Geo. 4, c. 64, s. 21, as the offence was sufficiently described in the words of the statute. *Quære* whether the offence under the 24 & 25 Vict. c. 134, by a bankrupt in not discovering his property on examination is complete until the examination is ended; but whether that be so or not, it was held that this indictment was sufficient. (h)

It appears to have been holden, that where an indictment against a bankrupt for concealing property did not, in stating the property, sufficiently specify particular parts of it, though it might have sufficiently specified others, and those specified might have been of the necessary value, such indictment was bad, on the ground that the statement as to the parts not specified tended to embarrass the prisoner. And the decision appears to have proceeded upon the principle that where value is essential to constitute an offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having only ascribed that value to all those articles collectively. (i)

The indictment against the prisoner, after stating the trading, &c., alleged that the prisoner surrendered, and was then duly sworn before the commissioner, and duly submitted himself to be examined, and 'that the prisoner at the time of his said examination was possessed of a certain real estate, to wit,' &c., describing it, and that the prisoner, 'at the

(e) Per Parke, B.

(h) *Nash v. R.* 4 B. & S. 935.

(f) Per Alderson, B.

(i) *R. v. Forsyth*, R. & R. 274.(g) *Courtivron v. Meunier*, 6 Exch. R.

time of his said examination, being so sworn as aforesaid, feloniously did not discover when he disposed of, assigned, and transferred the said real estate.' The prisoner was convicted, and, upon a case reserved, it was contended, first, that the indictment was bad because it nowhere alleged that there ever was an examination of the bankrupt. Secondly, that the allegation that he did not discover when he disposed of his estate was repugnant. And the judges held the indictment bad on the second objection, for the charge was that he did not discover when he disposed of an estate which he was alleged to be then in possession of; and, though no decision was pronounced on the first objection, Pollock, C. B., observed, 'I incline to think that "upon examination" means, upon questions being put to him about that specific thing which forms the subject of discovery. It is quite consistent with all the averments of this indictment that he may have been sworn, and the examination may have been partially gone through, and adjourned without any questions having been put to the bankrupt about his real estate.' (j)

An indictment on the 12 and 13 Vict. c. 106, s. 251, for embezzling part of his personal estate, alleged that the prisoner committed an act of bankruptcy by being unable to meet his engagements with his creditors, and by filing his petition for adjudication against himself; and it was held to be bad, as it did not allege a valid act of bankruptcy, there being no allegation that a declaration of insolvency preceded the petition. (k)

An indictment alleged that at the time of committing the offence hereinafter mentioned, to wit, on the 23rd day of November, &c., the prisoner was a trader, and that the prisoner, for more than six months next immediately preceding the time of filing the petition for adjudication in bankruptcy, resided and carried on business within the jurisdiction of the Court of Bankruptcy, and that the prisoner, so being such trader and whilst he so resided and carried on his business as such trader, afterwards, to wit, on the 23rd day of November, filed with the registrar of the Court a declaration in writing, in the form in the schedule to the statute, that he was unable to meet his engagements with his creditors; and that the prisoner, whilst he so resided and carried on his said business, to wit, on the said 23rd day of November, and within two months from the filing of the said declaration, presented his petition for adjudication of bankruptcy against himself as such trader. It then set out the petition, but did not aver that it was attested by the solicitor for the bankrupt. It was urged that there was no averment that the prisoner resided or carried on business in the district 'for six calendar months immediately preceding the time of the filing' of the declaration of insolvency. That there was no averment that the petition was in the form in the schedule to the Act, or that it was properly attested. But the indictment was held good after verdict. Where material matter is laid under a *videlicet*, it must be taken after verdict to have been proved as laid, and therefore, if the 23rd of November was material, it must be taken to have been proved that the declaration was filed on that day. (l)

(j) *R. v. Harris*, 1 Den. C. C. 461. In the course of the argument, Pollock, C. B., said to the counsel for the prisoner, 'the force of your argument is that the bankrupt may have surrendered, but had no questions put to him. Is he then to discover all his real and personal estate, at the peril of committing a felony, by mere silence, although not called upon to speak?'

(k) *R. v. Massey*, L. & C. 206. The

Court seem to have been of opinion that if the indictment had merely alleged that the prisoner had been duly adjudged bankrupt it might have been sufficient; and also that, if the indictment had stated that the prisoner had committed an act of bankruptcy by filing a declaration of insolvency, it would have been good.

(l) *R. v. Scott*, D. & B. 47. No remark was made on the other objections.

An indictment on the 6 Geo. 4, c. 16, s. 112 must have alleged that there had been a trading by the party, a petitioning creditor's debt, and that he became bankrupt, and it was not sufficient to allege that a commission of bankrupt was duly awarded, by virtue of which the commissioners found that the party became a bankrupt. (*m*)

On an indictment on the 12 & 13 Vict. c. 106, s. 253, against the prisoner for, within three months next before the filing a petition in bankruptcy, obtaining goods on credit under the false pretence of carrying on business in the usual course of trade, it was contended that the word 'bankrupt' in that section meant a person duly adjudicated a bankrupt; and it was therefore necessary to prove the trading, petitioning creditor's debt, and the act of bankruptcy, *R. v. Jones*. (*n*) It was answered that under the words of sec. 253, evidence of the adjudication alone was sufficient. That *R. v. Jones* was decided on the 6 Geo. 4, c. 16, s. 112, the words of which were different; and *R. v. Hilton* (*o*) was relied upon; but, on a case reserved, it was held on the authority of *R. v. Jones* that it was necessary for the prosecutor to prove all the ingredients of the bankruptcy. (*p*)

An indictment against a bankrupt for concealing part of his personal estate must, before the 14 & 15 Vict. c. 100, have concluded 'against the form of the statute,' or it was bad in arrest of judgment. (*q*)

Upon an indictment charging the bankrupt with not submitting to be examined, it was decided, that if a bankrupt surrendered to his commission, and at the time of such surrender refused to answer particular questions concerning his property, but took the oath, and assigned, as his reason for not answering, that he intended to dispute the commission, the refusal to answer such question was not a capital offence within the statute. (*r*)

Upon an indictment under an act against a bankrupt for not surrendering at the Bankruptcy Court at Birmingham, which was found and tried at the Worcestershire assizes, it appeared that the prisoner kept an inn at Stourport in Worcestershire, and that he had absented himself therefrom; but it was proved that Birmingham is in the county of Warwick, and is a borough and not a county of itself. Maule, J., 'The 38 Geo. 3, c. 52, s. 2, only gives a power to prefer an indictment in the adjoining county, where the offence was committed in a city or town corporate, which is a county of itself. The place where this offence was committed was certainly Birmingham. Assuming the facts to be as alleged, as soon as three o'clock came, and the prisoner did not sur-

(*m*) *R. v. Jones*, 4 B. & Ad. 345.

(*n*) *Supra*.

(*o*) 2 Cox, C. C. 318.

(*p*) *R. v. Lands, Dears. C. C. 567*. The following points were also raised, but no opinion expressed on them. 1. That by the use of the word 'bankrupt' in sec. 253, the Legislature must have intended a person who had committed an act of bankruptcy before obtaining credit or concealing the goods. 2. There was no proof of any order or request to send any goods within three months next before the adjudication, and it was contended that the mere receiving of goods within that time, in consequence of prior orders, did not constitute the offence. 3. There was evidence of removing and concealing within three months goods ordered before, but received within the three months; and it was contended that

this did not constitute the offence of removing or concealing within that branch of the clause, as it applied only to cases where goods had been obtained in such manner as to fall within the former branch against obtaining goods on credit.

(*q*) *R. v. Radcliffe*, 2 Moo. C. C. R. 68. S. C. 2 Lew. 57, where the indictment is set out at length. It was further objected that the indictment only alleged that the fiat was 'issued,' not that it was 'duly issued,' but Williams, J., held that the word 'duly' was better omitted, as he was bound to presume that it was duly issued, as it was issued by competent authority. This point also was reserved, but not decided by the judges. See 14 & 15 Vict. c. 100, s. 24.

(*r*) *R. v. Page*, R. & R. 392.

render at Birmingham, he committed the offence there. The prisoner therefore must be acquitted.' (s)

The prisoners were indicted under the 12 & 13 Vict. c. 106, s. 251, for that they, having been adjudged bankrupts, feloniously embezzled a part of their personal estate, to the value of £10, to wit, certain bank notes and moneys, with intent to defraud their creditors. The adjudication was on the 21st of June; on the 17th of that month one of the defendants had received more than £5000 in Bank of England notes, and the same day both prisoners crossed over to Ostend, and were afterwards seen together in various towns in Belgium; from some of which, after the adjudication, some of the bank notes were sent over from various mercantile houses in Belgium. The prisoners returned to England in August, and on one of them was found a book containing entries of trifling sums, in foreign coin, expended after their arrival in Belgium. There was no proof when or where the notes were disposed of. It was held that, if the notes were exchanged in England, the bankrupts had not committed any offence in respect of them, as they were then not the property of the assignees; and if they were exchanged abroad after the adjudication, though the notes and foreign coin for which they were exchanged would be the property of the assignees, yet the offence was not triable in England, for the offence was complete when the misappropriation took place; and though non-accounting for money is evidence of a fraudulent misapplication, it is not itself the offence of embezzlement. It was also held, that 'moneys' in the indictment must be taken to mean English money; and Alderson, B., expressed great doubt whether spending the money from day to day in small sums, not amounting in any instance to £10, could be considered to be within the clause. (t)

To an indictment under the 7 Geo. 4, c. 57, s. 70, for fraudulently omitting ten chairs, ten tables, two carts, &c., the prisoner pleaded *autrefois acquit*; and the former indictment was the same as the present, except that the two carts mentioned in the present indictment were not specified in the former one; it was, however, submitted that the two charges were substantially the same; the charge in each indictment was, that the prisoner had fraudulently sworn to a schedule which did not contain a true enumeration of his goods. Patteson, J., 'I cannot say that the plea of *autrefois acquit* is, in strictness, a good defence to the whole of this indictment. The prisoner may have fraudulently omitted out of his schedule the goods mentioned in this indictment, which were not mentioned in the last; and, in point of law, I think a prosecutor may prefer separate indictments for each such omission. But though the present indictment be in point of law maintainable, I cannot help saying that, excepting under very peculiar circumstances, I think such a course ought not to be pursued; and if the case goes on, I shall strongly advise the jury to acquit the prisoner, unless they think that the goods, now for the first time brought forward, were omitted out of the schedule under circumstances essentially different from the others. (u)

Upon an indictment under the 1 & 2 Vict. c. 100, s. 99, against an insolvent for wilfully and fraudulently omitting sums of money from

(s) R. v. Milner, 2 C. & K. 310. In R. v. Davison, 7 Cox, C. C. 158, on this case being cited, Alderson, B., said 'That is an act of omission, and can have no other locality except the place where the thing ought to have been done.'

(t) R. v. Davison, 7 Cox, C. C. 158. See R. v. Raudnitz, 4 F. & F. 65.

(u) R. v. Champneys, 2 M. & Rob. 26. See R. v. Moody, 5 C. & P. 23.

his schedule, it was opened that the omissions were those of certain sums of money which had been received by him prior to the date of the vesting order, and which, in accordance with the 1 & 2 Vict. c. 110, s. 69, should have been inserted in the special balance-sheet which had been filed by the defendant; there, however, they had been omitted. Lord Abinger, C. B., held that the indictment would not lie under the circumstances. The special balance-sheet was, as it were, a mere memorandum of the insolvent's receipts and disbursements for the guidance of the Court, and a man should not be held thus criminally responsible for errors therein. The consequence of such an interpretation of sec. 99, as would be necessary for the purpose of this indictment, would be to make a highly penal clause apply to cases possibly of no intentional fraud, and of comparatively trifling inaccuracy. The section applied only to cases where the omission would affect the interests of the creditors, and not where it is a mere omission of money received and subsequently expended by the insolvent. (*v*)

An indictment under the 6 Geo. 4, c. 16, s. 112, alleged that the prisoner 'feloniously did not, before three o'clock upon the forty-second day after notice of the fiat, &c., surrender himself to the commissioners, but wholly neglected and omitted to do so;' and it was held that the indictment was bad for omitting to allege that the prisoner intended to defraud his creditors, as the words 'with intent to defraud his creditors' overrode the whole of sec. 112 of the 6 Geo. 4, c. 16. (*w*)

The prisoner was indicted, under sec. 252 of the 12 & 13 Vict. c. 106, for having made a false entry in a book of accounts with intent to defraud his creditors. He had kept a book, in which he entered his receipts and payments, and at the time of his bankruptcy that book shewed receipts to the amount of £4,150 19s. 7d., and payments to the amount of £3,801 10s., leaving a deficiency of £349 9s. 7d. to be accounted for. Being uneasy as to accounting for this deficiency he made a false book, in which he entered false amounts opposite many of the items of receipts and payments, so as to shew receipts by him to the amount of £2,668 5s. and payments to the amount of £3,172 1s. 7d. The jury found that this was done by him with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him; and, upon a case reserved upon the question whether the false entries were, upon the facts found by the jury, made 'with intent to defraud his creditors' within the meaning of the section, it was held that the conviction could not be sustained. It may be that, in doing this, the bankrupt intended to defeat the object of the bankrupt laws; but that alone is not sufficient to constitute an indictable offence under this section. It must also appear that the intent was to defraud the creditors, and the jury have expressly negatived any intention to defraud them; and upon the whole finding of the jury, therefore, it is impossible that this conviction can be sustained. (*x*)

On an indictment under the 12 & 13 Vict. c. 106, s. 251, against the

(*v*) *R. v. Marner*, C. & M. 628.

(*w*) *R. v. Hill*, 1 C. & K. 168, Lord Denman, C. J., after consulting Patteson, J. *R. v. Hilton*, 2 Cox, C. C. 318. Pollock,

C. B., and Cresswell, J., after time taken to consider the question.

(*x*) *R. v. Ingham*, Bell, C. C. 181. See *R. v. Mamser*, 4 F. & F. 45.



prisoners for not surrendering, the jury found that the bankrupts left this kingdom on the 17th of June, believing that they would be made bankrupts, and that they stayed abroad with the intent to defraud their creditors by depriving them of their rights to examine the bankrupts and to make them responsible. And, on a case reserved, the following points were decided:—1. On the petition there was an alteration of the description of Westham-lane, the place of the distillery of the bankrupts, from Middlesex to Essex, and on the depositions there was the same alteration, and a name was interlined. On the adjudications there were alterations from Middlesex to Essex, from the 20th to 21st of June, and from the name of Holroyd to that of Fonblanque as commissioner. But all these papers were produced, sealed with the seal of the registrar of the Court; and some of the alterations were attested by the initials of the registrar, and evidence was given, after they had been read in evidence, which satisfied Erle, J., that all the alterations were made while the papers were in the course of formation and before they were used as complete. It was objected that these alterations rendered those documents inadmissible, and especially the deposition, as it was not stated that the alteration in it was made before it was sworn. But it was held that they were rightly admitted; for the rule is clear that, wherever an alteration in a document would involve a charge of fraud or misconduct, the presumption is against such fraud or misconduct having been committed. It must be presumed, therefore, that the deposition when sworn was in the same state in which it was when produced, until the contrary were proved. (y)

2. The petition was assigned by ballot to Goulburn, commissioner; but the subsequent proceedings were before either Holroyd, commissioner, or Fonblanque, commissioner; and it was objected that the proceedings could only be taken before Goulburn, commissioner, unless the Lord Chancellor otherwise ordered. But it was held that each commissioner had the full powers of a court, and that they could change the duties among them without leave of the Chancellor. (y)

3. The duplicate adjudication was left at the counting-house, being the usual and last known place of business of the bankrupts, on the 21st of June; all the papers and property of the bankrupts were thence removed, and the place was locked up on behalf of the assignees on that day; but this paper was left, and was seen there a fortnight after this removal. On the 26th of July the summons to appear was left at the same counting-house, which was unlocked for the purpose, and then locked up again. Before the trial the counting-house was searched, and neither of these papers was found. Notice to produce these papers was served on the prisoner in prison forty-eight hours before the trial began. Erle, J., admitted the duplicate originals on the ground that no notice to produce was necessary, and, if it was, that the search for the originals and the notice to produce were sufficient; and it was held that the search was sufficient. The documents were left at the last known place of business of the bankrupts; search was made at that place, and the documents were not found; the presumption, therefore, was either that the bankrupts had got them, or that they had got into the hands of some person to whom they were of no importance, and who, therefore, had destroyed them. If you do not find a document in the ordinary place of deposit, or in the hands of the person who has an interest in preserving it, it may be presumed to be lost. (y)

4. In the preceding proceedings the bankrupts were described as of Westham-lane, Essex; but in the *Gazette* they were described as of

Westham-lane, Middlesex; and it was held that this was merely *falsa demonstratio*, which did no harm, and no one could doubt that the bankrupts well knew who they meant by the description. (z)

5. The *Gazette* required the surrender on the 7th of July and on the 19th of August. The summons stated that Holroyd, commissioner, required the bankrupts to appear before Goulburn, commissioner, on the 7th of July and 19th of August; but it was not left at the counting-house in Mincing-lane till the 27th of July; it was objected that Holroyd, commissioner, had no authority to issue the summons, and that the service after the 7th of July was insufficient; but it was held that the first ground of this objection was disposed of by the ruling on the second point; and, looking at secs. 104 and 251, it was clear that the bankrupt was to have notice to appear and dispute the adjudication, or surrender on the day limited for that purpose; and the day limited was the last of the two days named in the notice. (x)

6. As Goulburn, commissioner, did not sit on the day on which the bankrupts were summoned to appear, it was objected that the bankrupts could not surrender to him; but it was held that this had been disposed of by the ruling on the second point.

7. Only one duplicate adjudication in bankruptcy, and only one duplicate summons to surrender, was served, and as the adjudication was against two jointly, it was urged that two duplicate adjudications and two notices ought to have been left at the counting-house; and it was held that there ought to have been a separate and distinct notice for each bankrupt. With respect to personal service, it was quite clear that when that mode of service was resorted to, there must be a separate notice served on each bankrupt, and so in service at the usual or last place of abode, it must be a service at the last place of abode of each; and the same construction applied to the service at the usual place of business. (a)

8. As the bankrupts had no knowledge of the adjudication, it was urged that their going away must be taken to be merely to avoid process: the jury had not found any intention to defraud after knowledge of the bankruptcy. But it was held that knowledge was not required by the statute: if the notice to surrender was duly served, and the bankrupts did not surrender pursuant to it, the offence was committed. It was not necessary to decide whether the words 'with intent to defraud' in sec. 251 overrode the entire section; for the fact of the defendants having absconded with the intent found by the jury, was quite sufficient to prove the intent to defraud. (b)

The prisoner was indicted on the 12 & 13 Vict. c. 106, s. 253, for fraudulently obtaining goods within three months before the fiat or the filing of his petition. The prisoner had filed a petition for arrangement with his creditors under the control of the Court, under sec. 211 of the Act, stating his inability to meet his engagements, and praying protection whilst proposals to his creditors were being carried into effect. This proposal not being assented to by a creditor, and cause being shewn, the Court adjudged the petitioner a bankrupt, and adjourned the proceedings into the public court, under sec. 223 of the Act. It was objected that, under sec. 253, there must be a petition for adjudication of bankruptcy to support the indictment, and here there was no such petition, but a petition for an arrangement to avoid bankruptcy; and Martin, B., held that the objection was good. (c)

(z) *R. v. Gordon*, Dears. C. C. R. 586.

the points except the 7th were decided by five judges.

(a) The decision of this point was by seven judges against three.

(c) *R. v. Powell*, 9 Cox, C. C. 184.

(b) *R. v. Gordon*, Dears. C. C. 586. All

**Obtaining goods on credit.**—The prisoner was indicted under the 24 & 25 Vict. c. 134, s. 221, for illegally pledging certain watches which he had obtained on credit within three months next before the filing of his petition. The prisoner wrote to Messrs. Cohen to send him some watches on approval, and they sent him £300 worth, and he acknowledged the receipt of them, said he would keep them all, and pay for them by bills. This Messrs. Cohen peremptorily refused, and the prisoner sent back £100 worth, retaining the remainder, and offering bills for them; this offer was refused, and Mr. Cohen went to the prisoner on the 17th of October, and he then agreed to pay for the watches £70 in cash, £100 in bills, and the rest in cash as soon as he could. Mr. Cohen swore distinctly that the watches were on approval only until the 17th of October; but it appeared that they had in fact been pledged on the 16th. Martin, B., ‘Then there is an end of the case. The bankrupt has been a day too quick for you. The goods had not, at that time, been obtained on credit.’ (d)

The prisoner was indicted on the 12 & 13 Vict. c. 106, s. 253, for having, within three months next before his bankruptcy, under false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtained on credit from J. Fordati a quantity of silk, with intent to defraud him of the same. A broker proved that, having obtained a sample of silk from Fordati, he went and shewed it to the prisoner; he knew that the silk was well adapted for the manufacture of an article which the prisoner was then making, and he told him he was sure the silk would just suit his purpose. The prisoner examined the sample very minutely, and said it was very good, and he should have no objection to purchase it; he said he wanted it to make that particular article. The price first mentioned was 28s. 6d. per lb., which the prisoner objected to several times, but at last he was persuaded by the broker to purchase, and authorised the broker to go to Fordati and buy it at the lowest price he could. The broker accordingly went to Fordati, told him the kind of article the prisoner was making, and for which the silk was wanted; and purchased a bale of it at 28s. 3d. per lb., and it was sent to the prisoner’s warehouse, and two days afterwards he pledged it for about half its value. Alderson, B., told the jury, ‘with reference to the present statute, if a man falsely pretends that he is carrying on business, or by his conduct intentionally leads persons to believe that he is carrying it on, when, in fact, he is not doing so, that is one ingredient of the offence. Another ingredient is that some one must, in consequence of such pretence, have been induced to part with his goods. The person charged must have said something, or done something, to make another let him have his property; it must be done falsely, and with intent to defraud; but the intent to defraud must, like every other intent, be inferred from circumstances. Applying this view of the law to the present case, you must first ascertain that the false representation came from the prisoner, and that the prosecutor parted with the goods upon that representation. If it were not so, the words “false colour and pretence” must be held to be useless. If nothing was intended by them, it would have been sufficient to say, “if any bankrupt within three months, &c., shall obtain credit, &c.” The words “false colour and pretence,” then, must mean that some act must be done by the prisoner by which he colourably pretends that he is doing something which, in truth, he is not doing at the time. That is the construction my brother Wightman and myself agree ought to be put upon the language of the statute. The whole case, therefore, rests upon the

testimony of the broker, who purchased the silk for the prisoner.' 'The question will be, whether the prisoner authorised the broker to make the statement he did to Fordati. He told the broker he wanted the silk to manufacture into the particular article referred to. He told him also to purchase it at the lowest price. Did the broker then make the communication to Fordati as the prisoner's agent? If so, the prisoner would be liable as far as that representation went. But you must remember that the only specific direction given to the broker was to get the silk as cheap as he could. Now, to let the dealer know that it was required for a particular purpose was not the way to induce him to lower his price. That is important in ascertaining the intention of the prisoner with regard to the course the broker should pursue. Then, if you think the representation of the broker was virtually the representation of the prisoner, the next question will be, whether at the time he authorised the broker to purchase, he did not mean to make use of the goods in his manufacture, but intended to get them into his possession that he might pledge them. If that was his object, we think the case is within the statute; but then he must have intended not to use the goods in his business at the very moment he gave the directions to the broker. As to this point, it is important to remember that they were pledged within two days of their receipt, and for a sum very considerably below their value. Substantially, then, did the prisoner authorise the statement made by the broker to Fordati, that he wanted the goods to employ them in his business; and, if so, did he, at the time he gave the order, intend otherwise to dispose of them?' (e)

**Concealment.** — Upon an indictment on 5 Geo. 2, c. 30, qualified by 1 Geo. 4, c. 115, s. 1, against a bankrupt for concealing his effects, where the evidence was that the prisoner, on his last examination, stated that a book given in by him contained an account of all his effects, it was holden to be incumbent on the prosecutor to produce the book, or to account for its non-production. (f)

In the same case it was held at the trial that it was not necessary that the goods should be concealed by the prisoner himself, or that he should have had the possession of them after the bankruptcy; but that it was sufficient if another person had them as the agent of and subject to the control of the prisoner, and had taken them by the direction, and with the privity and knowledge of the prisoner, to the place where they were deposited. (g)

In the same case it was also held at the trial that the indictment might be preferred in Middlesex, if the prosecutor could prove an actual concealment there; although the last examination of the bankrupt took place in London. (g)

**Act of bankruptcy.** — An indictment on the 12 & 13 Vict. c. 106, s. 251, against a bankrupt for embezzling part of his personal estate, alleged the act of bankruptcy to have been committed by being unable to meet his engagements with his creditors, and by filing his petition for adjudication. A copy of a declaration of insolvency in the form in the schedule to the Act, and certified to be a true copy by the registrar, and under the seal of the Court, was put in, and also the original petition of the bankrupt, under the seal of the Court, and both bore date the same day. The clerk of the attesting witness proved that he saw the prisoner sign both the petition and the declaration, and saw him leave the declaration at the Court the same day. The registrar proved that the declaration was delivered into his hands for the purpose of filing before 11½ o'clock in the morn-

(e) *R. v. Boyd*, 5 Cox, C. C. 502.

(f) *R. v. Evans*, R. & M. C. C. R. 70.

(g) *Ibid.* per Littledale, J.

ing; he could not remember anything by independent memory as to this petition, but his general practice was to see that the declaration was filed before receiving the petition founded on it. It was urged that there was no legal proof that the declaration was filed before the petition, and that the attesting witness ought to have been called; but Bramwell, B., left the case to the jury, and reserved the points. (*h*)

In a case before the Debtors' Act, 1869, in order to prove the time when an act of bankruptcy had been committed by filing a petition in the Insolvent Court, a copy of the petition, purporting to be signed by the officer, in whose custody the petition was, (*i*) was put in, and the only proof of the time of filing this petition was the endorsement on the back of the petition of the time of the filing the petition, and the only signature of the officer was in the inner fold of the paper; it was held, on a case reserved, that this was insufficient; for the endorsement of the petition was no part of the petition itself, and was not made evidence by the Act. (*j*)

**Evidence of examination.** — In a case before the Debtors' Act, 1869, it was held that parol evidence of anything a bankrupt said at the time of his last examination, could be received, although it appeared that no part of what he said was taken down in writing. The paper purporting to be the final examination, did not contain any questions or answers; it merely stated that the commissioners, not being satisfied with the answers of the bankrupt, adjourned the examination *sine die*; and it was proposed to give parol evidence of what the bankrupt said before the commissioners, which it was contended might be done, as it was shewn that what the bankrupt said was not taken down; and besides, by sec. 36, the commissioners are empowered to examine by parol: J. A. Park, J., 'I can receive no evidence of the examination but the writing. The examination is required to be in writing by the Act of Parliament; and that part which relates to the examining by parol, applies only to the questions which may be either put by parol or by written interrogatories.' (*k*) So where an indictment alleged that after the examination of the bankrupt and after he had subscribed the same, a question was put to the bankrupt, and it was objected to any evidence being given of questions and answers, which were not reduced to writing; it was replied that the material answers alone were taken down; and it sometimes happened that answers which at the time seemed immaterial, afterwards became material. The answers proposed to be given in evidence were given after the examination had concluded in the first instance, but they also were reduced to writing. Williams, J., 'I cannot receive parol evidence of any answers to questions that were put to the bankrupt before the commissioners subscribed their names to the examination. I must presume, that all the answers prior thereto that were material, were taken down, and included in the examination before their signatures were affixed to it. But answers to questions put subsequently to such examination may be given in evidence.' (*l*)

Where a bankrupt had removed certain of his goods, as it was alleged, with intent to defraud his creditors: Parke, B., held that if the goods had not been taken possession of by the assignees or the messenger, the indictment must be under the 6 Geo. 4, c. 16, s. 112; but that if the assignees or messenger had actually taken possession of the goods, and they were afterwards removed by the bankrupt, an indictment for larceny might be sustained; in such case, however, the trading, petition-

(*h*) R. v. Massey, L. & C. 206. The case went off on another point.

(*i*) See 12 & 13 Vict. c. 106, s. 239.

(*j*) R. v. Lands, Dears. C. C. 567.

(*k*) R. v. Walters, 5 C. & P. 138.

(*l*) R. v. Radcliffe, 2 Lew. 57.

ing creditor's debt, act of bankruptcy, &c., must be regularly proved; and even then, if the bankrupt meant *bonâ fide* to dispute the bankruptcy, that would prevent the taking from being a felony. (m)

It was agreed that a bankrupt's wife could not be examined on the part of the prosecution, on an indictment against the bankrupt for offences against the 5 Geo. 2, c. 30. (n)

To render an examination of a bankrupt reduced into writing under 12 & 13 Vict. c. 106, s. 117, admissible in evidence as a deposition under the seal of the Court, pursuant to 24 & 25 Vict. c. 134, s. 203, it must appear that his answers after they were reduced into writing were signed and subscribed by the bankrupt. (o)

On an indictment under the 5 & 6 Vict. c. 122, s. 32, against a bankrupt for not surrendering, the adjudication of the prisoner being a bankrupt, its publication in the *Gazette*, the appointment of the two days for surrendering and finishing his examination, and that the bankrupt did not submit himself to be examined on the second day, were all that was proved. It was contended that, though sec. 24 said that the *Gazette* should be evidence 'in all cases,' yet these words were controlled by the words that followed them, and applied only to civil cases. But it was held that the *Gazette* was admissible. Pollock, C. B., said (p) 'It has been contended that the words "in all cases" are limited by those that follow, and do not include criminal cases; and if I found the penal clauses in one statute, and those which merely related to the bankruptcy in another, I might be disposed to think that a reasonable construction; but those who framed this Act clearly had the criminal procedure in view, and I think, therefore, when they say all cases, they mean criminal as well as civil.' (q)

But it was also held that before the *Gazette* was admitted in evidence it was necessary to prove that the bankrupt had not taken any of the steps mentioned in the section to dispute the bankruptcy. (r) But it was held that the production by the registrar of the Court of Bankruptcy of the books containing the proceedings in the bankruptcy, which contained no reference to any such proceeding by the bankrupt, together with evidence by the solicitor to the fiat that he had never heard of any proceeding having been taken to dispute the fiat, was sufficient proof to make the *Gazette* admissible. (s)

On an indictment against a bankrupt for not discovering when he disposed of an estate, and against several others for aiding and assisting him, it was held that under the 5 & 6 Vict. c. 122, s. 24, the *Gazette* was only evidence against the bankrupt. (s)

(m) *R. v. Harris*, Monmouth Spr. Ass. 1844. MSS. C. S. G.

(n) 1 Hawk, P. C. c. 49, of *Fraudulent Bankruptcy*, sec. 4. Ex parte James, 1 P. Wms. 610, where the Lord Chancellor said, that a wife could not by the common law be a witness for or against her husband; and that though a former statute, 21 Jac. 1, authorised the commissioners to examine the wife touching any concealments of the goods, effects, or estate of the bankrupt, yet it did not extend to examining the bankrupt's wife touching his bankruptcy, or whether he had committed any act of bank-

ruptcy, and how or when he became a bankrupt.

(o) *R. v. Kean*, 11 Cox, C. C. 266.

(p) After intimating a strong opinion that the adjudication itself was sufficient evidence on this indictment, which has since been overruled in *R. v. Lands*, ante, p. 890.

(q) *R. v. Hilton*, 2 Cox, C. C. 318. Cresswell, J., concurred. *R. v. Hall*, Roscoe Cr. Ev. 288. But see *R. v. Lyons*, 9 Cox, C. C. 299.

(r) *R. v. Harris*, 4 Cox, C. C. 140. Platt, B., and Coltman, J.

(s) *R. v. Harris*, supra.

## APPENDIX G.

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### *Decisions on Repealed Statutes relating to receiving or having Possession of Public Stores.*

**Burden of proof.** — Upon the construction of the former statutes it was observed that the King's mark denoted the original ownership, and that the *onus probandi* was thrown upon the party having public stores in his possession, to account satisfactorily for that possession according to the regulations prescribed. But though the bare fact of possession ordinarily concludes the party, it is open to explanation; and the presumption arising from it may be rebutted by circumstances. (a)

This principle was acted upon by Foster, J., in a case where a widow was indicted on the 9 & 10 Will. 3, c. 41, for having in her custody divers pieces of canvas marked with His Majesty's mark in the manner described in the Act, she not being a person employed by the commissioners of the navy to make the same for His Majesty's use. The canvas was produced at the trial marked as charged in the indictment, and was proved to be of that sort which is commonly made for the use of the navy, and to have been found in the defendant's custody. The defendant did not attempt to shew that she was within the exception of the Act, as being a person employed to make canvas for the use of the navy; nor did she offer to produce any certificate from any officer of the crown touching the occasion and reason of such canvas coming into her possession. Her defence was that when there happened to be in His Majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the person entrusted with the stores to make a public sale of them in lots, larger or smaller, as best suited the purpose of the buyers; and that the canvas produced in evidence, which happened to have been made up long since, some for table linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant; and had been used in the same public manner by her to the time of the prosecution. This evidence was opposed by the counsel for the crown, who insisted that, as the Act allows of but one excuse, the defendant, unless she can avail herself of that, cannot resort to any other: and they asked why, if the canvas was really bought of the commissioners, or of persons acting under them (which is the only excuse pointed out by the statute), no certificate of that matter was taken at the time of the purchase, since the fourth section of the Act admits of that excuse, and the second section admits of no other. But Foster, J., was of opinion that though the clause of the statute, which directs the sale of these things, had not pointed out any other way for indemnifying the buyer than the certificate, and though the second section seemed to exclude any other excuse for those

(a) 2 East, P. C. c. 16, s. 153, p. 765.

in whose custody they should be found, yet still, the circumstances attending every case, which might seem to fall within the Act, ought to be taken into consideration; otherwise a law calculated for wise purposes might, by too rigid a construction of it, be made a handmaid to oppression. He observed that there was no room to say that this canvas came into the possession of the defendant by any act of her own; that it was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. That things of this kind had been frequently exposed to public sale; and though the Act pointed out an expedient for the indemnity of the buyers, yet, probably, few buyers, especially where small quantities had been purchased in one sale, had used the caution suggested to them by the Act. And that if the defendant's husband really bought this linen at a public sale, but neglected to take the certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for this neglect. He, therefore, thought the evidence given by the defendant proper to be left to the jury; and directed them that if, upon the whole of the evidence, they were of opinion that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her; and she was acquitted. (b)

In a subsequent case of an information upon the 9 & 10 Will. 3, c. 41, and 17 Geo. 2, c. 40, s. 10, it was contended by the counsel for the prosecution that the only mode by which the defendant, against whom a possession of the stores was proved, could discharge himself, was by producing the navy-board certificate granted at the time of the sale, as that was the only evidence of the legal possession of them. But Lord Kenyon, C. J., said that, though it was clear that in prosecutions under the statutes in question it was sufficient for the crown to prove the finding of the stores, with the King's mark, in the defendant's possession, to call upon him to account for that possession, and the manner of his coming by them, so as to throw the *onus* upon the defendant of proving that he had legally become possessed of them; yet that it could not bear a question, but that the defendant had other means of shewing that he had lawfully become possessed of them than by the production of the certificate from the navy-board; as, for example, he might shew that he had bought them from another person who was in the practice of buying stores at the navy sale; and who, therefore, might fairly be presumed to have had the regular certificate, but who, when he sold part to the defendant, could not, consistently with his own safety, part with the certificate he had obtained, of his having been the purchaser of the whole lot. (c) And his Lordship, after alluding to the case in which this doctrine had been holden by Foster, J. (whom he spoke of as one of the best crown lawyers that had ever sat in Westminster-hall), said that if the defendant could shew either a navy certificate, or prove the purchase of the stores mentioned in the information from any person who might be presumed to have been possessed of the proper certificate, from the circumstance of such person having frequently been a purchaser at such sales, he was of opinion that it was such evidence as ought to induce the jury to find the defendant not guilty. And the defendant, accordingly, gave such evidence, and was acquitted. (d)

**Knowledge of prisoner.** — A count charged the prisoner with having in

(b) *Anon.*, cor. Foster, J., on the Western circuit, *Fost.* 489.

(c) At this time, by the statute 39 & 40 Geo. 3, c. 89, s. 25, a buyer was protected

by producing a certificate from such person as should appear to have bought the stores from the commissioners.

(d) *R. v. Banks*, 1 Esp. R. 145.



his possession a piece of canvas, several blocks, copper sheathing, and a number of nails and other old metal articles of small value, marked in the manner described in the Act. The prisoner was a marine store dealer in a large way of business, and the articles were found in various parts of his shop and warehouse mixed up with a number of other articles, which did not appear ever to have had a government mark, or to have belonged to the government. The piece of copper sheathing, worth 2s. 6d., had come to the warehouse doubled up in the middle of a bundle of rope-yarn and other matters, called shakings, from a person who had sent the bundle for sale. The prisoner was not present when the bundle was opened, and his foreman stated that he believed the prisoner had never seen it. For the prisoner evidence was given that in government sales both by the admiralty and the ordnance, nails and other pieces of metal of small value, and blocks, such as those in question, were frequently sold, mixed up with other articles, and without any certificate being given by the commissioners, and some evidence was given that the canvas was sold, with other articles from Woolwich dockyard, to one Ledger, and by him sold to the prisoner. On the sale to Ledger a certificate had been given, not under the hands and seals of three commissioners of the navy, as required by the 9 & 10 Will. 3, c. 41, s. 4, but signed by Sir J. Brewer, superintendent of Woolwich dockyard; but Ledger had not given any certificate to the prisoner. Some of the small metal articles were shewn to have been bought by the prisoner at a sale under the authority of the Board of Ordnance, and a certificate was produced for them, signed by R. Byham, secretary to that board, but not under the hands and seals of the officers required by the Act. Coltman, J., told the jury that 'a man is not criminally responsible for the acts of his servants, and if his servants improperly receive into his warehouse articles marked with the broad arrow, without his knowledge, he is not responsible. (e) If the prisoner himself purchased any of these articles, to which the certificates do not apply, knowing them to be marked with the broad arrow, then he is liable to be convicted, but not otherwise. Unless the goods were on his premises with his knowledge, they were not in his possession at all. The account given of the sheathing, if true, illustrates what I say, that it is not everything found upon the prisoner's premises which can be said to be in his possession. With regard to the two certificates, although they are not strictly in conformity with the Act, the government ought not to dispute their validity. If they apply to any part of these stores, so far as they apply, they justify the possession of the prisoner, and you ought not to be asked for a conviction in spite of them. With regard to the other articles the question is, had the prisoner possession of them, that is, was he aware of them? If you think that it is not proved that he knew they were there, or that it is not proved that he knew that they were marked with the broad arrow, it will be your duty to acquit him.' (f) So where the prisoner was indicted for unlawfully having in possession certain naval stores marked with the broad arrow, it appeared that the prisoner assisted his father in carrying on an extensive business as a metal merchant, and two casks were traced by the police to the warehouse of the prisoner, and a few minutes after the delivery the police entered and found the casks in the passage unopened. They asked the prisoner where he obtained the casks from, and he said from Mr. Warren of Portsea; on being opened they were found to contain a quantity of naval stores marked with the broad

(e) But see *R. v. Dixon*, 3 M. & S. 11, as to the criminal responsibility of a master for acts of his servants done in the

course of his master's business, and for his benefit.

(f) *R. v. Wilmett*, 3 Cox, C. C. 281.

arrow. On the desk in the counting-house was found a bill for the carriage of the two casks from Portsea, made out to Mr. H. Cohen. On the police officers requesting to be allowed to search the premises, the prisoner refused, and great resistance was made, and the officers were ejected by the prisoner's workmen. It was urged that the mere deposit of the casks for a few minutes in the passage of the prisoner's warehouse was no proof of possession by him; but even if it were otherwise, there was no evidence whatever that he knew what the casks contained. It might be that the moment he had seen the broad arrow marked on the metal, he would at once have rejected it: and the preceding case was cited. Watson, B., 'I am of opinion that it is necessary, in order to convict a person under this statute of having naval stores marked with the broad arrow in his possession, to shew not only that he had them in his possession, but that he also knew the nature of the articles, and that they were marked with the broad arrow. The statute is no doubt couched in very general terms; it does not state in so many words that he must have them in his possession "knowingly," but that must be the true meaning of the statute. The word possession imports knowledge of that which is possessed. As to the question of possession, if it were necessary in this case, I should leave it to the jury to decide it, with the observation that, although the casks were brought to the prisoner's premises, there was no evidence of the terms on which they were sent, nor was any time given for examination, or for exercising any discretion as to returning or rejecting them.' (g) Hill, J., 'It is no offence under the second section of this statute, unless the person charged had possession of the goods, knowing them to be marked with the broad arrow; this is made clear by a reference to the recital in the first section. The possession in the second section is put in exactly the same category with the concealing, which is a positive act done by the individual, in order to constitute the crime. In my opinion it is necessary to shew that the person sought to be fixed with the crime, under the second section, had knowledge that the goods were marked with the broad arrow, and if he was ignorant of that fact, he is not guilty of any offence within the meaning of the statute. The application of common sense to the construction of the statute shews that this must be so. If a couple of sacks of old metal obtained from ships contained one thousand pieces, and one piece only bore the objectionable mark, could it be said that the person to whom the casks were sent was guilty of any criminal offence before he had opened the casks and seen the metal? and yet, if this application of the statute is insisted upon, the Crown must go the whole length of contending for that absurdity. It appears to me, therefore, to be only applying plain common sense to the construction of the statute, to hold that no offence is committed under the second section, unless it is shewn that the individual in whose possession the goods were knew that they were marked with the broad arrow.' (h)

The prisoner was indicted on the 9 & 10 Will. 3, c. 41, s. 2, for having possession of naval stores marked with the broad arrow: he was an ironmonger and brazier at Plymouth, and delivered on the quay to the captain of a coasting vessel a cask marked R. P., to be carried to Helston, and, on being asked for better directions, he gave to the captain a piece of paper on which was written 'Richard Pascoe, Helston.' Before the vessel sailed the police seized the cask, which on being opened was found to contain 324 lbs. weight of copper bolts in 150 pieces. The cask was packed with straw and shavings, and each bolt was packed separately

(g) Watson, B., then approved of the preceding case as expressly in point.

(h) R. v. Cohen, 8 Cox, C. C. 41.

with straw and shavings, so that the pieces could not rub together or make any noise. The whole of the metal had the appearance of government stores, and of such stores as are not allowed to be sold in the dock-yard. The greatest portion of it had been passed through the fire, and round bolts had been very nearly beaten square. On some of the pieces the mark of the broad arrow was visible in the state in which they were found; from others it was necessary to clean off the rust before it could be seen. More than 50 lbs. weight of the copper was marked with the broad arrow. When the prisoner was charged he said, 'Well, I did deliver the cask of metal; but I do not think it was marked.' The prisoner was told that the cask was packed in shavings and straw; and he said, 'Yes, it is; I packed it myself. I do that to keep it from knocking the head of the cask out, as I have had complaints before, as some of the casks on their arrival had their heads out.' The cask was shewn to the prisoner, and he admitted he had delivered it to the captain. He was then shewn the mark of the broad arrow on some of the pieces, and asked how he became possessed of the copper, and he said, 'No; he did not know of whom he had bought it.' There was no evidence given to justify or account for the prisoner's possession of the copper. It was urged that it must be proved not only that the prisoner had the marked copper in his possession, but that he knew that it was marked with the broad arrow. The jury found that the prisoner was found in possession of copper marked with the broad arrow; but that they had not sufficient evidence before them to shew that he knew that the copper or any part of it was so marked, but that he had reasonable means of knowing that it was so marked; and thereon a verdict of guilty was directed; but, on a case reserved, the verdict was held to be wrong. Cockburn, C. J., 'On the case as it is submitted to us the verdict is wrong. There was evidence for the jury that the prisoner knew that the copper was marked, but they have not so found; and therefore we must consider the case as if the prisoner was ignorant of the fact. It has been contended that mere possession constitutes the offence provided against by the 9 & 10 Will. 3, c. 41; but I am unable to adopt that view. It is a principle of our law that to constitute an offence there must be a guilty mind; and that principle must be imported into the statute, as has already been laid down in *R. v. Cohen*, (i) although the act itself does not in terms make a guilty mind necessary to the commission of the offence. Cases of innocent possession might be put in which it would be clear that the possessor had not that guilty mind. The authorities which have been cited (k) may be reconciled in this way, viz., that it is a fair presumption, where a man is found in possession of marked articles, that he knew them to be marked; but that presumption may be rebutted by the circumstances of the case. Here it is manifest, if the prisoner's statement is to be believed, that he was ignorant of the fact that the copper was marked; and the ordinary presumption is rebutted. The jury might, indeed, have come to the opposite conclusion; and in my opinion they ought to have done so; they have not done so, but have taken the prisoner's statement as true. The case accordingly falls within the principle laid down in *R. v. Cohen*, and the prisoner ought not to have been convicted.' (l)

These cases were decided before the 27 & 28 Vict. c. 91, sec. 8 of which provides that where the prisoner was at the time of the offence a dealer in marine stores, or a dealer in old metals, or in Her Majesty's service, knowledge that the stores bore the mark should be presumed until the contrary was shewn.

(i) *Supra*.

(k) The preceding cases.

(l) *R. v. Sleep*, L. & C. 44.

**What amounts to possession.** — Upon an indictment, which alleged that the prisoner unlawfully had in his possession, in the borough of Portsmouth, certain naval stores marked with the broad arrow, it appeared that the prisoner was a dealer in marine stores at Portsmouth. On the 27th of August several bags marked with the letter M., and directed to 'Mr. Godson, Nine Elms' Station,' were brought by two women to the Landport station at Portsmouth, and were sent by train to London, and arrived in the same state at the Nine Elms' Station, and were deposited in the goods department there. On the 25th of August, Mr. Godson, an officer of the railway company, received a letter in the prisoner's handwriting and signed by him, saying, 'Please to deliver goods marked M. to Mr. Emmanuel.' On the 1st September the prisoner went to the Landport Station and produced a letter from Mr. Godson to him, stating that 'there are several bags lying at this station (Nine Elms) consigned by you to me, and marked M. To whom are they to be delivered or forwarded?' The prisoner wrote on the back of this letter, 'Please telegraph to deliver M. to Mr. Emmanuel.' The prisoner also shewed the clerk another paper in his handwriting: 'To Mr. Godson. All the goods lying at the station marked M. to be delivered to Emmanuel as previously advised.' The bags were opened at Nine Elms, and found to contain a quantity of naval stores marked with the broad arrow. The jury found the prisoner guilty, and, on a case reserved on the question whether there was any evidence of the naval stores having been found in the custody, possession, or keeping of the prisoner within the meaning of the 9 & 10 Will. 3, c. 41, s. 2 (now repealed), it was held that the conviction was right. (*m*)

In a case upon the 9 & 10 Will. 3, c. 41, s. 2, an exception was taken to the indictment, in arrest of judgment, that no indictment lay because it was a new offence, and a particular penalty inflicted of forfeiture of the goods and £200; but the exception was overruled because the forfeiture accrued by the conviction on an indictment for the offence. (*n*)

Though the having in possession new stores, or stores not more than one-third worn, was subject to transportation for fourteen years, by the 39 & 40 Geo. 3, c. 89, s. 1, and the having in possession stores not new, or more than one-third worn, is, by the second section of that statute, subjected to a different punishment, yet counts for both these offences might be included in the same indictment. (*o*) It is said to have been agreed that, although an indictment state that the prisoner, 'then or at

(*m*) *R. v. Sunley*, Bell, C. C. 145. There was no argument and no ground stated for the decision. In *R. v. Sleep*, *supra*, Martin, B., said, 'The stores were not found in the custody, possession, or keeping of the prisoner within the meaning of the statute. If the goods have been parted with, as in this case, the time had ceased for finding the prisoner guilty. Had I been the judge I should have directed an acquittal, on the ground that the stores were not in the prisoner's possession.' Crompton, J., 'The statute requires that the goods should be found in the possession of the offender; yet the prisoner might be rightly convicted if the stores were found in the possession of some other person, as, for instance, his servant;' and he had some doubts on the point on the facts of the case. Willes, J., regretted the opinion that had been given, as the point had not been argued, and said,

'I cannot concur in what has been said on that point. Possession does not consist merely in manual detention. Suppose I request a bystander to hold anything for me, it still remains in my possession. So also possession may be acquired or retained over goods which are in the manual detention of a third person.' Cockburn, C. J., 'I certainly understood that the point as to the possession was not now to be adjudicated upon. As, however, an opinion has been expressed upon the point, lest I should be held by my silence to concur in it, I think it right to say that I hold a directly opposite opinion. The same point was submitted to this court two years ago, and it was held that it was sufficient if possession could be traced to the prisoner, *i.e.*, in *R. v. Sunley*.'

(*n*) *R. v. Harman*, 2 Lord Raym. 1104.

(*o*) By Lord Ellenborough, C. J., in *R. v. Johnson*, 3 M. & S. 550.

any time before not being a contractor with, or authorised by the principal officers or commissioners of our said lord the King, of the navy, ordnance, &c., for the use of our said lord the King, to make any stores of war, &c. ;' yet, that it was not incumbent on the prosecutors to prove this negative averment, but that the defendant must have shewn if the truth were so, that he was within the exception in the statute. (*p*)

The informer was a competent witness. (*q*)

An indictment under the 39 & 40 Geo. 3, c. 89, s. 1, alleged that the defendant unlawfully had in his custody certain naval stores, he 'not being a contractor with the principal officers or commissioners' of the navy, &c., and the Court of Queen's Bench held that the allegation of the defendant's not being a contractor could refer to no time but the time at which the defendant was in possession of the stores, and therefore the indictment was good. (*r*)

(*p*) Willis' case, 1 Hawk. P. C. c. 89, s. 17.

16 & 17 Vict. c. 83. See *R. v. Blackman*, 1 Esq. 5. *R. v. Banks*, 1 Esp. R. 145.

(*q*) *R. v. Cole*, 1 Esp. 169, Lord Kenyon, C. J., and see 6 & 7 Vict. c. 85, and

(*r*) *R. v. Silversides*, *supra*. See *R. v. Somerton*, 7 B. & C. 463. *R. v. Page*, 9 C. & P. 756. 2 M. C. C. R. 219.

## APPENDIX H.

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### *Cases upon Repealed Statutes relating to Forging Bank Securities.*

It has been held upon the 8 & 9 Will. 3, c. 20, s. 36, that the expunging by means of lemon-juice an endorsement on a bank-note, was a *raising* of the endorsement. (a) And in a case upon the 15 Geo. 2, c. 13, s. 11, it was holden that the resemblance to a bank note must appear on the face of the instrument; and that a signature for 'Self and Co.,' of 'my bank in England,' did not support an allegation that the paper purported to be a bank note; and further, that the representation of the prisoner could not alter the purport of the instrument. (b)

**Possession of forged notes.** — The 45 Geo. 3, c. 89, s. 6, made it felony if any person should knowingly have 'in his, her, or their possession or custody,' &c., any forged bank note, &c., and in a case upon this section, in which the circumstances necessary to constitute 'the having in possession' of forged notes, came under the consideration of the judges, they seemed to be of opinion, that every uttering included having in custody and possession within the statute; and some of them thought, that without actual possession, if the notes had been put in any place under the prisoner's control, and by his direction, the result would have been the same. (c)

**Uttering.** — In a case upon the 13 Geo. 3, c. 79, s. 2, which subjected to imprisonment any person who should 'knowingly and wilfully publish or utter any promissory note' of the description therein mentioned, it was holden that shewing to a person an instrument in the manner there adopted, with an intent to raise a false idea of the party's substance, did not come within its provisions; and also that the leaving it afterwards, sealed up, with the person to whom it was shewn, under cover, that he might take charge of it, as being too valuable to be carried about, was not an uttering or publishing. (d)

The indictment under the 15 Geo. 2, c. 13, s. 11, charged Palmer and Hudson in one count with feloniously disposing of and putting away a forged bank note, knowing it to be forged. Palmer had been in the habit of putting off forged bank notes, and had employed Hudson in putting them off; on a certain day being at a public house, he sent out Hudson with the forged note in question, for the purpose of passing it; she went to a neighbouring shop, purchased some handkerchiefs for six shillings, and tendered the note in payment, which was suspected and stopped, and, upon examination, appeared to be forged; on the evening of the same day, Palmer went with her to the shop, and when he got there

(a) R. v. Bigg, 3 P. Wms. 419.

(b) Jones's case, Doug. 300; 1 Leach,

(c) R. v. Rowley, R. & R., 110, and see the 24 & 25 Vict. c. 98, s. 45.

(d) R. v. Shukard, R. & R. 200.

said, 'This woman has been here to-day, and offered a two pound note, which you have stopped; it is my note, and I must have either the note or the change.' Upon these facts it was objected that the evidence related to two distinct and separate offences, and not to one joint offence; and the learned judge directed the jury to consider whether the woman was guilty of uttering the note at the shop, or the man of disposing of it to her; but told them that they could not convict both; that the man could not be convicted, unless they were satisfied that he gave the very note stated in the indictment to the woman for a fraudulent purpose, knowing it to be a bad one; nor the woman, unless they were satisfied that she put the note away knowing it to be forged; and that they must consider which they would convict, if either appeared to be guilty. The jury acquitted the woman, and found Palmer guilty; and a case was reserved upon the question, whether the evidence given would support the conviction. The opinion of the judges was afterwards delivered by Rooke, J., who first stated with respect to one of the counts which charged the prisoners with uttering and publishing the note as true, knowing it to be forged, that it seemed to be the general opinion of the judges, that if the woman had not known the note to be forged, Palmer might have been rightly convicted on that count; according to the doctrine, that where an innocent person is employed for a criminal purpose, the employer must be answerable: (e) but as it appeared that she knew the note to be forged, the judges had formed no opinion upon the evidence as applying to that count, thinking it sufficient to consider the case upon the count which charged the prisoners with disposing of and putting away the note in question. He then stated that upon the point whether the facts amounted to a disposing of, or putting away, within the meaning of the 15 Geo. 2, c. 13, s. 11, there had been a considerable difference of opinion amongst the judges. That some of them had holden that this was not an offence within the statute, because till the woman had uttered the note it ought to be considered as in the possession of the man; and when she did utter it, the man was only an accessory before the fact, and should have been so indicted. But that the majority of the judges were of opinion that the conviction was right. And as to the constructive possession, he observed, that it is by fiction of law only that when the actual possession is in one person the constructive possession shall be considered in another; and that these fictions are adopted for the sake of promoting justice, but ought not to be adopted when they tend to defeat that purpose. (f)

In a case upon the 45 Geo. 3, c. 89, s. 2, an objection was taken to the indictment, that it did not point out the name of the person to whom the forged note was disposed; but, upon argument in the Exchequer Chamber before the twelve judges, Lord Ellenborough, C. J., observed, that the indictment contained every word which the statute uses for constituting the offence; and that the statute did not contain the words, 'to any person or persons;' but to put off with intent to defraud the governor and company of the Bank of England; and the judges held the indictment to be sufficient. (g)

**Bank applying for forged notes.**—Another point arose in the same case upon the evidence, from which it appeared that the notes which the prisoners were charged with having disposed and put away were

(e) *Fost.* 349.

(f) *R. v. Palmer*, 1 New R. 96. 2 Leach, 978. R. & R. 72. *Thompson*, B., *Law-*

*rence*, Le Blanc, and *Chambre*, JJ., were of opinion that the conviction was wrong.

(g) *R. v. Holden*, 2 Taunt. 334. 2 Leach, 1019. R. & R. 154.

furnished by the prisoners in consequence of an application made to them by agents employed for that purpose by the bank, and that they were delivered to such agents as forged notes, for the purpose of being disposed of by them. In consequence of a great number of forged notes having been circulated in the neighbourhood, Shaw and Whitehead were employed by the magistrates, with the approbation of the agents for the bank, to detect those who were suspected to be the utterers. The prisoners did not pay the notes to Shaw and Whitehead as genuine; but those persons, for the purpose of detection, applied to the prisoners, as supposed dealers in forged bank notes, to purchase them, and the prisoners accordingly procured them, and sold them as forged notes, so that Shaw and Whitehead were not deceived or defrauded in any of the instances, nor were any of the prisoners the first movers in the transaction they had with them; nor did it appear, by any direct evidence, that either of the prisoners, when he was first applied to, had any of the notes in his actual possession; but they respectively produced them at meetings which took place subsequent to such first application. Upon this evidence it was objected that there was no sufficient disposing of the notes, as the prisoners were solicited to commit the act proved against them by the bank themselves, by means of their agents. The objection was overruled, and a case was reserved in order that the point might be considered by the twelve judges, who held the conviction right. (*h*)

**Merger of offences.**—In a case where the Bank of England had preferred a bill of indictment for the capital offence of disposing of and putting away forged Bank of England notes, and also another bill against the same prisoners for the transportable offence of having the *same notes* in their possession, knowing them to be forged, and had elected to proceed on the latter indictment, it was holden that, although facts sufficient to support the capital charge were made out in evidence, an acquittal for such minor offence ought not to be directed, because the whole of the minor offence was proved, and it did not merge in the capital offence. And that the bank might elect to proceed on indictments for the lesser offence, although indictments had been found for the capital charge. (*i*)

It was also holden in the same case that it is not necessary that the signing clerk at the bank should be produced, if witnesses acquainted with his handwriting stated that the signature to the note was not his handwriting. (*k*)

**Colonial banks, &c.**—The prisoner was convicted at the Central Criminal Court, upon an indictment founded on the 1 Will. 4, c. 66, s. 18, which charged that he feloniously, knowingly, and without lawful excuse had in his custody and possession a certain copper plate, upon which was engraved part of a certain promissory note for the payment of money, purporting to be a part of a promissory note of a certain company of persons carrying on the business of bankers in a certain country under the dominion of Her Majesty, that is to say, in the province of Upper Canada in North America, under the name and style of the president, directors, and company of the Bank of Upper Canada, the said company of persons being other than the Bank of England, which said part of a promissory note is as follows:—

(*h*) *R. v. Holden, supra*. The ground on which this decision proceeded, was that the intent is the essence of the crime, which exists in the mind, although from circum-

stances of which the prisoner is not apprised the prosecutor cannot be defrauded.

(*i*) Case of Bank Prosecutions, *R. & R.* 378. Both the offences were felonies.

(*k*) *Id. ibid.*



'Ten  
10 X No.

'Ten  
X C Ten.

'Chartered by Act of Parliament.

'The president, directors, and company of the Bank of Upper Canada promise to pay ten dollars on demand to the bearer for value received.

'Cashier.

'President.

'Ten  
'Toronto 18.'

'X  
'Ten.'

The second and third counts were in the same terms, except that the second described the note as a promissory note for the payment of money of a certain body 'corporate,' and the third as a promissory note for the payment of money of W. Proudfoot and others. The prisoner, within the jurisdiction of the Court, procured a copper plate to be engraved with the words and figures set out in the indictment, which are part of the form of the promissory notes, used and circulated by the Bank of Upper Canada; the plate so engraved was received by the prisoner, under circumstances pregnant with suspicion that it was obtained by him for a fraudulent purpose. W. Proudfoot was the president, and T. G. Ridout the cashier of the Upper Canada bank, the notes of which are usually signed by those persons, and the prisoner had endeavoured to obtain from another engraver a fac-simile of their signatures, which he had cut off from the Toronto note produced by him to the first engraver. It was contended that sec. 18 of the 1 Will. 4, c. 66, upon which alone the indictment could be supported, did not extend to notes of companies carrying on business within Her Majesty's dominions out of England, though the offence were committed within the jurisdiction of the Central Criminal Court; but after full argument upon a case reserved, the judges were all of opinion that the offence charged was within the statute, except Parke, B., Alderson, B., and Coleridge, J., who entertained some doubt, and the conviction was affirmed. (2)

Upon an indictment on the 41 Geo. 3, c. 57, s. 2, (now repealed,) which charged the prisoner with having in his custody a plate on which was engraved part of a promissory note, purporting to be the promissory note of a body corporate called the British Linen Company, it was objected that it was not an offence within this statute to have in custody a plate for making notes, &c., in the name of such company, though it appeared that they carried on business as bankers, because they were incorporated for a purpose entirely different, viz., that of carrying on a linen company; and it was also objected that the indictment was bad, as it omitted to aver that the company carried on the business of bankers, which the Act required. The objections having been reserved for the consideration of the judges, they seemed to be of opinion that the first objection was fatal; and were all of opinion that the indictment was bad, for the second reason stated, and that judgment should be arrested. (m)

Upon an indictment under the 1 Will. 4, c. 68, s. 18, for engraving part of a promissory note, it appeared that the prisoner had cut out the centre part of a promissory note of the British Linen Banking Company, on which the whole of the promissory part of the note was written, and taken the ornamental border to a printer, representing that he wanted to have a plate made of this border, intending to fill up the centre with the title of some oil or cosmetic, of which the firm in whose employ he

(2) *R. v. Hannon*, 2 Moo. C. C. R. 77.  
9 C. & P. 11.

(m) *R. v. Catapodi*, R. & R. 65.

represented himself to be were the vendors. The printer applied to an engraver, from whom he obtained a plate, the impression from which showed that the royal arms of Scotland and the Britannia respectively occupied the same place on the plate as they would in an original note of the company; and, upon a case reserved, upon the question whether a plate having on it merely the royal arms of Scotland and the Britannia satisfied the words 'any part of any promissory note purporting to be part of a note, &c.,' it was held that the conviction was right. The word 'note' is not limited to the parts of a promissory note in a strict legal sense; but includes all that is upon the paper, upon which the note is written, (n) and in order to ascertain whether an engraving purports to be part of a note, the engraving must be compared with a genuine note. (o)

(n) Per Coleridge, J.

(o) R. v. Keith, Dears. C. C. 486. This case was not argued for the prisoner, and seems open to very considerable doubt. The doubt is, whether there must not be such a portion engraved that on comparison it can clearly be seen that it purports to be part of a note of the particular company, and of no other company. Suppose two or more companies used the same border, how could any

engraving of that border *purport* to be part of the note of any one of those companies? Or suppose a tradesman headed his bills, or a magistrate his warrants, with the same identical form of the royal arms as a banker put on his notes, how would any document with those arms alone on it purport to be one more than the other? The question is not what the prisoner intended the thing to be, but what it *purported* to be. C. S. G.

## APPENDIX J.

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### *Repealed Statutes relating to the forgery of Private Papers.*

It was holden to be in the election of the party in the case of forging deeds to lay the indictment either at common law, or upon the 5 Eliz. c. 14. (a) And as this statute is repealed by the 1 Will. 4, c. 66, and had been considered, some years previously, as having nearly fallen into disuse, (b) it may be deemed sufficient merely to refer in this place to the books in which the cases upon the construction of it are to be found collected. (c) In one of the latest of those cases it was holden that the statute did not mean that there should be a forged conveyance of the very lands; but if it were any deed whereby the party *might* be molested, it was sufficient. (d) And a variance as to the description of the lands was holden not to be material. (e)

The more modern statutes in relation to the forgery of private papers, securities, and documents, were the 2 Geo. 2, c. 25 (extended to forgeries with intent to defraud any corporation by 31 Geo. 2, c. 22, s. 78), the 7 Geo. 2, c. 22 (extended in like manner by 18 Geo. 3, c. 18), the 43 Geo. 3, c. 130 (as to the forging of *foreign* bills of exchange, &c., and the 45 Geo. 3, c. 89. But these statutes were repealed by the 1 Will. 4, c. 66, s. 31. It was remarked with reference to these repealed statutes, that the same general rules of construction would apply equally to the same instruments named in the several statutes passed *in pari materiâ*; and all must necessarily be governed by the same principles of the common law. (f)

Upon an indictment for forging a will, the probate of that will unrepealed, is not conclusive evidence of its validity, so as to be a bar to the prosecution. (g)

Where a forged instrument is uttered to one of two partners in the absence of the other, the jury may find in some cases that the intent was to defraud the partner to whom the instrument was uttered. (h)

(a) Obrian's case, 2 Str. 1144. As, however, the forgery of a will is now made a felony by statute, it is always prosecuted as a felony.

(b) 2 East, P. C. c. 19, s. 33, p. 919.

(c) 3 Inst. chap. 75, p. 168, *et seq.* 1 Hale, 682, *et seq.* 1 Hawk. P. C. c. 70, s. 12, *et seq.* Bac. Abr. tit. *Forgery* (C). 2 East, P. C. c. 19, s. 33, p. 919, *et seq.*

(d) Crooke's case, 2 Str. 901. 2 East, P. C. c. 19, s. 33, p. 921.

(e) Id. *ibid.*

(f) 2 East, P. C. c. 19, s. 33, p. 920.

(g) R. v. Buttery, R. & R. 342.

(h) R. v. Hanson, 2 M. C. C. 245; C. & M. 334.

## APPENDIX K.

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### *Decisions on Repealed Statutes as to Deeds, Bills of Exchange, and Promissory Notes.*

MANY questions have arisen as to the written instruments which may be considered as deeds, bills of exchange, promissory notes, endorsements, &c.; or as receipts; or as warrants or orders for the payment of money or delivery of goods.

**Deeds.**—A power of attorney was held to be a deed within the meaning of the 2 Geo. 2, c. 25, s. 1. And in the same case it was decided that forging a deed was within that statute, though the directory provisions of subsequent statutes had directed that instruments for the purpose for which the forged deed was intended should be in a particular form, or should comply with certain requisites, and the forged deed was not in that form, nor had been made in compliance with those requisites; for the directory provisions did not make the deed wholly void in consequence of its not being in the form prescribed, and not having such requisites. (*a*)

Upon an indictment for forging or uttering a note of the Royal Bank of Scotland, it is not necessary to prove that any of the charters gave the bank power to draw or issue notes, for that power is sufficiently recognised by the 42 Geo. 3, c. 149, s. 16, and the 55 Geo. 3, c. 124, s. 23. (*b*)

**Bank notes.**—It was held that a promissory note for the payment of a guinea in cash or Bank of England note was not within the 2 Geo. 2, c. 25. (*c*) In this case the question was reserved whether the note was for the payment of *money* within the 2 Geo. 2, c. 25, the guinea being by the terms of the note to be paid in cash or Bank of England note at the option of the payer; and it is understood that the judges were of opinion that it was not. (*c*)

**Bills of exchange.**—In the following case a point was made whether the instrument in question could be considered as a bill of exchange within the 2 Geo. 2, c. 25. The prisoner was convicted for forging a certain bill of exchange in the following form:—

‘3rd Rate, Robert Gore.

‘Entered 13<sup>th</sup> day of *May*, 1814.

|   | £  | s. | d.   |
|---|----|----|------|
| ‘Full pay from 13th day of May, 1814, } |    |    |      |
| to the 4th day of August, 1814. }       | 25 | 4  | 0    |
| ‘Amount of deductions                   |    | 2  | 17 3 |

|          |     |   |   |
|----------|-----|---|---|
| ‘Net pay | £22 | 6 | 9 |
|----------|-----|---|---|

(*a*) R. v. T. R. Lyon, R. & R. 255. R. v. Fauntleroy, R. & M. 52. And see R. v. Waite, R. & R. 505.

(*b*) R. v. M’Keay, R. & M. C. C. R. 130.

(*c*) Wilcock’s case, *cor.* Le Blanc, J., Yorkshire Lent Ass. 1808, MS. And see

‘Gentlemen,

8th day of August, 1814.

‘Ten days after sight,

‘Please to pay to Mrs. Eliz<sup>th</sup>. Coall, or order, the sum of twenty-two pounds six shillings and ninepence, being the net personal pay due to me as act<sup>l</sup>. Lieutenant of his Majesty’s ship Zealous between thirteenth day of May, 1814, and fourth day of August, 1814, for value received.

‘ROBT. GORE.’

‘Approved,

‘T. BOYS, Captain of H. M. S. Zealous.

‘To the Commissioners of his Majesty’s Navy,  
London,’

with intent to defraud Elizabeth Coall, widow, against the statute, &c. The second count of the indictment was for uttering, &c., with the like intention: and the third and fourth counts were similar, only laying the intention to be to defraud his Majesty. The counsel for the prosecution contended that the instrument was a bill of exchange within the 2 Geo. 2, c. 25. It was urged on behalf of the prisoner, that it appeared clearly that the instrument was intended to be a bill under the 35 Geo. 3, c. 94, s. 3; that it was not drawn to be presented for acceptance or payment by the commissioners of the navy as a bill of exchange; but in order to procure an assignment of it according to the fifteenth section of that statute: that it was not a bill of exchange, because it was not drawn on any persons bound to accept or pay it; and that the commissioners of the navy were removable at pleasure, and might be changed between the drawing and presenting of the bill. On the other hand it was contended that the intention with which this instrument was made was not material, and that it was not necessary to constitute a bill of exchange for this purpose that the parties on whom it was drawn should be liable to accept, or even be existing persons; and that it was enough if the instrument purported to be drawn on a person or persons to whom it might be presented. On a case reserved on the question whether this instrument was properly described as a bill of exchange, the judges were of opinion that the conviction was right; that the instrument was in form a bill of exchange, and that the 35 Geo. 3, c. 94, did not prevent its being so considered. (d)

The indictment alleged that the prisoner had in his possession the following bill of exchange:—

‘£5,000.’

‘Manchester, December 20th, 1839.

‘At seven days’ sight pay to Mrs. Elizabeth Isherwood, widow, Miriam Isherwood, spinster, Anne Magdalene Isherwood, spinster, also Anne Maria Isherwood, now the wife of Charles Bellairs, Esq., or order, the executrixes of the late John Isherwood, Esq., £5,000 in full, for loss under policy No. 11,012.

‘To the Trustees of the Pelican Life Office, London.

‘W. J. TATE,’

and that he forged on the back of the said bill of exchange a certain endorsement as follows:—

‘ANNE MAGDALENE ISHERWOOD’—

Harrison’s case, 1 Leach, 180. 2 East, P. C. c. 19, s. 19, s. 36, p. 926, where an objection that certain counts of the indictment were not within the 2 Geo. 2, c. 25, and 31 Geo. 2, c. 22, s. 78, because those statutes were confined to the forgery of receipts

for money or goods, whereas the counts in question charged the forgery of a receipt for bank notes, which were neither money nor goods, was allowed.

(d) Chisholm’s case, MS. and R. & R. 297.

with intent to defraud John Petty Muspratt and others as trustees of the Pelican Life Office. There were fifteen other counts for forging and uttering, varying the statement and the parties intended to be defrauded. The prisoner had been attorney to the late Mr. Isherwood, who died in 1839, leaving a widow and three daughters his executrixes, and a gentleman executor, who never took out probate. Mr. Isherwood had insured his life in the Pelican Office for £5000. The probate to Mrs. Isherwood and her daughters was taken out, and the prisoner without their knowledge made application to the office for payment of the policy, which he produced to Mr. Tate, the agent of the office, together with the probate, and it was arranged that payment should be made by the bill in question, which Mr. Tate drew, and gave to the prisoner to procure the endorsement of the executrixes. In January, 1840, the bill was paid by the prisoner into the bank at Stockport, with which he kept an account, with the apparent endorsements of Mrs. Isherwood and her three daughters, and among these the one named in the indictment, and his own endorsement after theirs, and it was on that day placed to his account, and he instantly began drawing upon it. It was objected that the bill being made payable to the executrixes, or order, was negotiable only upon endorsement by all the said payees, and therefore that the forgery of one of the said names was not a forged endorsement of the said bill. (e) And, upon a case reserved, it was contended that the endorsement mentioned in the 1 Will. 4, c. 66, s. 3, meant such an endorsement as, if genuine, would be valid; it must be such as might both in law and fact defraud. The endorsement of one name was no endorsement at all, for it would not transfer the property in the bill. To make this a good endorsement there must be a genuine endorsement of all the four names. The statute speaks of 'an endorsement on or assignment of any bill;' clearly shewing that the endorsement must be such as will amount to a valid assignment of, and will transfer the entire property in, the bill. On the part of the Crown it was argued that the prisoner had forged on the back of the bill an endorsement. Could it not be said that one of these executrixes had endorsed the bill? If there is an endorsement, which will satisfy the endorsement of any one of the executrixes, that is within the statute. Any endorsement that will bind any one person is sufficient. An endorsement of a stranger's name would be within the Act. If the parties were not executrixes, an endorsement of the name of any one would be an endorsement within the Act. Suppose a bill payable to three parties, and a person forges the name of one, and gets the endorsement of the others, would not that be an endorsement? 'Any endorsement' in the Act means any endorsement which is usually called so. The four payees might have sued on this bill as executrixes; therefore any one of them could have released the action. They are joint tenants; all the incidents of joint tenancy attach: any one of them might transfer the property. The Court took time to consider; and afterwards held the conviction right, on the ground of any endorsement being sufficient. (f)

**Promissory notes.** — It was not necessary that a promissory note should be in itself *negotiable*, in order to make it such a note as might be the subject of an indictment for forgery within the 2 Geo. 2, c. 25. The prisoner had been convicted on an indictment which charged him with having forged, &c., a certain promissory note for the payment of money, which was as follows: —

(e) There were several other objections taken, but as the prisoner's counsel admitted on the argument before the judges that the case could be decided on the objection above

stated, and the judges expressed no opinion on any of the others, they are here omitted.

(f) *R. v. Winterbottom*, 1 Den. C. C. 41. 2 C. & K. 37.

'On demand we promise to pay Mesdames Sarah Willis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 per cent. interest for the same, value received, this 7th day of February, 1815.

'£64.'

'For Felix Calvert and Co.

'JOHN FORSTER.'

It was moved, in arrest of judgment, that this was no promissory note; and the case was argued before the twelve judges. Their opinion was afterwards delivered by Le Blanc, J., to the following effect:—'An objection was taken in arrest of judgment, and argued before all the judges, that the instrument in question, such as it is stated in the indictment, was not a promissory note within the statute, so as to be the subject of an indictment for forging or uttering it, knowing it to be forged. The objection to this instrument was founded on this circumstance, that it appears to be made payable to two ladies, describing them as stewardesses of a provident society, or their successors in office; and that this society not being enrolled according to the statute, this note was not capable to enure to their successors, and was not negotiable. The judges are of opinion that this is, as stated in the indictment, a valid promissory note within the statute of Geo. 2. It is not necessary that such a note should be in itself negotiable; it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not. And though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it. Therefore, it is an instrument capable of being the subject of forgery, and there is no ground to arrest the judgment; and the judges are all of opinion that the conviction is right.' (g)

The prisoner was indicted for forging a promissory note payable to 'The Temple of Peace United Lodge of Odd Fellows;' and it was objected, that it was not a promissory note, because there was no payee, or at least no person to whom the bill was payable, whom the law could recognise. Gurney, B., refused to stop the case, and afterwards consulted Parke, B., and Rolfe, B., who had no doubt that the document was a promissory note. (h)

**Post dated cheques.**—Upon an indictment for uttering a forged order for the payment of money, it appeared that the prisoner uttered on the 28th of August a forged cheque bearing date the 29th of August, and it was objected that it was not an order for the payment of money, as it was post dated; but Cresswell, J., was of opinion that it was an order for the payment of money within the meaning of the statute, and that, to make it such, it was not necessary that the party should be bound to pay it at once if genuine. It might be that there were no effects, and then the banker would not be bound to pay the cheque at once, and yet it would be an order for the payment of money. (i)

**Uttering incomplete forged bill.**—Forging a bill payable to the prisoner's own order, and uttering it without endorsement, as a security for a debt, was holden to be a complete offence. The count in the indictment more peculiarly applicable to the facts of the case charged that the prisoner having in his possession a paper whereon was written or printed to the following tenor:—

(g) R. v. Box, 6 Taunt. 325. R. & R. 303.

(h) R. v. Clarkson, 1 Cox, C. C. 110.  
(i) R. v. Taylor, 1 C. & K. 213.

‘Pay to the order of  
value received.

‘ATHERTON, GREAVES, and DENISON.’

‘To Joseph Denison, Esq. and Co., London.’

‘Ent<sup>d</sup>.

did forge, &c., in and upon the said paper, as follows: — ‘2,310’ — ‘35: 3: 5’ — ‘16 August’ — ‘Two months after date’ — ‘Mr. John Birkett, thirty-five pounds 3: 5 — R. N.’ — and by that means did forge, &c., a bill of exchange as follows: —

‘No. 28.

£35 : 3 : 5.

‘2,310

Preston Bank, 16 August, 1804.

‘Two months after date pay to the order of Mr. John Birkett, thirty-five pounds 3 : 5, value received.

‘ATHERTON, GREAVES, and DENISON.’

‘To Joseph Denison, Esq. and Co., London.

‘Ent<sup>d</sup>. R. N.’

with intent to defraud Atherton, Greaves, & Co. Other counts charged an uttering, &c.; and others an intent to defraud different persons, and amongst others one Matthew Yates. M. Yates kept an inn at Liverpool, to which the prisoner came on the 14th of the preceding August, with a horse, and continued boarding and lodging there until the 27th of the same month. Four or five days before the 27th, a person came to the inn, and took away the horse, and Yate’s wife then directed the waiter to carry the prisoner his bill; after which the prisoner came to her and gave her the bill of exchange, filled up as stated in the indictment, saying he hoped that would satisfy her for what he had had; to which she answered, ‘I dare say it will;’ and took it from him and kept it until the 27th of August, when the prisoner was apprehended. Upon cross-examination, the wife said that the prisoner did not give the bill of exchange to her as payment; and that she knew she could make no use of the bill until the prisoner endorsed it; that he told her he did not wish to discount it, and would pay her in a few days without it. She further stated, that she considered herself as keeping the bill for the prisoner, and not for herself. The prisoner had been a clerk in the house of Atherton and Co., from July, 1803, to July, 1804, and it had been usual in that house to have cheques signed ‘Atherton, Greaves, and Denison,’ kept in a drawer within the proper custody of two superior clerks, but accessible to the prisoner, who was sometimes permitted to sign them. The whole of the written part of the bill of exchange stated in the indictment, except the signature, ‘Atherton, Greaves, and Denison,’ was in the handwriting of the prisoner. Graham, B., left the case to the jury, telling them that the use made of the instrument when filled up by the prisoner, though not endorsed, was conclusive evidence of the fraudulent intention, and proved as well the counts charging the actual forgery, as those which charged the uttering, &c., knowing it to have been forged; and the jury returned a verdict of guilty. But Graham, B., doubting whether he ought not to have left the question of fraudulent intention more open to the jury — in which case they might have found that the prisoner did not mean to defraud any person, but, by paying his reckoning and taking back the bill, to make



no further use of it — reserved the case for the consideration of the judges, who were of opinion that the facts stated amounted to forgery, and with a fraudulent intent; the bill having been given to the landlady to obtain credit, though as a pledge only. (*j*)

**Forging acceptance where no drawer.** — Where a prisoner was indicted for forging an acceptance of a bill of exchange, and it appeared that at the time when the acceptance was written a blank was left in the bill for the drawer's name, it was held that the indictment was not supported, as the instrument, to which the forged acceptance was affixed, was not at the time of the forgery a bill of exchange, there being no drawer's name. (*k*) And where upon an indictment containing counts for forging and uttering a bill of exchange, it was proved that the prisoner wrote the acceptance on a blank stamp, and the bill was drawn two days afterwards in the absence of the prisoner; Patteson, J., doubted whether the charge of forgery could be supported, because at the time when the acceptance was written on the stamp, it was a blank paper, but said that it was not very material if the prisoner uttered the bill afterwards, knowing the acceptance to be a forgery. (*l*)

(*j*) R. v. Birkett, R. & R. 86.

(*k*) R. v. Butterwick, 2 M. & Rob. 196, Parke, B.

(*l*) R. v. Cooke, 8 C. & P. 582. See R.

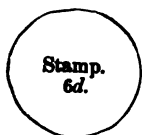
v. Hawkes, 2 Moo. C. C. R. 60. R. v. Kinnear, 2 M. & Rob. 117, R. v. Bartlett, 2 M. & Rob. 362, R. v. Lee, 2 M. & Rob. 281.

## APPENDIX L.

### *Decisions on Repealed Statutes relating to undertakings for the Payment of Money.*

AN undertaking by a supposed party to an instrument for the payment of money by a third person, was an undertaking for the payment of money within the 1 Will. 4, c. 66, s. 3. (a)

The prisoner was indicted for forging the following undertaking for the payment of money:—



‘ St. Helier’s, Jersey,  
‘ 23rd Sept., 1861.  
‘ Messrs. Crawford, Lindsay, & Faithful,  
3, Lawrence Lane, London.  
‘ Gentlemen,

‘ I hereby guarantee to you the payment in full of the following promissory notes of Mr. José:—

‘ His promissory note to you for £50 due 30th March, 1862.

|   |   |   |      |                   |
|---|---|---|------|-------------------|
| “ | “ | “ | “    | Sept.             |
| “ | “ | “ | “    | 30th March, 1863. |
| “ | “ | “ | £150 | Sept.             |

‘ In all £300.

‘ I am, Gentlemen,

‘ Yours truly,

‘ WM. FRODSHAM.’

It was objected that this was not an undertaking for the payment of money within the 1 Will. 4, c. 66, s. 3, as it stated no consideration, and that that Act only applied to documents which were binding when it passed; but it was held that this was an undertaking for the payment of money, as it was rendered valid by the 19 & 20 Vict. c. 97, s. 3. (b)

Where the plaintiff and defendant in a suit in the county court entered into an agreement which was as follows, excepting the parts between brackets: ‘that the said plaintiff arranges to wait for the balance now due, and to waive all proceedings whatever against the defendant for the term of four months [viz. from the 13th day of May, 1861, to the 13th day of September, 1861; and to allow for putrid bacon £5 5s., and on costs £1 5s. Balance due £7 3s. 8d.], upon the conditions as above, and now stated that the defendant do now pay to the plaintiff the sum of £4. Received the sum of four pounds on account of the debt and costs in this action, this 26th day of April, 1860 [and the balance, £7 3s. 8d., to be paid 13th day of September, 1861],’ which was signed by both parties, and the defendant afterwards inserted

(a) R. v. Reed, 2 Moo. C. C. R. 62, 8      (b) R. v. Coelho, 9 Cox, C. C. 8. The  
C. & P. 624. R. v. Stone, 1 Den. C. C. Recorder.  
181, 2 C. & K. 364.

the parts between brackets, the effect of which was to reduce the balance by £6 10s., and to postpone the payment of it nearly a year and five months instead of four months. Hill, J., held that this was not an undertaking for the payment of money, as the plaintiff did not undertake to pay anything; and that it was not a forgery of a receipt, for there was no alteration of the sum for which the receipt was given. (c)

(c) *R. v. Wright*, 2 F. & F. 320.

## APPENDIX M.

### *Decisions on Repealed Statutes as to Receipts.*

**What amounts to a receipt.** — Where the prisoner was indicted for uttering a forged 'receipt for money,' in the following words — 'Received the contents above, by me, Stephen Withers' — it appeared that he was employed by a person who kept a lottery-office to carry out the prize-money, with an account of the deductions, and to pay it to the party, and bring back his receipt, and that the following account was delivered to him, with money to pay the balance: —

'No. 38,811.

| MR. WITHERS.  |   | £       | s. | d. |
|---|---|---------|----|----|
| 'One-16th of a £20 prize                            | . | 1       | 5  | 0  |
| 'Deduct for expenses, advances, and remitting money | . |         |    |    |
| to you  | . | 0       | 1  | 0  |
|   |   | 1 4 0.' |    |    |

That upon producing this account again, when he settled his accounts with his employer, the receipt stated in the indictment was at the bottom of it; and that he had not paid the money to Mr. Withers, whose handwriting had been forged. It was objected on behalf of the prisoner that this receipt did not correspond with the indictment; for nothing was set forth but the receipt as for the contents above; and that, together with the bill of particulars, was one entire thing; and it being set forth, 'which said false receipt, &c., is as follows,' the whole ought to have been set forth, and not part only, namely, 'the contents above,' which did not appear to be the same, nor to be a 'receipt for money.' And it was also urged, in arrest of judgment, that it did not appear by the receipt set out in the indictment that it was a receipt for money, or what it was for; and that being only for the contents above, and nothing set forth to shew what they were, or explain the receipt, it was unintelligible. The judges were of opinion that the indictment was sufficient, for it was, 'Received the contents above,' which shewed it to be a receipt for something, though the particulars were not expressed; and it was laid to be a forged receipt for money, under the hand of Stephen Withers, for £1 4s.; and the bill itself was only evidence of the fact, and shewed it to be a receipt for money as charged. (a)

It appears to have been held, in one case, that an entry of the receipt of money or notes made by a cashier of the Bank of England in the bank-book of a creditor, was an *accountable receipt* for the payment of money within the 7 Geo. 2, c. 22. (b)

(a) Testick's case, 2 East, P. C. c. 19, s. 86, p. 925.

(b) Harrison's case, 1 Leach, 180. 2 East, P. C. c. 19, s. 86, p. 926. In the last

The prisoner was the treasurer of a voluntary friendly society, which was not enrolled. His duty was (amongst other things) to pay into the West Riding Union Bank moneys received at the meetings of the society in his own name. On the first Saturday in November, 1857, he received at a meeting of the society £20 to pay into the bank, and on the first Saturday in December following the prisoner, at a meeting of the society, said that he had paid it in, and produced a book purporting to be a banker's pass-book, in order to vouch to the society that the sum of £20 had been paid in to the said bank. At subsequent meetings of the society the sums of £40, £15, £40, and £30, were paid to him for the like purpose, and the said book was produced by the prisoner and shewn to the members at meetings of the society, to vouch the payment of the several sums into the bank. The entries in the book were as follows:—

‘Mr. Charles Smith, Shepley, in account with the West Riding Union Banking Company.

| Dr.                       |  | Cr.             |             |
|---------------------------|--|-----------------|-------------|
| 1859.                     |  | 1857.           |             |
| Feb. 22nd.                |  | Nov. 18th, Cash | £20 0s. 0d. |
| Interest up } £2 15s. 0d. |  | 1858.           |             |
| to that time }            |  | Feb. 19th, Cash | £40 0s. 0d. |
|                           |  | Aug. 24th, Cash | £15 0s. 0d. |
|                           |  | Dec. 22nd, Cash | £40 0s. 0d. |
|                           |  | 1859.           |             |
|                           |  | Feb. 22nd, Cash | £30.'       |

The book which the prisoner had so produced from time to time was fictitious, and did not truly represent the state of account; on the contrary, the prisoner had only paid into the bank the three sums of £20 on the 18th November, 1857, £40 on December 23rd, 1858, and £20 on February 22nd, 1859; and he had reduced the amount in the bank, which included money paid in and interest thereon to the sum of £3 1s. 11d., by drawing out at various times sums of money which he had appropriated to his own use. It was objected that the prisoner was interested in the moneys; and that as the book which he presented stated the moneys which he had received, the mere misrepresentation of the true state of the account between him and the bank was no offence. The objections were overruled, and the jury were told that if the prisoner presented a false account to the members with intent thereby to obtain credit for having duly paid into the bank the various sums which he had received, and to be continued in his office of treasurer with a view to obtain other moneys from the society, which he might fraudulently appropriate to his own use, they should find him guilty; and, upon a case reserved, it was held that the conviction was right on the authority of the preceding case. (c)

So where the prisoner was the secretary of a society for the relief of the sick and burial of deceased members, and at a meeting of the society he was directed by the society to pay into the Huddersfield Savings Bank, for the society, £40, which was at the time given to him for that purpose; and at the next meeting he produced a book endorsed ‘Savings

authority this point respecting the *accountable receipt* is not reported; but it is referred to as being stated in 1 Leach. See Lyon's case, 2 East, P. C. c. 19, s. 36, p. 934, Grose, J.

(c) R. v. Smith, L. & C. 168. The case does not state or shew whether the indictment was for felony or misdemeanor; but it might well have been for uttering a forged accountable receipt.

Bank, New Street, Huddersfield,' and on the first page of which was written '1855, Oct. 30. Received £40 0s. 0d.,' and said, 'that is the book belonging to the money;' and it was proved that neither the endorsement nor the entry was in the handwriting of any one employed at the bank. The prisoner was indicted for uttering an accountable receipt for money. It was held, on a case reserved, that the forged writing was an accountable receipt; for, if it had been genuine, it would have been evidence that the bank had received the money, and were to be accountable for it. (d)

A count charged the prisoner with forging the following accountable receipt for money:—

'Ulster Branch Bank, No. 1.

'Enniskillen, 14th January, 1851.

'We have received from the Lowtherstown Union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company.

'£40.

'SAMUEL CLARKE, Manager.

'Entd. Alex. H. Stockdale'—

with intent to defraud the guardians of the Lowtherstown Union. The prisoner was a poor-rate collector of the Union, and should have lodged about £40 in the Ulster Bank, who are treasurers of the Union; and he stated to the clerk of the guardians of that Union that he had lodged £40 in the bank, and produced the receipt in question. The bank furnished weekly accounts, shewing the sums lodged by each collector, and it was from their account so furnished that the collectors got credit in their accounts with the Union; and on the morning the receipt was given to the clerk by the prisoner, the clerk had previously received from the bank the weekly account, which shewed that the prisoner had lodged only £4 in the bank; the prisoner had in fact only lodged £4, and when the receipt left the bank it was a receipt for that sum only, but the £4 in the margin had been altered to £40, and an endorsement on the back had been altered in its figures so as to make the total £40 instead of £4. For the prisoner it was proved that the practice had always been to give the collectors credit for the bank accounts, and that the receipts were never referred to. It was objected that as the prisoner could only get credit for the sums stated in the account, and not for the amount of the receipt, it was not a receipt within the statute, and that as the receipt was not altered in the body, it was still a receipt for four pounds; but, on a case reserved, it was held that the receipt was an accountable receipt within the statute, and that the amount in figures, in the corner of the receipt, was a material part of the document, and the alteration in them was a forgery. (e)

In the following case the point arose as to the necessary averments in the indictment of the instrument in question purporting to be and being a receipt, where it did not necessarily purport to be such on the face of it. The indictment charged that the prisoner had in his possession a certain navy-bill (which was set forth according to its tenor and effect), under which navy-bill there was contained a certain order in writing for payment, called an assignment, &c., and upon which there was contained a certain endorsement, partly printed and partly written, by one Wm. Davis, chief clerk to the comptroller of His Majesty's navy, in his office, for bills and accounts, to the following tenor and effect: 'The certificate within mentioned is endorsed by Edward Wilson, payable to Mr. Wm. Thornton; T. Davis:' and that the prisoner forged, &c., a certain

receipt for money, to wit, for the sum of £25 mentioned and contained in the said paper, &c., called a navy-bill, which forged receipt was as follows; that is to say — ‘Wm. Thornton,’ ‘Wm. Hunter:’ with intention to defraud the king. A second count stated the navy-bill, the order for payment and endorsement, as in the first count; and then stated, that to the said last-mentioned navy-bill was annexed and written a certain false, forged, &c., receipt for money, to wit, for the sum of £25, in the said last-mentioned paper, called a navy-bill; which said false, forged, &c., receipt for money was as follows: that is to say, ‘Wm. Thornton,’ ‘Wm. Hunter;’ and that the prisoner knowingly uttered the said last-mentioned forged, &c., receipt for money, with intent to defraud the king. Other counts, nearly similar, charged the instrument forged to be an acquittance; and some of the counts stated the intention to be to defraud Wm. Thornton and other persons. It appeared that Edward Wilson, who had been pilot of the *Lord Mulgrave*, having received from his captain a certificate of his service, sent it to Wm. Thornton, to receive his wages. The prisoner was a clerk in the comptroller’s office; and, being employed to forward the pilot’s bill through the office, got into his hands the bill stated in the indictment, and carried it with the order for payment and endorsement upon it, which were necessary for receiving the money, to the cashier of the pay-office; having wafered to one side of the bill, on which was written the sum £25, under those figures, a fourpenny stamp used for receipts, on which were written the names of ‘Wm. Thornton,’ ‘Wm. Hunter,’ without any words importing that they had received the money. And it was proved that the cashier was in the habit of paying navy-bills on the owner’s name being written under the sum, without any other receipt. It appeared on producing the bill that the name Major Woolhead was written at the bottom of it; with respect to which it was proved that it was usual to have his name to the bills, as without it they did not regularly pass through the office; but that a bill would not be stopped if his name were not put to it. There also appeared on one side of the bill the initials of Mr. Davis’s name, T. D., which were not stated in the indictment. The prisoner having been convicted, judgment was respited, to take the opinion of the twelve judges on the case; and it was argued before them that the indictment was defective upon several grounds; and amongst others, first, because it did not appear, by the tenor of the instrument as set forth therein, that it was a receipt; and secondly, because there was nothing stated in the indictment to shew that this could operate as an acquittance. And judgment was arrested, on the ground that it did not appear on the face of the indictment, nor was it shewn by averment that the instrument was a receipt. Grose, J., in delivering the opinion of the judges, said, that it was not enough to call the signature of the two names. ‘Wm. Thornton’ and ‘Wm. Hunter,’ a receipt, for they did not, standing by themselves, purport to be a receipt; and therefore the indictment should have averred that the said names ‘Wm. Thornton’ and ‘Wm. Hunter,’ written on the said paper, imported and signified that the said Wm. Thornton and Wm. Hunter had received the sum of twenty-five pounds mentioned in the said paper writing. ‘This is undoubtedly the law upon this subject; therefore as the words ‘Wm. Thornton,’ ‘Wm. Hunter,’ do not import to be a receipt, and there being nothing to explain the import of these words, or to shew that they were in any way intended to signify that those persons had received the money, this indictment is clearly bad on the first count; and as the same objection applies in substance to the second count, though it is different in point of form, the majority of the judges are of opinion that the judgment ought to be arrested.’ (f)

(f) *Hunter’s case*, 2 Leach, 624. 2 East, said that Buller, J., thought the second count P. C. c 19, s. 36, p. 928. In 2 East, it is might be supported, considering this to be as

Two cheques were paid on account of the Patent Wadding Company to the prisoner, who at the time named the amount due from Messrs. Schoolbred to that company, and subscribed the entry in their book, which was in the following form:—

| 1853   |                        |               | £17,000 | £12,000 |
|--------|------------------------|---------------|---------|---------|
| Nov. 1 | A. B. & Co.            | John Doe      |         |         |
| " 2    | C. D. & Co.            | Richard Roe   |         | £100    |
| " 3    |                        |               |         |         |
| " 4    |                        |               |         |         |
| " 5    |                        |               |         |         |
| " 27   | Patent Wadding Company | H. N. Overton |         | £22 4 0 |
| " 28   |                        |               |         | £14 6 0 |
| " 29   |                        |               |         |         |

In one of these columns were entered the names of all the creditors who had supplied Messrs. Schoolbred with goods, and in the last column, and opposite to the names of the creditors, were entered all the sums due to each, and in an intervening column was written the signature of the person who received the money at the time when each account was paid. The course of business was that, when any person called for the amount due to any creditor whose name was entered in the book, he was asked the amount of the debt claimed, and if the amount thereupon named by him corresponded with the amount entered in the book, the debt was immediately paid by Messrs. Schoolbred's clerk, and the person receiving it was required to sign his name in the middle column of the book, intervening between the name of the creditor and the sum entered as the amount of the debt. No other receipt was required or taken by Messrs. Schoolbred; but if an entire stranger to both parties called for the debt, and mentioned the amount correctly as entered in the book, he would receive the money upon his signature opposite the entry as above described. The signature, H. N. Overton, was that of the prisoner, who was in the service of the Patent Wadding Company. And, on a case reserved on the question whether the entry in the book was a receipt for money within the Stamp Acts, it was held that it was, for a document containing a signature without more may be proved to be a receipt, and here the evidence *aliunde* shewed this entry to be a receipt. (g)

It has been held that a count setting out as an acquittance an invoice of goods sold, with the word 'settled' at the foot, and signed with a name in full, is good without any averment of the meaning of the word 'settled.' A count charged the prisoner with uttering the following acquittance for money, viz.:—

'May 4, Mr. Martin.

'Bought of Lang and Son,  
'Wholesale Druggists, Bristol.

'6 Quarts of settledated striking acid.

'Settled £4: 0: 0.'

'SAM. HUGHES.'

much a receipt as the writing a name was an endorsement on a bill of exchange; but to this it was answered, that an endorsement was complete by writing the name on the bill without any thing more; whereas the name itself, as stated in the indictment, was no receipt, though the name, coupled with the

navy-bill, might together form a receipt. But then it ought to be so stated.

(g) *R. v. Overton*, Dears. C. C. 308. The case was decided on the question whether the writing was admissible without a stamp. *R. v. Hunter*, *supra*, was relied on by the Court.



and it was objected on the authority of the preceding case that this count was bad, as there was no averment as to the meaning of the word 'settled.' It was further urged, that if the word 'settled' had any definite meaning, it meant a receipt, as was held in *Spanforth, q. t. v. Alexander*, (h) and as the Legislature must be taken to have meant different things by the words 'receipt' and 'acquittance,' the Court could not say that it was an acquittance. But, upon a case reserved, the judges were unanimously of opinion that the count was good. (i)

The indictment charged the prisoner with forging a certain receipt for the payment of money, in form following (that is to say) :—

'6<sup>th</sup> January, 1830.

'£16: 15: 6

'For the High Constable,

'JAMES HUGHES'

with intent to defraud J. Grundy. It was objected that the document set out was not on the face of it necessarily 'a receipt for the payment of money.' The words were in themselves quite ambiguous, and might as well be construed to import that Hughes had paid money for the high constable, as that he had received it for him; neither was it to be deemed a receipt because the prosecutor had called it by that name in the indictment. He should have gone further, and explained by reference to the other documents, or to the course of business, how the instrument, in itself ambiguous, came to have the effect of a receipt. (j) Alderson, B., 'The cases cited are clearly distinguishable from the present. In *Hunter's case* the forgery consisted in merely counterfeiting the signature of the party, which, of course, meant nothing without reference to other documents. In *Thompson's case*, the forgery consisted in writing the word "settled" on an account; that, also, was an expression in itself entirely ambiguous: it might mean either that the party was satisfied as to the correctness of the items, or that he had received the amount. But, indeed, that case has been expressly overruled by *R. v. Martin*. I think there is nothing in the objection.' (k)

So where on an indictment for forging and uttering an acquittance and receipt for money, it appeared that the prosecutrix gave the prisoner the bill of a Mr. Sadler, a cheesemonger, with money to pay that bill and a variety of others, and the prisoner brought the bill back again to the prosecutrix, with the words, 'Paid, sadler,' at the bottom of the bill, with a little s, and no Christian name, and Sadler proved that he never signed any bills in such manner, with a little s and no Christian name, but all his bills had his initials, 'S. Sadler,' to them; it was contended that the words 'Paid, sadler,' did not necessarily import a receipt by Sadler, but they might be a memorandum of the prisoner of her having paid the money to him. But Lord Denman, C. J., in summing up, said, 'You must be satisfied that this was a receipt for money, and I apprehend that that does not admit of any kind of doubt. The prisoner clearly produced it as a receipt; but it is said that it might be merely a memorandum of her own, denoting that she had paid the bill; but I apprehend that where a person writes under a bill the word "paid," with the name

(h) 2 Esp. R. 621.

(i) *R. v. Martin*, R. & M. C. C. R. 483.  
7 C. & P. 549. See *Thompson's case*,  
2 Leach, 910.

(j) *Hunter's case*, ante, p. 916, *Thomp-*

*son's case*, supra, and *R. v. Barton*, R. &  
M. C. C. R. 441, were cited.

(k) *R. v. Boardman*, 2 M. & Rob. 147.  
2 Lew. 181.

of the tradesman, it will be difficult to say that it does not purport to be a receipt for the money.' (l)

An indictment for forging or uttering a receipt at the foot of an account was bad, if such receipt was signed with the initials only, and there was nothing in the indictment to explain what those initials meant, though such receipt was described as being in the handwriting of a person whose name agreed with those initials, and was stated to have been written by him as a receipt for other money, and falsely affixed at the foot of another account. An indictment for forging or uttering a receipt in the name of T. S., should shew that T. S. was a person to whom the money might have been paid. (m) The indictment stated that a precept had been issued by Christopher Hindle, one of the high constables for the hundred of Blackburn, directed to the overseers of the poor of Clayton-le-dale, to collect £21 11s. 4d.; that a receipt for money, viz. for the sum of £21 11s. 4d., had been forged, by falsely affixing and cementing to the said precept, at the foot thereof, a certain receipt in the handwriting of one Henry Hargreaves, of the tenor following, that is to say, '1825, Rec<sup>d</sup>. H. H.,' which had, before then, been made and written by the said Henry Hargreaves, as a receipt for certain other money, and that the prisoner published the said forged receipt as and for a true and genuine receipt for the said sum of £21 11s. 4d., with intent to defraud the said Henry Hargreaves. A motion was made in arrest of judgment, on the ground that there should have been some averment or innuendo to have explained what was meant by the abbreviated word 'Rec<sup>d</sup>.' and what by the initials 'H. H.' (n) The indictment appeared to Bayley, J., to be open also to another objection, viz. that it was not shewn what connection Henry Hargreaves had with Hindle or with the receipt. And, upon a case reserved, the judges held the indictment bad, because there was nothing to shew what the initials 'H. H.' meant, or what connection Hargreaves had with Hindle or with the receipt. (o)

If a party wrote on the back of a bill of exchange, 'Received for R. A.,' and signed his own name to it, this was not forging a receipt within the 1 Will. 4, c. 66. (p)

The prisoner was indicted for uttering a forged receipt for money as stated in some counts, and for uttering a forged acquittance and receipt for money as stated in other counts. The instrument was as follows:—

'Received from  
'Mr. Bendon, due to  
'Mr. Warman, 17s. 0d.  
'Settled.'

The prisoner was servant to Mr. Warman, and applied to Bendon's wife for payment of a debt of 17s. due to Warman. She refused, unless

(l) *R. v. Houseman*, 8 C. & P. 180. The report does not set out the bill.

(m) These positions are taken from the marginal note in *R. & M. C. C. R.*, but, perhaps, they are hardly deducible from the case itself. *C. S. G.*

(n) *Hunter's case*, *ante*, p. 916, *Testick's case*, *ante*, p. 913, and *Thompson's case*, *ante*, p. 918, were cited.

(o) *R. v. Barton*, *R. & M. C. C. R.* 141. In order to avoid any such objections as were raised in this case, the better course in similar cases would be to describe the instrument as 'a certain receipt for money, that is to say, a receipt for the sum of £3,'

which has been held to be sufficient. In *R. v. Guy*, 1 Cox, C. C. 18, a receipt was written at the foot of an account for meat supplied, headed 'A. B. to Joseph Locke,' and the receipt was 'Received, Joseph Locke, junior;' and the account was set out in some counts, and it was objected that these counts were bad, because there was nothing to shew what connection J. Locke, junior, had with the debt of J. Locke; but Erskine, J., refused to stop the case, and the prisoner was convicted on these as well as other counts which were unobjectionable. *C. S. G.*

(p) *R. v. Arscott*, 6 C. & P. 408. *Little-dale, J.*, *Bolland, B.*, and *Vaughan, J.*

she had Warman's receipt, and the prisoner went away and returned with the above document; upon which she paid the money. The jury having convicted, upon a case reserved, six of the judges (*q*) thought the conviction good, as the receipt sufficiently appeared to be the receipt of Warman, especially considering the conduct of the prisoner in producing it as such, and if so it was a forgery. The other five judges (*r*) thought it did not purport to be the receipt of Warman, and therefore was no forgery, inasmuch as if it was taken to be the receipt of the prisoner it was no forgery; and that the offence of the prisoner was obtaining money by false pretences. (*s*)

The prisoner was convicted upon an indictment, which charged that he did feloniously forge a certain receipt for money, which was as follows:—

'Received the 22nd day of May, 1834, of Messrs. Cox and Co., Paymasters, Royal Regiment of Artillery, the sum of £13 sterling, being a part of subsistence for a detachment of Captain Bayley's company, second battalion Royal Artillery at Woolwich, for the month of June, 1834.

'R. M. POULDEN, Lieutenant Royal Artillery'—

with intent to defraud R. H. Cox and others. There was another count for feloniously uttering a like forged receipt for money, knowing it to be forged, and several other counts, upon which no question arose. In May, 1834, Lieutenant Poulden had the charge of a detachment of Captain Bayley's company of the second battalion Royal Artillery at Woolwich, of which he was also the paymaster; the prisoner was acting under him as pay-sergeant. The following is the mode by which the subsistence money is provided:—The pay-sergeant makes out for the use of the paymaster, at the beginning of every month, an abstract of the subsistence money which will be wanted for the soldiers during the ensuing month, and the paymaster gives information to Messrs. Cox and Greenwood, the agents of the regiment, accordingly. The pay-sergeant, in order to receive this money, brings to the paymaster about once a week, a receipt, partly printed and partly filled up by himself, in the form above set forth, and upon obtaining the paymaster's signature thereto, he gets cash for it from any of the neighbouring tradesmen, who afterwards either pass it to others or send it up through their bankers to Messrs. Cox and Greenwood, who ultimately pay the amount to the bearer. In the present case the prisoner brought the instrument in question to Lieut. Poulden, on the 22nd of May, filled up as a receipt for subsistence money for the month of May, which Lieut. Poulden signed, not being aware at the time that he had already signed the receipts for all the subsistence money which had been provided for the month of May. The prisoner, after obtaining it, erased the word May, and inserted instead thereof the word June, thereby making it appear to be drawn for subsistence money for the ensuing month. This had the effect of preventing an immediate discovery, as Cox and Greenwood would have suspected the issuing of a receipt for a sum beyond the subsistence money provided for the month of May, supposing all the other receipts to have then come in. The prisoner took the receipt to H. T. Failey, a grocer at Woolwich, from whom he obtained thirteen sovereigns, and it was afterwards transmitted to Cox and Greenwood, who paid the same. It was objected that the

(*q*) Lord Denman, C. J., Wilde, C. J., Platt, B., Cresswell, Erle, and Williams, JJ.  
(*r*) Parke, Rolfe, BB., Patteson, Colman, and Wightman, JJ.

(*s*) *R. v. Inder*, 1 Den. C. C. 325. 2 C. & K. 635. The marginal note in Den. C. C. is quite unwarranted by the statement in the body of the report.

instrument was not properly described in the indictment as a receipt, that it was in its legal effect an operation, if anything, an order for the payment of money, and ought to have been so described, and this point was reserved for the opinion of the judges, all of whom (except Lord Lyndhurst, C. B., J. A. Park, J., and Bolland, B.), having considered this case, were unanimously of opinion that the conviction was good. (t)

So where the prisoner was charged with forging a certain receipt for money, viz., a receipt for the sum of £20, and it appeared that the prisoner went to the house of a tradesman and obtained £20, by saying that he came from Quartermaster-Sergeant Hunter, for change for an instrument in the following form:—

‘Received this 26th day of September, 1834, of Messrs. Cox and Co., Paymasters Royal Regiment of Artillery, the sum of £20, on account of subsistence for my detachment for the present month.

‘£20.

(Endorsed)

‘H. PESTER, Capt. Adj. R. H. A.

‘SAM. RICE, Gun. R. H. A.’

It also appeared that these receipts were frequently cashed by the tradesmen in Woolwich, who afterwards received the money from the army agents. J. A. Park, J., after mentioning the preceding case, and stating that he was not aware whether the question had been considered or not, was of opinion that this indictment was good. (u)

The indictment, under 1 Will. 4, c. 66, s. 10, charged that the prisoner did feloniously forge a certain receipt for money (that is to say):—

|                            |   |   |
|----------------------------|---|---|
| ‘Herefordshire,<br>To Wit. | } | ‘To the Churchwardens and Overseers of the<br>Poor of the Parish of Titley, in the County<br>of Hereford. |
|----------------------------|---|---|

‘By virtue of an order of Her Majesty’s Justices of the Peace in and for the said county, at their general quarter sessions assembled, you are hereby required, within thirty days from your receipt of this precept, or otherwise having had due notice thereof, to pay me out of the money by you collected, or to be collected, for the relief of the poor of your parish, the sum of £3 15s. 9d., being the proportion of your said parish, for and towards the general county rate, to be applied for the several purposes mentioned and set forth in the several statutes in such case made and provided, and herein fail not at your peril.

‘Given under my hand at Mowley, in the said county, the 6th day of December, 1837.

‘Dec. 31.

Rec<sup>d</sup> the above rate.

J. POWELL.’

‘JOHN POWELL, Chief Constable of the Hundred of —.’

And it was proved that Powell, the high constable, had sent the precept for the county rate, which was set forth in the indictment, with the sum of £3 5s. 9d., stated in it as the amount, and that he afterwards received that sum from the prisoner, and then wrote, ‘Dec. 31. Received the above rate, J. Powell.’ The prisoner afterwards presented the document altered into £3 15s. 9d. to the auditor of the Union, and obtained that sum from him. It was objected that this was not a forgery of a receipt, for that the whole receipt was contained in the words, ‘Dec. 31. Rec<sup>d</sup> the above rate, J. Powell,’ which was unaltered, and that altering the precept for the rate to which the receipt referred was not a forgery of the receipt. It was answered that the alteration varied the amount for which the receipt was given, and therefore it was a forgery of

(t) R. v. Hope, R. & M. 414.

(u) R. v. Rice, 6 C. & P. 634.

the receipt: and it was held that it was clearly a forgery of the receipt. (v)

It has been holden that a *scrip receipt*, not filled up with the name of the subscriber or person from whom the money was received, is not a receipt for money within the statutes. The point came on for consideration upon demurrer; and after argument, Grose, J., delivered the opinion of the judges, and said that the instrument, the tenor of which was necessarily set forth in the indictment, was not a receipt for money in contemplation of law within the meaning of the 2 Geo. 2, c. 25, &c. That it was the duty of the cashier appointed by the bank to receive such subscriptions to fill up the receipts with the names of the subscribers, or persons from whom they originally received the money; and until the blank left in the printed form was so filled up, the instrument did not become an acknowledgment of payment; or, in other words, a receipt for money. While in such a state it was no more a receipt than if the sum professed to be received had been omitted. (w)

In an action for false imprisonment the defendants justified on the ground that the plaintiff had uttered a forged accountable receipt for money, and on the trial the plea was amended by substituting the words 'acquittance or receipt.' The document was as follows:—

'1845.

'Scrip.

'Buckinghamshire Railway and Oxford and Bletchley Junction.

'Provisionally Registered.

'Capital £2,250,000, in shares of £20 each.

'Deposit £2 2s. per share.

'Nos. 101,801 to 101,850. The holder of this voucher is entitled to fifty shares in the above undertaking, he having signed the subscribers' agreement and parliamentary contract, paid the deposit as above, and agreed to pay all calls in respect of the said shares.

'By order of the Provisional Committee of Management.

'W. HARDING, Secretary.'

This document was a forgery. It was held that this instrument was not an accountable receipt, acquittance, or receipt within the 1 Will. 4, c. 66. It was merely a certificate that something had been done by some person, which would entitle the holder of it, at a future period, to shares in the company. In the statute the word 'acquittance' is found in connection with the word 'receipt,' which means a receipt which acquits. (x)

The first count charged the prisoner with uttering 'forged acquittances and receipts for money;' the second 'accountable receipts for money;' the third 'warrants and orders for the delivery of certain securities for the payment of money;' (y) the fourth, 'undertakings for the payment of money,' describing them; the fifth 'undertakings for the payment of money.' The London and S. W. Railway Co. was established by the 4 & 5 Will. 4, c. 88, and the 2 Vict. c. 28. The company in November, 1846, determined to create a number of new shares, and a bill was depending in Parliament relating to such new shares. The new

(v) *R. v. Vaughan*, 8 C. & P. 276, Gurney, B. It was also objected that there ought to have been an innuendo that 'Recd' meant 'Received,' but this objection was also overruled.

(w) *Lyon's case*, 2 Leach, 597. 2 East,

P. C. c. 19, s. 36, p. 933. And see several points as to the forgery of *scrip receipts* discussed in *Reeves's case*, 2 Leach, 808, *et seq.*

(x) *Clark v. Newsam*, 1 Exch. R. 1. 13.

(y) The third was abandoned on the argument by the prosecution.

shares had been allotted to the old proprietors. The course pursued in relation to the new shares was this: letters were written to the old proprietors, giving them the option of subscribing for the new shares, and the new shares were allotted to such proprietors as desired it. The allotment was intimated to a proprietor by a letter, which required him to pay a deposit of £5 per share to the banker of the company. The proprietor took his letter of allotment to the banker, paid his deposit of £5 a share, and the banker gave a receipt for the amount paid, and also signed the letter of allotment as a voucher that the deposit had been paid. The proprietor then took the letter of allotment so signed by the banker to the office of the company, and there received in exchange an instrument signed by two of the directors in the form of the instruments, which were the subject of the indictment, and which were denominated 'Scrip,' and the instruments proved to have been uttered by the prisoner were the same in form and contents as such scrip. The possession of the scrip was the only proof required by the company of the title of the holder, and of the payment of the deposit. The prisoner having been convicted, upon a case reserved, it was contended that the instruments were not receipts at all, either accountable or otherwise. At the time of receiving such instrument the party is in possession of a receipt for the money, and therefore it is presumable that it was not intended as a receipt, but as something else; and if it be contended that it is a second receipt, the form of the instrument negatives that, and shews that it operates quite in a different manner, and was intended so to do. The mere recital in the instrument—that the party had paid £5—cannot make it a receipt. Neither are the instruments undertakings for the payment of money. They are mere contingent undertakings; for it is left in doubt what the party undertaking will do. The nature of the undertaking itself depends on the occurrence of a contingency. On the part of the Crown it was contended that the instrument was both a receipt and acquittance. Suppose A. writes to B. offering to make him a present, the offer is intercepted by C., who forges the receipt of B., and presents it to A., who thereupon gives him the present; would not that be forgery? The Act seems to distinguish a receipt from an acquittance. It says 'receipt *or* acquittance,' and seems to have contemplated some such case of acquittance, where the payment was voluntary, and not merely such receipts as are themselves acquittances. The holder was discharging an obligation when he paid the £5, as there was an agreement that he should do so. The instrument operates as an accountable receipt, being an acknowledgment by the company that they have received £5, and hold it on account of the holder of the scrip. The instrument is also an undertaking for the payment of money. It is an undertaking by the company to pay interest on the shares. If on any contingency the interest might become payable, this is an undertaking within the statute. Afterwards eight of the judges (z) were of opinion that the instrument did not purport to be a receipt and acquittance, nor even a receipt within the statute. It was not a receipt in ordinary parlance, nor made with the intent of being such, though it might be used as evidence of the payment of the deposit; but any written paper capable of being so used was not a receipt; as, for instance, a letter written by a landlord to a third person saying that his tenant had duly paid his rent. On the other hand, four judges (a) thought that the instrument was on the face of it an acknowl-

(z) Pollock, C. B., Parke, Alderson, and Rolfe, BB., Coleridge, Coltman, Maule, and Williams, JJ.

(a) Lord Denman, C. J., Wilde, C. J., Wightman, and Erle, JJ.

edgment of the payment of the deposit, and was therefore a receipt for that sum. Coltman, J., thought it was an undertaking for the payment of money. Lord Denman, C. J., and Wilde, C. J., doubted whether it were so, but gave no opinion; and the rest of the judges were of opinion that it was not. They thought it was only an undertaking to deliver shares bearing interest, not that the interest should be paid; as an undertaking to deliver a bond for the payment of money with interest would be no undertaking for the payment of money. (b)

A memorandum importing that A. B. had paid a sum to C. D., but not importing any acknowledgment from C. D. of his having received it, was holden not to be a receipt within the statute. (c)

On an indictment for forging a receipt it appeared that the document purported to be an agreement between the prisoner and S. Cooper, and recited that an order of affiliation had been made on the prisoner for the payment of two shillings a week to S. Cooper, and that an arrangement had been made between the parties, whereby, on payment by the prisoner to S. Cooper of £25, *the receipt whereof was thereby acknowledged*, S. Cooper should indemnify the prisoner from all further expenses respecting the child. The document purported to be signed by the parties. Coleridge, J., 'This is an agreement between the parties, with a positive statement of the receipt of the money, purporting to be signed by the prosecutrix. In *R. v. Harvey* (d) there was merely a recital. This is no recital. It is true there is a recital in the first instance; but the allegation of the receipt of the money is not by way of recital. The words are "the receipt whereof is hereby acknowledged." I can't conceive anything more like a receipt.' (e)

Where a person who was employed by the executors of a contractor with the navy-board to settle the account of the testator with government produced certain forged acquittances and receipts for money, and delivered them to the navy-board in order to exonerate the estate of the testator from an extent, it was holden to be a forging and uttering within the 2 Geo. 2, c. 25. The indictment charged the prisoner with forging and uttering, knowing, &c., a great many acquittances and receipts (which were set forth), with intent to defraud the King. It was objected by his counsel that the case was not within the 2 Geo. 2, c. 25, as the receipts in question purported to be receipts given to Collinridge, the contractor, by persons employed by him, for money therein stated to have been paid to them for work and materials done and provided for

(b) *R. v. West*, 1 Den. C. C. 258. 2 C. & K. 496. Maule, J., in the course of the argument asked, 'Would it be forgery to write to a man, "Sir — I have to acknowledge the receipt of your obliging letter, and return you many thanks for your kind present of £10." — would that be an acquittance? No; for the giver is quit before he gives the present. There is nothing that it is an acquittance of. He need not give the present at all.' The documents were as follows: —

'London & South Western Railway,

'New Capital, 1846-7.

'One share, £50

'No. ———'

'The holder of this scrip certificate having paid the deposit of £5, signed the Parliamentary contract and subscribers' agreement, and agreed to pay all calls in respect thereof, is the proprietor of one share of £50, part of the additional capital

raised under the authority of the special general meeting of proprietors held on the 17th of November, 1846, and the resolutions of the court of directors held the same day. The share represented by this scrip certificate will bear interest at the rate of £5 per cent. per annum on the amount paid, from the 1st of January, 1847, to the 1st of July, 1853, after which latter date it will rank with the original stock, and share rateably in the net profits of the company. See also 10th resolution of the court of directors, 17th November, 1846, on the back hereof.

'Dated the 1st day of January, 1847.

'Entered, J. L. Eyre, }  
'Alfred Morgan, H. C. Lacey, } Directors.  
Treasurer.

(c) *R. v. Harvey*, R. & R. 237.

(d) *Supra*.

(e) *R. v. Hill*, 2 Cox, C. C. 246.

the business in which he was employed under the navy-board, and were produced by the prisoner as vouchers, to accompany and verify Collinridge's accounts, in order to get them passed by the navy-board; which accounts the prisoner had taken upon himself, after Collinridge's death, to get passed, in order to avoid an extent which had issued against Collinridge's estate and effects. And it was urged in support of the objection, that these workmen were solely employed by Collinridge, and not by the navy-board; and that he, and not the navy-board, was answerable to them. That, therefore, the board had nothing to do with these receipts; and it was indifferent to the board whether these sums had been paid to these several persons or not. The prisoner having been convicted, the case was submitted to the consideration of the twelve judges, who all (with the exception of Lawrence, J., who was absent), held that the conviction was right, and that the receipts, as stated, were within the statute. Grose, J., in delivering their opinion, said, 'The facts in the case prove that these receipts were forged; and that they purported to have been given to Collinridge by workmen for moneys paid by him to them for work done *for the commissioners of the navy-board*. The persons, therefore, employed for that purpose by him, were employed not solely on his account, but on account of the King; and these receipts, if genuine, would have been legal vouchers for his account, and would have entitled him to a discharge from the navy-board. It is clear then, from the facts proved at the trial, and from the verdict of the jury, that these receipts are forged receipts, and that they were knowingly uttered by the prisoner with intent to defraud the King.' (f)

In the foregoing case a point arose as to the right of the prisoner to put the prosecutor to his election, on an indictment stating various forgeries. The first count of the indictment charged that the prisoner uttered, &c., a certain forged acquittance and receipt for money, setting it forth, also a certain other forged acquittance and receipt for money also setting it forth; and stated in like manner above twenty other receipts of different dates, for different sums, and purporting to be signed by different persons, with intent to defraud the King. And before any witnesses had been examined, the counsel for the prisoner submitted to the Court whether the prosecutor ought not, under the circumstances of this case, to elect on which of the several receipts stated in the first count of the indictment he intended to proceed, and be restrained from proceeding on more than one of them; as, amidst such a variety, it would otherwise be almost impossible for the prisoner to conduct his defence. But Le Blanc, J., referred to the indictment, by which it appeared that all the receipts stated in the first count were charged to have been *uttered at one and the same time*; and as this single act of uttering the receipts would, if clearly proved, constitute only one offence of *uttering*, he refused the application. The proof was, that the several receipts stated in the indictment were uttered at the same time in one bundle, given by the prisoner to the solicitor of the navy-board. And when the case was submitted to the consideration of the twelve judges, they were all of opinion that the application to put the prosecutor to his election was properly refused. (g)

The prisoner was indicted for forging a receipt with intent to defraud W. Clegg. Clegg's mother had sent a post-office order for £1 to him at Portsmouth, and this letter, after having been left in Clegg's room, had

(f) Thomas's case, 2 Leach, 877. 2 East, P. C. c. 19, s. 36, p. 934. And see Jones's case, 1 Leach, 366.

(g) 2 Leach, 882.



been abstracted by some one; and the same day the prisoner went to the post-office, and there produced the order, asking payment for it. The clerk told him he must first sign it, and thereupon he signed the name 'William Clegg,' and received the £1. Byles, J., doubted whether this document was not an order for the payment of money. It was submitted, on the part of the Crown, that it was a receipt, and had always been so treated. There was an order on the back directing the payee to sign the receipt on the other side. Byles, J., 'As it has hitherto been taken to be a receipt, I shall so receive it.' (h)

Where on an indictment for uttering a forged receipt for the sum of £10, it appeared that the prisoner pretended that he was authorised by James Reese to settle the debt and costs in an action brought by Reese against Pritchard, and thereby obtained from Pritchard the sum of £10, for which he produced the following receipt, which was stamped with a 2s. 6d. stamp:—

'Received of Mr. Wm. Pritchard by the hands of Mr. Wm. Griffiths the sum of 10 pounds, being in full for debt and costs due to the said Jas. Reese, having no further claim against the said Wm. Pritchard. As witness my hand this 15 day of October, 1842.

'The mark of + James Reese.'

And it was clearly proved that Reese had not signed the receipt or authorised it to be signed, or empowered the prisoner to settle the debt and costs. It was objected that the instrument was not a receipt, but an agreement; and that the statute only applied to cases where a debt was actually due. But Wightman, J., overruled the objections, and the prisoner was convicted. (i)

Upon an indictment for uttering a forged accountable receipt for goods, it appeared that the prisoner, who was a pawnbroker, uttered the following forged document:—

'William Fitchie, Pawnbroker,  
'No. 85, Church Street,  
'Preston, 15th January, 1856.  
'741. Blanket—2 Sheets—Counterpane.  
'8/  
'Elizabeth Hopton, New Preston.  
'7  
'1/10  
'5'

and at the time of uttering it the prisoner alleged that it was a ticket or note which he had given to a person at the time certain goods were pledged to him; and, upon a case reserved, it was held that this ticket was an accountable receipt within the meaning of sec. 10 of the 1 Will. 4, c. 66; for it is substantially in the form required by the Pawnbrokers' Act (39 & 40 Geo. 3, c. 99, s. 6), and it is a receipt for goods pledged with the pawnbroker, upon the production of which, and payment of the principal and interest due, the party would be entitled to demand the goods. (j)

The prisoner was indicted for forging an acquittance and receipt for money, and it appeared that the prisoner was clerk to an attorney who

(h) R. v. Ansell, 8 Cox, C. C. 409. Byles, J., added, that he would consider the point, and, if the doubt were not removed, reserve the point; but it does not seem that the point was reserved.

(i) R. v. Griffiths, Monmouth Spr. Ass. 1843. MSS. C. S. G.

(j) R. v. Fitchie, D. & B. 175.

had been employed by W. Ryder to prosecute J. Ash for perjury. Ash was tried for perjury at the Stafford Summer Assizes, 1845, and an order made for the payment of the costs of the prosecution on the treasurer of the county. This order was in the usual form, directing a certain sum to be paid to the prosecutor and each of the witnesses respectively. The practice of the county treasurer was to pay the whole amount of such an order to the attorney for the prosecution, or his clerk; but he required the signature of every person named in the order to be written on the back of the order, and opposite each name the sum ordered to be paid to each person respectively; but the treasurer did not make any inquiry, or take any step to ascertain whether the different persons had actually received the sums set against their names. The prisoner took the order to the treasurer's office, having obtained the signatures of W. Ryder, the prosecutor, and all the witnesses except three, and on behalf of these three witnesses the prosecutor had signed his name, and the endorsement at the back of the order when first presented to the treasurer was as follows:—

|  | £  | s. | d. |
|--|----|----|----|
| 'William Ryder . . . . .                         | 24 | 11 | 6  |
| 'George Keates . . . . .                         | 2  | 13 | 4  |
| 'Joseph Perkin . . . . .                         | 2  | 13 | 4  |
| 'Samuel Shellard . . . . .                       | 2  | 14 | 8  |
| 'Jane Vickerstaff . . . . .                      | 2  | 14 | 8  |
| 'William Bransfield . . . . .                    | 3  | 0  | 0  |
| 'James Brentnall . . . . .                       | 1  | 10 | 0  |
| 'Thomas Hodgkinson . . . . .                     | 1  | 10 | 0  |
| 'For John Cliff, James Oakes, and<br>Thomas Hope | 6  | 10 | 8  |
| 'William Ryder                                   |    |    |    |
|  | 49 | 8  | 2' |

The treasurer's clerk objected to pay the amount, and required the actual signatures of the three witnesses, and having drawn his pen across their names, he gave back the order to the prisoner, who took it away, and brought it back; and the order, as he then presented it, appeared to have the signatures of the three witnesses, thus:—

|                        | £ | s. | d. |
|------------------------|---|----|----|
| 'James Oakes . . . . . | 1 | 10 | 0  |
| 'John Cliff . . . . .  | 3 | 10 | 8  |
| 'Thomas Hope . . . . . | 1 | 10 | 0' |

The treasurer's clerk then paid the prisoner £49 8s. 2d.; and the prisoner wrote 'C. J. Parker, for T. Cooper,' under the endorsements on the back of the order. The name James Oakes was not written by him or by his authority. It was objected that this signature on the back of the order was neither a receipt nor acquittance. The 7 Geo. 4, c. 64, s. 24, required the treasurer to pay to the person named in any order, 'or to any one duly authorised to receive the same on his or her behalf, the money in such order mentioned.' The signature on the back of the order, therefore, was merely an authority from the witness to the treasurer to pay the money to the person producing the order. Erle, J., 'I have considered the point with my brother Coleridge, who concurs with me in thinking that the names on the back of the order have merely the effect

of giving an authority to the holder of the document to receive the sums of money, and that the amounts written opposite to the several names do not express, nor are they intended to express, that the parties have given a receipt or acquittance for the money. As there appears to be no count adapted to the instrument in question, I am bound to say that this indictment has not been sustained.' (k)

R. F. Pries was indicted for forging the following accountable receipt:—

'By order of R. F. Pries, we have this day transferred into the name of Messrs. Collman and Stolterfoht, 759 quarters and 4 bushels of wheat, ex August Ferdinand, Captain Richards, à Neustadt.

'Entered by R. F. Pries, and now lying in our granaries, Bermondsey Wall

'The wheat is insured against risk of fire by us.

'BROWN AND YOUNG.

'Corn Exchange, October 23, 1852.'

It was objected that this document merely purported to be a memorandum of the transfer of goods by Brown and Young, but it was no evidence of a receipt of goods. Alderson, B., 'I am clearly of opinion that this is an accountable receipt within the statute. It purports that on the 23rd October Brown and Young had goods belonging to the prisoner in their granaries, which they had received from him for the benefit of Collman and Stolterfoht, and that they, Brown and Young, held themselves accountable to Collman and Stolterfoht for such goods. It is true that the word "receipt" is not named throughout the document, but it is sufficient that it appears to be a receipt in substance.' (l)

The prosecutor, G. Fowler, was a dealer in earthenware, and the prisoner bought four crates of earthenware from him, paying only for one, and it was agreed that on the prisoner remitting the price of the three that remained unpaid for, the prosecutor should remit to the prisoner an order for the delivery of the crates to him, and that in the meantime they should lie at the dock in the name of the prosecutor. The goods were forwarded by canal to Liverpool on this understanding, and deposited on the Duke's Dock quay. It was the ordinary course of business with the canal company on the arrival of the goods to send a 'note deliverer' to obtain the signature of the consignee to a note in the following form:—

| Date<br>1857 | To whom<br>consigned | Specifi-<br>cation of<br>goods | Charges     | Signature of<br>parties acknowl-<br>edging that the<br>goods are lying<br>on the quay at<br>Duke's Dock at<br>their own risk | Date<br>1857 | Time |
|--------------|----------------------|--------------------------------|-------------|--|--------------|------|
| October 20   | G. Fowler            | 4 Crates                       | £1 14s. 9d. | George Fowler  | October 20   | 8 30 |

(k) *R. v. Cooper*, 2 C. & K. 586, S. C. as *R. v. Parker*, 2 Cox, C. C. 274. See 24 & 25 Vict. c. 98, s. 23. (l) *R. v. Pries*, 6 Cox, C. C. 165. Martin, B., concurred.

This note stated the date of arrival in Liverpool, the consignee's name, and the amount of charges in separate columns, leaving three other columns to be filled up by the consignee. The first of these latter columns was headed, 'Signature of the parties, &c. ;' the others contained the date and the hour of making the signature in the preceding column. The practice was for the note deliverer to hand to the party signing this document, as consignee, a delivery note, entitling the holder to the delivery of the goods on payment of the canal charges. The note deliverer called at an earthenware dealer's in Liverpool, and saw the prisoner standing at the door, and asked him 'if he knew George Fowler.' He said, 'Yes ; I am George Fowler.' He then obtained the prisoner's signature to the book which he carried, and thereupon handed him the delivery note. The above document is the form as signed by the prisoner. The prisoner subsequently presented the delivery note and obtained the goods. He had no authority from the prosecutor to sign for him. It was objected that the document was not a receipt within the Act ; for the prisoner's signature did not entitle him to the possession of the goods, but merely to a delivery note. It was answered that as the delivery note would entitle him to receive the goods, a constructive delivery of the goods did in fact take place on his signing, for the liability of the consignor and of the carrier was at an end ; and Wightman, J., overruled the objection. (*m*)

(*m*) *R. v. Meigh*, 7 Cox, C. C. 401. said, he had no doubt, and therefore did not  
After taking time to consider, Wightman, J., reserve the point.

## APPENDIX N.

### *Cases on Repealed Statutes as to Warrants or Orders for the Payment of Money or Delivery of Goods.*

THE statutes were not confined to commercial transactions. (a)

A bill of exchange or banker's draft (b) might be laid as an order for the payment of money, (c) and in one of the cases it was observed that every bill of exchange seemed to be an order for the payment of money, though not *vice versâ*. (d)

In another case the prisoner was convicted of forging and uttering, knowing it to be forged, a certain order for the payment of money in the words and figures following:—

*'Petersfield, 6 August, 1799.*

'Sir, — Please to pay on demand to Mr. Hugh Young, or order, all my proportion of prize-money, due to me for my services on board His Majesty's ship *Leander*, for which this shall be your authority. Witness my hand,

'JOHN JOHNSON,  
✕  
his mark

'To Alexr. Davison, Esq.  
No. 21, *Millbank-Street, Westminster.*

'Signed before us,

'WALTER NOBLE, Minister.

'JOHN WILLIAMS, }  
'FRANCIS GIBBONS, } Churchwardens.'

In two counts it was called an order for payment of money; and in two other counts a bill of exchange; and it was stated to have been forged and uttered, with intent to defraud J. Johnson. Four other counts charged the offence to have been committed with intent to defraud A. Davison. One of the objections on the part of the prisoner was that this was not a bill of exchange, nor an order for the payment of money within the 7 Geo. 2, c. 22, because no sum of money was mentioned, and it was not certain that any money would be due to Johnson. But, on a case reserved, the judges held the conviction proper. (e)

In a case in which the prisoner drew a bill, 'Please to pay the bearer on demand fifteen pounds, and account to your humble servant, Charles H. Ravenscroft,' which was his own name; but the bill was not addressed to any one, and when the instrument was uttered, the following

- (a) Graham's case, 2 East, P. C. c. 19, Leach, 94. 2 East, P. C. c. 19, s. 38. s. 41, p. 945. M'Intosh's case, 2 East, P. C. p. 940.  
(b) Willoughby's case, 2 East, P. C. (d) Shepherd's case, 2 East, P. C. c. 19, s. 40, p. 944. 1 Leach, 226.  
(c) M'Intosh's case, 2 East, P. C. c. 19, s. 40, p. 944.  
(e) Lockett's case, Trin. T. 1774. 1 s. 39, p. 942.

words and signature were forged upon it. 'Payable at Messrs. Masterman & Co., White Hart Court, Wm. M'Inerheny;' and it appeared that M'Inerheny kept cash at Masterman and Co.'s, who were bankers; a majority of the judges held that this was not an order for payment of money, there being no special averments in the indictment that it was intended for an order, or that Masterman and Co. were bankers. (*f*)

The prisoner drew a forged bill upon the treasurer of the navy, and made it payable to blank or order, and signed it in the name of a navy surgeon. It was holden that such a direction to pay to blank or order was not sufficient, and that to constitute an order for payment of money, there must be some payee. (*g*)

It is said that it seems to be settled, that if the *warrant or order* mentioned in the 7 Geo. 2, c. 22, do not purport on the face of it, or be shewn, by proper averments, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulsory on the person having possession of the subject-matter of it, but only purport to be a request to advance the money or supply the goods on the credit of the party applying, which the other may comply with or not, as he sees proper, it is not a warrant or an order within the statute. (*h*)

Thus it was holden that a note in the name of an overseer of the poor to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, was not a warrant or order for the delivery of goods within the repealed statute. Nine of the judges, on a conference, were clearly of opinion that the writing was not a warrant or order for the delivery of goods within the Act, considering that the words warrant or order, as they stand in the Act, are synonymous, and import that the person giving such warrant or order has, or at least claims, an interest in the money or goods which are the subject-matter of it, and has, or at least assumes to have, a disposing power over them, and takes on him to transfer the property, or at least the custody of them, to the person in whose favour such warrant or order is made. And though this case must fall within the mischief, yet, in the construction of an Act so penal, the strict letter of it ought not to be departed from. (*i*)

So a note to a tradesman, requesting him to let the bearer have certain goods, has been holden not to be an order for the delivery of goods within the statute, it appearing that the person whose name was forged in the note, though a customer of the tradesman, was not the owner of, nor had any special interest in the goods in question, or any others in the tradesman's hands, nor had any authority to send any such order if it had been genuine. (*j*)

Upon similar grounds it was ruled, that a forged order for the purpose of obtaining a reward for the apprehension, &c., of a vagrant, was not a forgery within the statute, unless it contained the requisites prescribed by the Vagrant Act, 17 Geo. 2, c. 5, s. 5. The order was deficient in the requisites described by that Act, inasmuch as it did not purport to be under seal, and it was not directed to the high constable of the Riding: and it was contended, on behalf of the prisoner, that such an instrument, supposing it to have been genuine, would have been perfectly inoperative; that it was nothing more than an order by a

(*f*) *R. v. Ravenscroft*, R. & R. 161.

(*g*) *R. v. Richards*, R. & R. 193, and see *R. v. Randall*, id. 195.

(*h*) 2 East, P. C. c. 19, s. 37, p. 936. *R. v. Newton*, 2 Moo. C. C. R. 59.

(*i*) *Mitchell's case*, Post. 119. 2 East, P. C. c. 19, s. 37, p. 936.

(*j*) *William's case*, 1 Leach, 114. 2 East, P. C. c. 19, s. 37, p. 937. *Ellor's case*, 2 East, P. C. c. 19, s. 37, p. 938. 1 Leach, 323.

magistrate on the county treasurer for the payment of a sum of money, over which the magistrate had no control or dominion whatsoever, except by means of the 17 Geo. 2, c. 5. On the part of the prosecution, it was contended principally, that since orders in the form of the order in question had been generally drawn and acted upon in the Riding of the county in which this offence was committed, it was not essential, to bring the prisoner within the statute, that the order should comply with the requisites of the 17 Geo. 2, c. 5: and that it was sufficient that it pursued the usual form, being thereby capable of being the instrument of fraud. But Bayley, J., said, 'To bring the case within the statute, the order must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. In this case, the party looking at the Act must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order, and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of a justice of the peace, had no authority to make such an order; if he had any it was derived from the statute, but he had no power to make such an order as this, and if such a one had been made, the treasurer ought not to have obeyed it. (k)

The same prisoner was tried and convicted at the same assizes for presenting the same order to the treasurer of the county pretending it was genuine, and obtaining from the said treasurer under such order the sum of £4 10s. 6d. The indictment after charging that the prisoner, with intent to cheat, &c., the treasurer, presented the order, and that he knowingly, &c., pretended that it was a genuine order, proceeded, 'And so the jurors, &c., say that the prisoner on the day and year, &c., did obtain the said sum of £4 10s. 6d.;' but the intent to cheat and defraud the said treasurer was not stated in this part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly. And upon a case reserved the judges held the indictment bad. (l)

By the 48 Geo. 3, c. 75, a justice of the peace may order the treasurer of the county to pay every churchwarden, overseer, headborough, or constable, the expenses he has incurred in burying any dead body that has been cast on shore. A justice's order was forged, stating that a dead body had been cast on shore in the parish of A., that I. S. had made oath before the justice that he had laid out £8 5s. in the burying such body and requiring the treasurer to pay him that sum. The indictment was for forging and uttering, &c., this order; and was founded on the 7 Geo. 2, c. 22, and it was objected that the order in question was not properly a warrant or order for the payment of money within that

(k) Rushworth's case, R. & R. 317. In Graham's case, 2 East, P. C. c. 19, s. 41, p. 945, the prisoner was indicted for a similar offence, and an objection taken on his behalf was, that the 17 Geo. 2, c. 5, s. 18, expressly subjected the party forging such an order to a penalty of £50, which must be considered as a repeal of the 7 Geo. 2, c. 22, as to orders of this description. And it is observed in 2 East (*ubi supra*) that this objection seems to have been entitled to a different consideration from what it is stated to have received; as the prisoner was, notwithstanding, convicted, and received judgment. And a *quæ* is made as to what became of the case. It should, however, be observed that the 17 Geo. 2, c. 5,

s. 18, enacted, that 'in case any such petty constable or other officer or governor or master of any house of correction shall counterfeit any such certificate, receipt, or note, or make or knowingly permit to be made any alteration in any such certificate, receipt, or note, he shall forfeit the sum of fifty pounds;' and that it does not appear from the report that the prisoner, Graham, was a petty constable or other officer, &c. A still better answer to the objection seems to be, that the order in question was neither a certificate, receipt, or note, within the 18th section of the 17 Geo. 2, c. 5.

(l) R. v. Rushworth, *cor.* Bayley, J., R. & R. 317.

statute; that it was not in its purport a compulsory or even a valid order within the 48 Geo. 3, c. 75, as it did not appear on the face of it that the person who was stated to have laid out the money, and to whom repayment thereof was ordered, was one of the officers of the parish or place to whom, by that statute, a justice of the peace has authority to order a repayment. That the order must be compulsory, which this was not, because it did not state all that was sufficient to entitle the person to the payment of the money: and that the instrument also purported to be an order to pay to the person at whose expense the corpse was buried, and not to the officer of the parish or place who had repaid him. The learned judge thought that the order, though it might not be compulsory, was not in itself a nullity, nor made void by the statute, but was still an order for the payment of money, and protected by the 7 Geo. 2, c. 22. And, upon a case reserved, several of the judges thought the conviction wrong, being of opinion that the instrument was not properly a warrant or order for the payment of money within the 7 Geo. 2, c. 22, because the justices had no authority to make such an order, but in favour of a churchwarden, overseer, &c.: but a majority of the judges thought the conviction right, because it did not appear on the face of the order that I. S. was not a churchwarden, &c., and that if nothing appeared to the contrary, on the face of the order, they thought the treasurer bound to conclude that the justice had not made an order without satisfying himself that I. S. was a churchwarden, &c. (m)

An indictment which charged the prisoner with forging an order for the delivery of goods stated that the order was subscribed by one L. D., 'he, the said L. D., then and there being the servant of one J. L. D. in his business of a silk dyer, and purporting to be a warrant or order from the said L. D. as such servant of the said J. L. D. for the delivery of 8 lb. of raw silk.' It appeared that L. D., whose name was forged, was, in fact, the son of J. L. D., and was apprenticed to his father, whose business of a silk dyer was principally conducted by him. Amongst other objections, on behalf of the prisoner, it was urged that to bring the offence within the statute the order must purport to be made by a person who had an authority, or at least claimed an interest in the subject matter of it, and who took upon him to transfer it to the person in whose favour the order was made. That it was not averred in the indictment that L. D., whose order it purports and is averred to be, had any authority over, or interest in, the goods in question, or any authority to make such an order, which ought to have been expressly alleged. It states that another person was the owner, namely, the father J. L. D., to whom the son was only a servant; and it cannot be inferred from that circumstance that the son had authority over the goods; and the want of such an averment cannot be supplied by parol evidence: on the contrary, the order appears to have been made by an apprentice, who was not *sui juris*, and had no disposing power. And, upon a case reserved, the judges held the conviction bad. The learned judge, who delivered their opinion, said, 'that on the construction of the statute the forged warrant, or order for the delivery of the goods, must purport to be the order of the owner, or of some person who has, or at least claims, an interest in, or who has, or at least assumes to have, a disposing power over the goods, and takes upon him to transfer the property or custody of them to the person in whose favour such order is made.' And, as to the form of the indictment, he said, 'that it ought to have appeared in the indictment that the person, whose name was subscribed to the order, had an authority to make it; but that this could not be collected by any



legal inference from the words of the indictment; for L. D., the person whose name was forged, was stated to be the *servant* of the owner, which excluded every idea that he had or could claim any interest in the goods which were the subject of the order, and that it ought to have been expressly averred that he had authority to make it.' (n)

In the foregoing case it was further objected, on behalf of the prisoner, that the instrument in question was not an order, but a bare request; that it was not directed to any person, and consequently was not, upon the face of it, compulsory upon the holder of the goods: and further, that it ought to have appeared on the face of the indictment that the order was to the holder of the goods. (o) Upon these points the learned judge, who delivered the opinion of the judges, said, 'that the order must be directed to the holder or person interested in or having possession of the goods; that the order set forth in the indictment was not directed to any person whatsoever, but merely expressed a desire that 8 lb. of silk should be delivered to the bearer of it without any direction from whom it was to be received; and that on this ground, therefore, the judges were of opinion that this was not a warrant or order within the statute.' (p)

But where on an indictment for forging an order for payment of money it appeared that the prisoner called at the bank of Messrs. Alexander, where Mr. Ramsey kept an account, and said that she had called for £800, which she had deposited with Mr. Ramsey — the clerk told her that he could not pay her without an order. The next day she came again, and handed to the cashier a forged paper as follows:—

'Holton, Mar. 31, 1853.

'Sirs, — Please to pay the Bearer, Mrs. Smart, the sum of Eight Hundred and 50 4£ ten shillings for me,

'JAMES RAMSEY.'

This paper was folded in the shape of a letter, and addressed outside, 'Mrs. Smart.' The cashier asked the prisoner if her name was Smart; she said 'Yes.' He then asked her if she had seen Mr. Ramsey write the order: she said 'No; he handed it to her.' The cashier did not pay the money. He said that if he had seen Mr. Ramsey write it, or had known that it was his writing, he should have treated it as an order, and have paid the money, although it was not addressed to Messrs. Alexander. Upon a case reserved upon the question whether the paper above set forth was, under the circumstances, an order for the payment of money within the statute, it was held that it was. Supposing the facts to have been true, and the instrument to have been genuine, it would have been such an order as, if paid, would have relieved the bankers from any further demand for the money so paid. The facts supply the want of a formal direction to the banker. Suppose Ramsey had told the prisoner to go to the bank, and that she had been told that they would not pay her without an order, and that she came back the next day with this document from Ramsey, it would then have been a good order. (q)

(n) Clinch's case, 2 East, P. C. c. 19, s. 37, p. 938. 1 Leach, 540. And see R. v. Wilcox, R. & R. 60. And it seems, therefore, that if the indictment states the person in whose name the order was forged to have been servant to I. S., and that the order was for the delivery of goods to I. S., it ought to shew that the servant as such

had a disposing power over the goods. MS. Bayley, J.

(o) The form of the instrument was: 'Please to send by the bearer 8lb. of that whorpe hun market.'

'L. DESMOCKKK.'

(p) Clinch's case, *supra*.

(q) R. v. Snelling, Deane. C. C. 219.

But it should be observed that if the order purport to be one which the party has a right to make, although in truth he had no such right, and although no such person as the order purports to be made by existed in fact, it falls within the statute. (r)

The prisoner was convicted of uttering a forged order for the payment of money, in these words, 'Messrs. Neale Fordyce, and Down. Pay to Wm. Hopwood or bearer £16 10s. 6d. Rt. Vennest,' with intent to defraud one J. Scoles. The prisoner applied to Scoles, who was a colourman, and agreed to purchase goods to the amount of £10 0s. 6d., which he was to send for. He went away, taking with him a little Prussian blue; and afterwards came again, pretending to be in a hurry, and presented this note, which he said was a good one; and for which Scoles gave him £6 10s., being the difference. No such person as Rt. Vennest kept cash with Messrs. Neale and Co.; nor did it appear that there was any such man existing. Upon these facts it was submitted to the consideration of the judges whether this was an order within the statute; and after very long consideration they at last agreed that it was a forgery. They thought it quite immaterial whether such a man as Vennest existed or not; or if he did, whether he had kept cash at the banking-house of Messrs. Neale and Co.; and that it was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. (s)

The prisoner was indicted for forging the following order for the payment of money:—

'No.

'Pakenham, Sept. 23, 1846.

'Messrs. Oakes, Bevan, Moor, & Bevan, Bankers,

'Bury St. Edmunds.

'Pay Mr. Clarke seventeen or bearer pounds, eleven shillings.

'£17 11.

'SETH SPARKE.'

It was objected that this document was not an order for the payment of money. Pollock, C. B., 'This surely is an order which, if genuine, the drawer would be obliged to pay if the bank had refused payment. It is not the less an order for the payment of money within the statute because the words have been transposed.' (t)

The indictment charged the prisoner with forging a certain order for the payment of money, as follows:—

'*St. Ann's Union.*

'Mr. Thomas,

'Sir, — You will please to pay the bearer, for Richard Power, three pounds for three weeks due to him, a country member, and you will much oblige yours, &c.

'J. BESWICK,

'Feb. 21, 1829.

2 *Brown's Buildings, Stanhope Street.*

'To Mr. Thomas, Gray's Inn Lane,'

with intent to defraud John Thomas, the said J. Thomas, on whom the said false, forged, and counterfeited order for payment of money was made, then and there being entrusted with, and having in his hands and

R. v. Clinch, *supra*, was distinguished on the ground that the averments in the indictment in that case were insufficient. But in this case the evidence supplied all that was necessary. This case seems to overrule R. v. Denny, 1 Cox, C. C. 178.

(r) 2 East, P. C. c. 19, s. 38, p. 940.

(s) Lockett's case, 1 Leach, 94. 2 East, P. C. c. 19, s. 38, p. 940. S. P. in Abraham's case, 2 East, P. C. c. 19, s. 38, p. 941.

(t) R. v. Boreham, 2 Cox, C. C. 189. R. v. Bartlett, 2 M. & Rob. 362, was cited in support of the objection.

possession, as the landlord of a certain public-house, known by the name of the 'Crown and Barley Mow,' in Gray's Inn Lane, a certain large sum of money, to wit, the sum of thirty pounds, belonging to W. Ireland and others, members of a Friendly Society called the St. Ann's Union, meeting at the said public-house, for the purpose of enabling the said J. Thomas to pay, and that he might pay all orders for payment of money due to any of the members of the said society, according to the rules and regulations thereof. Second count for uttering a like order for payment of money, well knowing the same to be forged, with intent to defraud the said J. Thomas. Third same as second, with intent to defraud J. Beswick. Fourth same, with intent to defraud W. Ireland and others. J. Thomas was the landlord of the Barley Mow, Gray's Inn Lane. A society called the 'St. Ann's Friendly Society,' was holden at his house, of which Mr. Beswick was the secretary: there was usually money in Thomas's hands to pay any demands that might be made by Mr. Beswick's orders. On Saturday, the 21st February, the prisoner produced a cheque to Thomas, at his house, and said he brought it from Mr. Beswick for three pounds, for a country member who had broken his arm. Upon looking at it Thomas saw it was not Mr. Beswick's handwriting, and told him so. He said he knew that; that Mr. Beswick, being an undertaker, was out of town at a funeral, and Mrs. Beswick directed her son to write it. Thomas accordingly gave him the three pounds. Mr. Beswick proved that the handwriting to the cheque was not his, and that there was no member of the name of R. Power in the society. On the 21st of February Beswick lived at No. 2, Brown's Buildings, Stanhope-street, Claremarket. It was proved that no authority was given to any one to write or issue the cheque, and that it was not written by Beswick's son. W. Ireland said he was a member of the St. Ann's Society, that there were many other members, that he subscribed to the funds of it; if taken ill, a member received money from the funds of the society to support him. There were no rules or regulations put in, or any evidence of their having been enrolled. The Recorder suggested that, upon the authority of *Mitchell's case*, (u) the prisoner ought to be acquitted, as for want of the rules and regulations, of which no parol evidence could be given, there was no evidence to prove that Beswick had any disposing power over the money in the hands of Thomas. Littledale and Gaselee, JJ., however, thought the better way was to leave the case to the jury, and reserve the point suggested for the consideration of the judges, if the prisoner should be convicted. The jury found the prisoner guilty on the counts for uttering, and, upon a case reserved, all the judges (except Gaselee and Parke, JJ.) thought that this was not an order on the face of it, and that the conviction was therefore wrong. (v)

The prisoner was indicted for forging an order for the payment of money, which was as follows: —

‘Thornton-le-Moor, July 20, 1844.

‘Mr. Johnson, — Sir, — Please to pay James Jackson the sum of £13 by order of Christopher Sadler, Thornton-le-Moor, brewer, the District Bank. I shall see you on Monday. Yours obliged,

‘CHAS. SADLER.’

Sadler was a customer of the Yorkshire District Bank, and had been, till shortly before the uttering, a brewer. The agent of the bank stated that Sadler was not in the habit of drawing on the bank, but that if he

(u) Foster, 119.

(v) R. v. Baker, R. & M. C. C. R. 231.

had been certain of the handwriting being his he should have paid the money; but it was not proved that Sadler, at the date of the instrument, or the time of the uttering, had any effects in the bank. It was objected that the instrument was improperly described as an order; that it did not on the face of it purport to be an order; nor was it shewn that the party whose name was forged had any authority to order payment; but the jury having convicted, the judges, on a case reserved, held that it was an order for the payment of money, and therefore the conviction was right. (*w*)

Where the forged instrument did not purport on the face of it to be an order, and the party in whose name it was drawn had not the right or power to order the payment of the money at the time when the instrument was drawn, it was not an order for payment of money within the 1 Will. 4, c. 66, s. 3. The indictment charged the prisoner with forging an order for the payment of money, which was set out in the first count as follows:—

‘*Monmouth, June 9, 1842.*

‘Mr. Fisher, I should feel greatly obliged to you if you will please to send by the bearer the sum of three pounds, as I have had a large quantity of bones this week, and the man from Coleford is coming in to-morrow with 10 cwt. weight. I have about one ton now.

‘Yours,

‘THOMAS DAVIS.

‘Mr. E. Fisher, Lanwarne,’

with intent to defraud J. E. Fisher. The instrument was described in all the succeeding counts generally as an order for the payment of money. Upon the trial, it appeared that the prisoner had written the letter, and forged the signature of Davis thereto, and that Fisher, on the faith of its being genuine, had paid the £3 to the bearer of the same. Davis was a waterman living at Monmouth, and was in the habit of collecting bones throughout the adjoining country, and sending them to Fisher as he collected them, generally by a waggon-load or three tons at a time. Davis did not wait till he had delivered the bones before he got paid, but drew upon Fisher as he was collecting the bones, but at the time the letter was written Davis had overdrawn, and had no money due to him from Fisher. The jury found the prisoner guilty, but a doubt occurred to Tindal, C. J., whether this could be considered an order for the payment of money within the meaning of the 1 Will. 4, c. 66, s. 3, and his Lordship submitted that question to the consideration of the judges; and all the judges present agreed that this was not an order for the payment of money, the party who made the order not having any right or power to make it. (*x*)

(*w*) *R. v. Carter*, 1 Den. C. C. 65. 1 C. & K. 741. In the argument Parke, B., observed, ‘It makes no difference at all whether the drawer has funds or not in the hands of the drawee.’

(*x*) *R. v. Roberts*, MSS. C. S. G. S. C. 2 M. C. C. 258. This report is taken from the case submitted to the learned judges, with which the editor was favoured by the Lord Chief Justice. *R. v. Rogers*, 9 C. & P. 41, was referred to before the judges, where an indictment for forging a warrant for the payment of money under similar circumstances was held sufficient, because the instrument would have been a voucher

for the payment. Upon *R. v. Rogers* being cited at the trial, Tindal, C. J., said, ‘In that case the instrument was charged as a warrant. The doubt I feel is whether such an order as this made upon a person when there are no funds in his hands, is an order within the statute. Suppose Fisher had said, “I will not pay the money, I will have the bones first,” Davis would have had no remedy against him. A banker who had money in his hands could not say so. The question is whether this instrument is an order for the payment of money. It might be a very good warrant for the payment of it.’ MSS. C. S. G.

The prisoner, a German, went to Messrs. Rothschild with the following letter, purporting to come from Cologne from Messrs. Schaaffhausen, who were correspondents of Rothschild, whose house had money of S. in their hands. He presented himself as Dr. F. A. Stern.

*'Cologne, 23rd March, 1838.'*

'Gentlemen,—I beg to introduce to you Dr. F. A. Stern, who intends stopping some time in England for scientific purposes. You would therefore much oblige me if you could acquire him the necessary access to public buildings, such as libraries, &c. I also request you, in case he should be at any time in want of money, to pay him at his desire to the extent of £60 sterling, as he is accredited with me, and I am consequently prepared to pay such an amount against his receipt. It will in similar cases be my zealous endeavour doubly to outweigh all the kindness you may be pleased to shew him, and I have the honour to remain, &c.,

*'A. SCHAAFFHAUSEN.'*

When the prisoner presented this letter he described himself as the Dr. Stern therein mentioned, but at that time no money was paid him: but in two days he called for £30 and it was paid him on the credit of the letter. He brought the following receipt with him, 'For account of Mr. A. S., of Cologne, to have received of Rothschild and Sons the sum of £30. Attests Dr. F. A. Stern.' He again went in two days more with another receipt for £30 more, and got that money—£60 altogether. It was proved that when such a paper as this letter is brought to Messrs. Rothschild from a correspondent who has money in their hands, the person who brought it is paid whatever he claims, not exceeding the amount mentioned. If such person does not require the whole, the house write upon the letter whatever is paid, and they consider such a document exactly as they would a bill of exchange, and equally obligatory on them to pay to the extent of the fund in hand. The question was, whether the above document was a warrant or order for the payment of money, within the 1 Will. 4, c. 66, s. 3; and, upon a case reserved, the judges were unanimously of opinion that the facts with the paper, warranted their considering this document as an order. (y)

The prisoner was indicted for uttering an order for the payment of £50. A letter of credit had been issued by the Union Bank of London, who were agents of the Oriental Bank at Melbourne, in Australia, in the following form:—

*'Union Bank of London, 2, Prince's-street,  
'London, July 28, 1858.'*

*'Original—£50 (1,380)—On demand please honour the draft of Mr. Robert Thomas for £50. Equivalent received here from the Shropshire Banking Company, Wellington.'*

*'Your most obedient Servant,*

*(Signed by the Assistant Manager).*

*'To the Oriental Bank Corporation, Melbourne.'*

The prisoner presented this letter of credit at a bank in Walsall; the clerk saw that it was endorsed with the name of 'Robert Thomas,' and asked the prisoner whether that was his name, and he said it was. The prisoner had by misrepresentations induced the father of R. Thomas, who

was in Australia, to procure the letter of credit and send it to him. According to banking practice in this country, a letter of credit in this form was usually paid on the simple endorsement of the payee, but whether it would be so paid at Melbourne was not shewn. According to the regular practice, on the presentation of the letter of credit at Melbourne the bank there would take pains to ascertain the identity of the person credited, and, on being satisfied, would credit him to that amount, and in the terms of the letter of credit, would 'honour the draught' of the party to the extent of the letter of credit. It was submitted that the endorsement was not shewn to be an order. Bramwell, B., 'It is quite true that if the bank at Melbourne chose to pay such a letter of credit on the simple endorsement of the person credited, the latter could not afterwards oblige the bank to pay him a second time. But the letter of credit was directed to the Oriental Bank at Melbourne, who were to "honour the draught" of Robert Thomas. I think the simple endorsement in this country is not an order, not being within the original mandate, and therefore must direct the jury to acquit the prisoner.' (z)

An instrument containing an order to pay the prisoner or order a sum of money, being a month's advance on an intended voyage, as per agreement with the master, in the margin of which the prisoner had written an undertaking to sail in a certain number of hours, was an order for the payment of money within the 1 Will. 4, c. 66, s. 3. The prisoner was indicted for uttering the following order for the payment of money:—

'Port of London, May 1st, 1834.

'On receiving this check I agree to sail in the ship Mary Ann, and to be on board within sixteen hours from the date of this check.'  
May 1st.

'Three days after the ship Mary Ann sails from Gravesend, please to pay to Wm. Bamfield or his order the sum of four pounds five shillings, being a month's advance in part of wages of an intended voyage to Quebec in the ship hereinbefore mentioned, as per agreement with your obedient servant,

'G. MARTIN, Master.

'To R. Ray, Esq.,  
'No. 48, Fore Street, City'—

with intent to defraud E. Child and another. The prisoner was convicted, subject to the opinion of the judges, whether the order set forth in the indictment were an order for the payment of money within the meaning of the 1 Will. 4, c. 66, s. 3, and at a meeting of all the judges except Lord Lyndhurst, C. B., J. A. Park, J., and Bolland, B. this case was considered, and the conviction was unanimously held good. (a)

So where the prisoner had presented to a person who was in the habit of discounting seamen's shipping notes, an instrument in the following form:—

'In consideration of Charles Fletcher sailing as steward in the brig Kezia, from the port of Liverpool, I undertake to pay to Charles Fletcher, or bearer, the sum of £2 15s. 0d. five days after the said brig Kezia shall sail from the said port to St. Thomas.

'Dated this 8th of December, 1842.

'WILLIAM ROBINSON, Master.

'At Turner and Tomline's, Rumpland Street, Liverpool.

'Good voyage and safe return, £2 15s. 0d.'

(z) R. v. Wilton, 1 F. & F. 391.

416. But see R. v. Howie, 11 Cox, C. C.

(a) R. v. Bamfield, R. & M. C. C. R. 320.

Parke, B., after consulting Coltman, J., held that this instrument was 'an undertaking, warrant, or order for the payment of money' within the 1 Will. 4, c. 66, s. 3. *R. v. Bamfield*, (b) decided that; and it was not within the 17 Geo. 3, c. 30, which is confined to instruments, which, but for that statute, would be negotiable or transferable. Neither by the custom of merchants, nor by statute, would this instrument be so, since it is payable on a contingency, and the fact of its assuming to be so, by purporting to be payable to bearer, does not make any difference; the question is, whether it would be in fact negotiable or transferable, not whether it assumes to be so. (c)

The prisoner was indicted for uttering the following order for payment of money:—

'£4 0s. 0d.

Sunderland, Oct. 10, 1846.

'Three days after the ship *Selah* has sailed from the port of Sunderland, please to pay to John Wilson, or bearer hereof, the sum of four pounds 0 shillings, and 0 pence (provided the said John Wilson has actually sailed in the said ship), being part of his wages in advance on her intended voyage to Alexander.

'JOHN ROBSON, Master.

'To Mr. John Stobart, owner of ship.'

This document was set out in one count. It was urged that this was not an order within the statute, as it was conditional, and if it did come within the statute, the indictment ought to have alleged the performance of the condition; but the indictment was held to be good. (d)

The third count charged the prisoner with feloniously forging 'a certain warrant and order for the payment of money, to wit, a warrant and order for the payment of £85.' The sixth count described the instrument as 'an acquittance and receipt for money, to wit, for £85.' The seventh and eighth counts were for uttering forged instruments described as in the third and sixth counts. John Mann, in June, 1839, had deposited the sum of £85 in the hands of Jonathan Backhouse and others, who constituted the Darlington Bank at Stockton, and on that occasion he received from the bank an accountable receipt in the following form:—

'This receipt not transferable.'

'No. F. 266. Darlington Bank, Stockton.  
12th. 6 M. 1839.

Received of John Mann

Eighty-five Pounds

to his credit

For Jonathan Backhouse & Co.

FREDERICK BACKHOUSE.'

'£85.

'Entered, F. B.'

In October, 1840, the prisoner having this receipt in his possession, went to the bank, and representing himself to be John Mann therein mentioned, wrote the words 'John Mann' on the face of the receipt, and delivered it to the bankers, who paid him the sum of £87 17s. 6d., being the amount mentioned in the receipt with interest. By the course of

(b) *Supra*.

(c) *R. v. Anderson*, 2 M. & Rob. 469.

(d) *R. v. Lonsdale*, 2 Cox, C. C. 222.

*Alderson, B.*, after consulting *Rolfe, B.*

dealing between the bankers and their customers, interest was payable on their accountable receipts, and the bankers on having a receipt delivered back to them with the name of the party who had deposited written upon it by him, treated it as an order for the payment of the amount deposited with the interest then due, and paid such amount and interest accordingly. It was objected that on the evidence these counts were disproved; that the document itself, independent of the evidence, had no meaning, and that the evidence shewed it to be an order or warrant, not for £85, but for £87 17s. 6d. For the prosecution it was submitted, that it was not necessary to state the amount at all, and that, being stated under a *videlicet*, it need not be proved precisely; and, upon a case reserved upon the question whether the evidence supported the third, sixth, seventh, and eighth counts, or either of them, the judges held the conviction right. (e)

The prisoner was indicted for uttering a forged order for the delivery of goods, which was set forth as follows:—

‘July 11, 1838.

‘Mr. Lang, please to send one piece of lead by the bearer, 12 long 16 wide.

‘GEORGE KILBY, Queenborough,’

with intent to defraud, &c. The prisoner pleaded guilty. On looking into the facts, it occurred to Bosanquet, J., that they did not shew any right in Kilby to make an order on Lang for the delivery of lead, and that the instrument set forth in the indictment did not import anything more than a request, which Lang might or might not comply with, as he might think fit, and he respited the sentence in order to bring the case under the consideration of the judges, who held the conviction wrong, and ordered a fresh indictment to be preferred for forging, &c., a request for the delivery of goods, under the 1 Will. 4, c. 66, s. 10. (f)

It has been held that where an indictment describes a warrant for the payment of money, under the 2 & 3 Will. 4, c. 123, s. 3, averments to shew what the instrument is are not necessary, but it is matter of evidence whether the instrument comes within the description given of it by the indictment. (g)

An instrument may be described as a warrant *and* order, if the instrument be in fact both a warrant and order; a warrant authorising the banker to pay, and an order upon him to do so. (h) And, where the prisoner was indicted for stealing four post-office money orders, which were described in some counts as ‘warrants and orders for the payment of money,’ and it was objected that such description was not correct, because it was uncertain; the judges, upon a case reserved, were all of opinion that what was meant by the indictment was, that the prisoner stole four instruments, or four valuable securities, each of which was both a warrant and order, and putting that construction upon the indictment, they were of opinion that the instrument stolen was a warrant and order. They were of opinion it was an order as well as a warrant, because assuming the postmaster had paid the order, the document itself delivered up to him would be a warrant, which would be a discharge from the person to whom he had to account for the post-office

(e) R. v. Atkinson, C. & M. 325. S. C. 2 M. C. C. R. 215. In the latter report it is said that the judges held that ‘the conviction was good. The document is an acquittance for £85 and interest.’ No ground is given in C. & M. for the decision.

(f) R. v. Newton, M. C. C. R. 59.

(g) R. v. Rogers, 9 C. & P. 41.

(h) R. v. Crowther, 5 C. & P. 316. See also R. v. Atkinson, *supra*.



money. Therefore they were of opinion that the counts of the indictment were not uncertain, meaning that these instruments had both characters. (i)

Where the prisoner had been convicted of forging an order for the delivery of goods to the following purport: 'Sept. 23rd, 1764. Sir,— Please to deliver my work to the bearer — Lydia Bell, Fleet Street, London,' with intent to defraud the Wardens and Company of Goldsmiths; and it appeared that the goods in question were articles of plate, which had been sent by Mrs. Bell, a silversmith, to Goldsmiths' Hall, to be marked; and that the form of the order was the same as was usually sent upon such occasions, except that in strictness, and by the rule of the plate office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it; the judges affirmed the conviction upon reference to them, after a motion in arrest of judgment. But the prisoner was pardoned on condition of transportation. (j)

The prisoner was indicted for uttering an instrument described in some counts as a warrant for the delivery of goods, in others as an order, and in others as a request. The prisoner went to the London Docks, and presented to a clerk in the service of the company in the Crescent Vault wine department, a document called a tasting order, in the following form:—

'1242.

'To the Cooper,

Vault London Docks, 184 ;

'S. 32.

'Permit self and company to taste

wines.

'Ex Traveller, Capt. Austin @ Cadiz.

'Entered by Williams,

May /48.

| Mark. | No.  |
|-------|------|
| D a.  | 112/ |
| □ P   | 114  |

Butts.

'VINCENT & PUGH.

'Tasted

Casks Nos.

'Sampled

Do. Shewn by }

The course of business at the London Docks with reference to such orders is that the merchant, who has wine in the vaults, and wishes to enable a party to taste it, gives an order in the form set out. It is then taken to the clerk before mentioned, and he writes his name across it, and when it has been so signed by him, but not otherwise, the coopers of the company are authorised to act upon it, and allow the party presenting it to taste the wines described in it. The instrument in question was presented to the clerk for his signature, but he, suspecting it was not genuine, refused to sign it. The signature, 'Vincent and Pugh,' was a forgery. For the prisoner it was objected that a tasting order could not be considered an order for the delivery of goods; and secondly, that this never was a perfect order, nor was uttered as such, but was handed to the clerk for his signature in order that it might become an available tasting order. The prisoner was convicted, and, upon a case reserved, after argument on both the above points, and time

(i) R. v. Gilchrist, 2 M. C. C. R. 233, C. & M. 224.

(j) Jones's case, 1 Leach, 53. 2 East P. C. c. 19, s. 39, p. 941.

taken to consider, Wilde, C. J., delivered the judgment as follows: 'The first question is whether the instrument, which the prisoner uttered, was an order. It was directed to the cooper at a particular vault, in the London Docks, and purported to be signed by the owner of the wine in that vault, and was in this form, "Permit self and company to taste wines, Ex 'Traveller," &c., which must mean, permit the party signing and company to taste; the order, therefore, to the cooper to permit the wines to be tasted was given by that party. It is true that the order was presented by the prisoner to a clerk of the company in order that he might also affix his name to it, and without his signature the cooper had no authority to obey it; but it was not the less an order because the cooper had not authority to obey it. Again, assuming that the signatures of both the merchant and the clerk of the company were necessary to make a perfect and efficient order, it would be an order by each as soon as his signature was affixed. If a promissory note was made payable to A. and B. not in partnership, or their order, so that the signature of both would be requisite to make an efficient endorsement, a party forging the endorsement of A., and uttering the instrument to B. for the purpose of procuring his signature, would be guilty of uttering a forged endorsement. (k) Upon the same principle we think that the prisoner in this case was guilty of uttering a forged order. The next question is, whether it can be considered an order for the delivery of goods. Now, although it is true that the quantity delivered for the purpose of tasting is very small, yet it is impossible to say that it is not an order for the delivery of *some* wine, and as we cannot apply the principle of *de minimis non curat lex* to such a transaction, we feel bound to say that it was an order for the delivery of goods, and that the verdict of guilty was right.' (l)

Where the prisoner had been convicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable; under which circumstances his genuine order would not have been valid, by the provisions of the 32 Geo. 3, c. 34, s. 2, unless made in the manner therein prescribed; the judges held the conviction to be proper, the order itself purporting on the face of it to be made at another place beyond the limited distance. (m)

The prisoners were convicted of forging a warrant for the payment of money, with intent to defraud David Evans and others. D. Evans and four other persons carried on business in partnership as bankers, under the firm of the Brecon Bank. D. Davies and a number of other persons, including the prisoners, were members of a benefit club, called 'The Loyal Urgant Lodge of Odd Fellows.' David Davies held an office in the club called 'The Noble Grand;' David Lloyd held the office of 'Vice Grand.' The funds of the club had been raised by the contributions of the different members. The club had at different times deposited with the Brecon Bank a sum of £25, and a sum of £105, for which sums the bank gave common bankers' receipts, and by desire of the depositors they wrote across the receipts the names of six persons,

(k) *R. v. Winterbottom*, 1 Den. C. C. 41.

(l) *B. v. Illidge*, 1 Den. C. C. 404. 2 C. & K. 871. During the argument, Alderson, B., said, 'An order is an order by a party who may command to a party who must obey. A warrant is a like direction to a party who may obey, and is indemnified

by the warrant if he does so. A request is an instrument addressed by any one person to another who has an interest in the subject-matter of the request, and may comply with the request if he pleases.'

(m) *M'Intosh's case*, 2 East P. C. c. 19, s. 39, p. 942. 2 Leach, 883. See *R. v. Pike*, 2 Moo. C. C. R. 70.

who were represented to them as being the committee, and the bankers were directed not to pay the money mentioned in the receipts except to the order of the committee of the club. The receipts were kept with certain cash belonging to the club in a box with two locks, the key of one lock being kept by David Davies as Noble Grand, and the key of the other lock by another officer called deputy treasurer. The prisoners contrived to get possession of the box and its contents, and they presented the receipts at the Brecon Bank, together with a paper writing as follows:—

‘Urgant Lodge, Hirwann, 14th March, 42.

‘Sir,—As we have had a plan, which will return more interest on our cash, with good security, the bearers are authorised to apply for the same. In witness hereof we subscribe our names, and affix the seal of our lodge.

‘N. G. DAVID DAVIES.

‘V. G. DAVID LLOYD.

‘Sec. WILLIAM LEWIS.’

On this paper there was also a seal or stamp containing the words ‘Urgant Lodge, Hirwann,’ encircling two closed hands. The letters N. G. and V. G. were proved to mean Noble Grand and Vice Grand. The prisoners, on producing the receipts and paper, desired to have the £130, and Mr. Evans, one of the partners of the bank, considering the paper produced to be an authority from the club, paid the money to the prisoners. Mr. Evans stated that he should not have paid the money on the receipts alone without the paper, nor on the paper without the receipts. The signatures were all forged. On the part of the prisoners it was contended that this was not a warrant for the payment of money, and even if it were, yet that the prisoners, being members of the club, could not be convicted of forging; but, upon a case reserved, the judges all thought that this was a warrant, and that there was no ground of objection that the prisoners were joint owners. (*n*)

The prisoner was convicted of uttering, on the 25th of May, 1844, the following forged warrant and order for the payment of money:—

‘Mr. Martin will be pleased to send by the bearer £10 on Mr. Hodge’s account, as Mr. Hodge is very bad in bed, and cannot come himself.

‘MARTIN RALPH, Foreman.

‘St. Austell Foundry.’

Martin was clerk to Coode & Co., bankers, with whom Hodge kept an account. It was the duty of Ralph, the foreman, to pay Hodge’s labourers, but he had no general authority to draw money. He had once in January preceding drawn a cheque, which Hodge had adopted, but he had given him no authority to draw this cheque. It was not in Ralph’s handwriting, nor had he or Hodge authorised any one to draw it. It did not appear positively how Hodge’s account stood on the day the cheque was uttered; it was usually settled half yearly; but Martin paid the amount without hesitation, and stated that his impression was that the account was in Hodge’s favour. Upon a case reserved upon the question whether this instrument was, under the circumstances, a warrant *or* order for payment of money, the conviction was held right, and Coleridge, J., at the next assizes delivered judgment thus: ‘Any instrument for payment, under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this whatever be

(*n*) R. v. Harris, 2 M. C. C. R. 267. 1 C. & K. 179.

the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not. This case may be said to be removed one step further than the ordinary one, where the name of the actual accountant is forged, because Ralph had himself no account with Messrs. Coode and Co.; but by this instrument, if genuine, Ralph says, in effect, that he had authority from Mr. Hodge, who had an account with them; as against him, therefore, it is as much a warrant as if he himself had had such account, and would have equally bound him. The difference in the fact, therefore, is immaterial in the principle. It may not be easy to reconcile all the decisions on this point, and one of the judges doubted on the propriety of that which I am now pronouncing, and principally on the case of *R. v. Thorn*. (o) He was, however, quite satisfied with the soundness of the principle on which we proceed.' (p)

The prisoner was convicted of uttering a forged warrant for the payment of money, which was as follows:—

'To Molyneux and Co.—Pay to my order, two months after date, to Mr. John Smith, the sum of £80, and deduct the same out of my account.'

There was no signature, but across the front of the instrument was written, 'Accepted, Luke Lade,' and it was endorsed 'John Smith, farmer, Hailsham, Sussex.' There was a John Smith, a farmer at Hailsham, not a customer of the bankers. Luke Lade was a customer, and kept money with them; and, upon a case reserved on the question whether this instrument was properly described as a warrant for the payment of money, the judges all thought that it was a warrant from Luke Lade to the bankers to pay to J. Smith, and, if genuine, would have been a warrant to the bankers to pay the money. (q)

The indictment charged the prisoner with uttering the following forged document:—

'Mr. Lowe.

'London.

'Bought of C. Dawson, English and Foreign fruit merchant and potato salesman.

'Nov. 9th — 2 bushells of apples — 9s.

'Sir, — I hope you will excuse me sending for such trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling.

'Yours, &c.

'F. Dawson.'

Lowe, to whom the document was directed, was indebted to Dawson, the person by whom it purported to be signed, in the sum of 9s. for two bushells of apples. It was objected that the document was neither an order nor a warrant for the payment of money; the objection was overruled, and, upon a case reserved, the judges were unanimously of opinion that it was a warrant. If it had been a genuine document, and payment had been made on its production, proof of those facts would have been a good defence to an action for the 9s. The judges seemed also to think that it was an order for the payment of money. (r)

(o) 2 M. C. C. R. 210; 1 C. & M. 206.

(q) *R. v. Smith*, 1 Den. C. C. 79, 1 C.

(p) *R. v. Vivian*, 1 Den. C. C. 35. 1

& K. 700.

C. & K. 719. The judgment is from C. &

(r) *R. v. Dawson*, 2 Den. C. C. 75. The initial is C. in one part, and F. in the other.

K. It was Coleridge, J., who doubted.

The prisoner was indicted for forging and uttering a warrant and order for the payment of money which was as follows:—

‘Messrs. Wilkins and Co., Bankers, Merthyr.

‘Please to advance the bearer, Samuel Richards, the sum of two hundred and fifty pounds, and place the same to my account.

‘MORGAN THOMAS,  
‘Gold Merchant, Uniscoy.’

Thomas had a *deposit* account with Messrs. Wilkins’ bank, but not a drawing account; and the course of dealing was not to pay cheques, even if tendered by the depositor himself, unless the deposit receipt was also produced. Wightman, J., ‘I am of opinion that the instrument is a warrant, and not an order, because it appears from the nature of the contract between Thomas and the bankers, that the bankers were not bound to obey it, although in point of fact they did obey it.’ (s)

The prisoner was indicted for forging and uttering the following warrant for the payment of money:—

‘Sir,— You will please to comply with my wish, if possible, in sending a messenger with the bearer of this note; he is acting paymaster; but waiting for his commission: he is the total dependence whom the contract depends on. I want of you £20 in change, £10 in gold, £5 in silver, and £5 in copper; and I shall send you four £5 notes, Bank of England.

‘THOMAS PAISLEY, Quartermaster-Sergeant.’

Roberts, a flour-dealer at Manchester, supplied bread, under contract, to the troops at the barracks there. The prisoner presented to him the above letter; Roberts had on many occasions lent sums of money to the quartermaster-sergeants of the regiments stationed at the barracks, but had never lent money to T. Paisley, the quartermaster-sergeant of a regiment, which had only been stationed there about a week. He refused to lend the money, but only because he suspected from the terms of the letter that it was not a genuine one. Rolfe B., after citing *R. v. Carter*, (t) ‘I think if this be a request to Roberts to pay £20 to the bearer on the writer’s account, it is a warrant for the payment of money. The test is, if this were a genuine letter, and the money had been paid to the bearer, would Roberts have a right of action against Paisley, the writer? I think he would. Roberts had been in the habit of lending money to quartermaster-sergeants of regiments in these barracks; this regiment had then recently come; and Roberts had never advanced money to this quartermaster-sergeant; but if the meaning of this document be that Roberts was to send that money by the bearer on Paisley’s credit and account, it is, I think, a warrant within the meaning of the statute.’ But the next day Rolfe B., said, that on looking again at the document he thought that it did not authorise the payment of the money to the bearer, but only desired that a messenger of Robert’s might be sent with it. The principle was as he had stated it, but the document did not come within it. (u)

The prisoner was indicted for uttering a forged warrant and order for the payment of money, which was set out in each count thus:—

‘August 16th, 1848. Gentlemen,— I do hereby authorise the bearer of this note to draw the money that you now hold belonging to me.

‘William Stoker.’

(s) *R. v. Williams*, 2 C. & K. 51.  
(t) 1 Den. C. C. 65.

(u) *R. v. Ferguson*, 1 Cox, C. C. 241.

Alderson, B., 'The indictment is bad, because the instrument set out is a warrant and not an order. Every order is a warrant, but every warrant is not an order. This is a warrant and not an order.' (v)

On an indictment for forging a warrant for the payment of money it appeared that a district lodge of the society of Odd Fellows existed at Wordesley, having (amongst others) a branch lodge, called 'The Conqueror Lodge.' At a meeting of the Conqueror Lodge that lodge was dissolved, and the funds in hand distributed among the members. The prisoners afterwards presented to the secretary at Wordesley the following certificate:—

'Conqueror Lodge.

'This is to certify that Brother Jno. Higham — (or wife) labourer, resident at Kidderminster, died the 10th day of April, 1849. He was initiated a member the 1st day of May, 1845, and was clear upon the books of the lodge at the time of his death. Certified by us this 11th day of April, 1849.

'WM. JONES, N. G.

'JOHN BAXTER, V. G.

'WILLIAM POOL, Secretary.

'The above certificate must be signed separately by the officers of the lodge, and must be forwarded to the C. S. of the district at least one clear day before the time of the money being required, which regulation will and must be strictly abided by.'

There had not been any such persons, either members or officers of the Conqueror Lodge, as those purporting to sign the certificate, and the name of the deceased member and his death were equally fictitious; but the form was taken from the printed forms in the cheque-book, which had been used in the Conqueror Lodge, and by the rules it was requisite, before any money could be paid to the family, that this certificate should be filled up with the name and dates of the death and admission of the deceased member, and signed by the officers of the lodge, viz., by the noble grand, the vice grand, and the secretary. The treasurer, being ignorant that the lodge had been dissolved, paid the prisoner £16, the proper amount under the circumstances mentioned in the certificate. It was objected that this was not a warrant for the payment of money. *R. v. Rogers* (w) was cited for the Crown. Erle, J., 'That case appears to be in point as far as the question whether an instrument in this form might be a warrant within the statute, but there was there in fact such a course of business as would make the document effectual if genuine; but here there was no Conqueror Lodge in existence, and the order, if genuine, was of no force.' . . . 'No doubt an instrument in this form, "The bearer has laid three courses of masonry," might be shewn to be a warrant for the payment of money between the parties. So in the present case, although no stranger would understand the instrument to be a warrant for the payment of money, it might be shewn by extrinsic evidence that in the course of business between the parties it was such a warrant. Here, however, there is no society existing — no course of business authorising such a payment as was made. The Conqueror Lodge had ceased to exist. If the words "Roman Lodge" or "Parisian Lodge" had been used, would it then have been valid? How can you make that an order or warrant which, if all the names of persons mentioned in it were true, would yet be of no force?' The case, however, was left to the jury, and the prisoners convicted. (x)

(v) *R. v. Dixon*, 3 Cox, C. C. 289.

(w) 9 C. & P. 41.

(x) *R. v. Rouse*, 4 Cox, Criminal Cases,

7. The prisoners were afterwards convicted of obtaining money by false pretences, and sentenced for that offence;

But where the prisoner was indicted for forging and uttering a warrant for the payment of money, and he was a member and the paid actuary of a society of Odd Fellows, by the rules of which a sick member was entitled to an allowance out of the funds of the society, and the course on such an occasion was for the sick member to apply to the actuary, who drew out an order or cheque on the treasurer of the society for the amount to which the sick person was entitled: upon this order being signed by the noble grand of the society, it became the duty of the treasurer to pay the amount mentioned in it. On the occasion in question the prisoner took an order to Chatterley, the noble grand, for his signature and asked him to sign it, which he did: the sum mentioned in it at that time was twelve shillings and sixpence only. On the same day the prisoner presented the order to Rees, the treasurer, and it then was as follows:—

‘10th March, 1849. Newport.

‘Mr. W. Rees — Please to pay P. G. T. E. Turberville [Three] [£3] 12s. 6d. for sick pay paid to Brother Isaac Jones.

‘JACOB CHATTERLEY, N. G.

‘T. E. TURBERVILLE, Actuary.

‘[£3] 12s. 6d. Newport, 10th March, 1849.’

The word and figures between brackets were added after the cheque was signed by Chatterley. Rees paid the prisoner £3 12s. 6d. It was contended that this was neither an order nor warrant for the payment of money, but merely a request. Erle, J., ‘Bankers’ cheques are often in the same form, and make use of the words, “Please to pay,” but they are not less orders for the payment of money. The same instrument may be of all three descriptions. The one in question is a warrant, and an order, and a request. Upon the face of it, it is an order, and by the evidence it is a warrant.’ (y)

Upon an indictment for forging the following warrant for payment of money:—

‘May 13, 1850.’

‘James Williams is entitled to the sum of six shillings.’

(Surgeon’s name),

it appeared that a company allowed their sick workmen six shillings a week upon such documents as the preceding being obtained from their surgeon and presented to their cashier. The date and names of the workman and surgeon were written, the rest was printed. It was held that this was a warrant for the payment of money; for, if it had been genuine, it would have authorised the payment of the money by the cashier, and entitled him to be repaid by the company. (z)

The prisoner was indicted for uttering a warrant for the payment of money: he was in the employ of a tanner and paid by the job, and was employed also to arrange the accounts of himself and the other men. He made out the account weekly, and brought it to the foreman, stating the amount to which he was entitled. The foreman looked it over, and if he saw it was correct signed it. The prisoner took the account so signed to the cashier, who, on seeing the signature, paid the amount. The prisoner on one occasion altered the account for a larger sum than was due to him, with the foreman’s name forged upon it. Bramwell, B., held that the document was not a warrant for the payment of money. (a)

otherwise the point would have been reserved.

(y) R. v. Turberville, 4 Cox, C. C. 13.

(z) R. v. Job Smith, Stafford Sum. Ass. 1850. Greaves, Q. C. MSS. C. S. G.

(a) R. v. Pilling, 1 F. & F. 324.

The prisoner had been a convict in the Lewes convict establishment, and by a rule of that establishment every prisoner was credited with a certain sum called 'convict money;' and the convict was entitled under this rule to the sum of £2 11s. 3d.; which would have been paid to him on the production of a certificate, signed by two witnesses and the clergyman of the parish, that he was getting his living honestly. The prisoner sent by post to the superintendent of the establishment the following document:—

'I hereby certify that the within-named William Mitchell (the prisoner) is gaining his living by hawking. Dated 30th Sept., 1859.

'CATHERINE BULL, Grocer, Boongate, Peterborough.

'W. B. Hopkins, Vicar, Wisbech, St. Peter's.'

The signatures were forgeries. Williams, J., held that this document was not a warrant or order for payment of money. (b)

(b) R. v. Mitchell, 2 F. & F. 44.



## APPENDIX O.

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### *Cases on Repealed Statutes as to Requests for Delivery of Goods.*

THE following cases were decided relative to requests for the delivery of goods.

An indictment for forging and uttering a request for the delivery of goods, set out the request in each count in the words and figures following:—

‘Gentlemen—

‘Be so good as to let the bearer have 5½ yards of blue to pattern, and to send the drab cloth up, in the whole piece, on Monday morning, by 10 o’clock; also a yard measure, as I do not know what quantity will be wanted; and you will oblige

‘W. READING, Mortimer-street.

‘N.B. Let the drab be good, as it is for the inspection of a gentleman,’

and, upon a case reserved upon the question whether, as the request was not addressed to any individual person by name or description, the request set out in the indictment was a request for the delivery of goods within the words and true intent of the statute, the judges present held the conviction right. (a)

So where the prisoner was indicted for forging a request for the delivery of goods with intent to defraud Messrs. Warner and Co., and the instrument forged was as follows:—

‘Aug. 3, 1839. One 16 in. helmet scoop; one four quart oval kettle.

‘JAS. HAYWARD,’

and it was proved that the prisoner had been in the employ of Hayward, an ironmonger, who had had dealings for some years with Messrs. Warner, and that once or twice, during the time the prisoner was in Hayward’s employ, he had taken orders from him to Messrs. Warner. It was also proved by a person, who managed the business of Messrs. Warner, that it was the custom of their business to deliver goods on such papers as the one in question; it was constantly done every day; and being asked by the court whether he had done so as between the firm and Hayward, the witness replied, ‘Certainly; it is the ordinary form of a request to deliver goods to Mr. Hayward, or to anybody.’ Upon a case reserved upon the question whether such a paper amounted in law to a request for the delivery of goods within the meaning of the statute, the judges were of opinion that it did, although it was not addressed to any one. (b)

(a) *R. v. Carney*, R. & M. C. C. R. 351.  
Tindal, C. J., Lord Lyndhurst, C. B.,  
and Taunton, J., were absent.

(b) *R. v. Fulbrook*, 9 C. & P. 37.

So where on an indictment for forging and uttering a request for the delivery of goods with intent to defraud Bradley, it appeared that Bradley was a butty-collier and Jones a grocer, and that the course of dealing between them was for Bradley to write a list of names, with an amount against each name, which denoted that Jones was to supply that person with goods on Bradley's account to the amount set opposite his name; and that the prisoner took a paper to Jones in the following form :—

| '1841, Oct. 22.           | £ | s. | d. |
|---------------------------|---|----|----|
| Eliz. Bradley . . . . .   | 0 | 12 | 0  |
| Will. Jones . . . . .     | 1 | 0  | 0  |
| J. Frise . . . . .        | 0 | 5  | 0  |
| Jno. Bayley . . . . .     | 0 | 5  | 0  |
| Peter Stapleton . . . . . | 0 | 8  | 0  |
| Simeon Walters . . . . .  | 0 | 15 | 0' |

Here followed ten more names and a sum against each, and the sums were cast up £7 4s. 6d., which was the correct casting if the sum opposite the prisoner's name had remained 5s. as it originally stood, but he had put the figure 1 before the 5 and made it 15s. Opposite the sum £7 4s. 6d. was the prosecutor's signature, 'John Bradley.' Ludlow, Serjt., having consulted Patteson, J., stated that that learned judge was of opinion that although this was not a request for the delivery of goods on the face of it, yet it might be shewn by evidence that the course of dealing between the parties was that goods should be delivered on the production of such documents as this; and that being shewn, the paper was a request for the delivery of goods, and as such might be the subject of an indictment, if a forged alteration were made in it. (c)

But where the prisoner was indicted for forging and uttering the following instrument, which was described in some counts as a warrant for the payment of money, and in others as a request for the delivery of goods. The prosecutors were railway contractors, and their manager, by their direction, issued notes or tickets to their workmen, which on being presented at a shop, kept by M. Hughes, entitled the holder (by an agreement between the prosecutors and Hughes) to receive goods to the amount mentioned in the ticket. These tickets were given to the workmen in lieu of wages in money. They were in the following form :—

|   |
|---|
| <p style="text-align: center;">W. TRIM.</p> <p style="text-align: center;">2s.</p> <p>No.</p> |
|---|

The prisoner had procured a large number of these tickets to be printed, but he was apprehended before he could utter any of them. It was objected that this ticket was neither a warrant for the payment of money nor a request for the delivery of goods; there must be something on the face of the document to shew that it is a request; if this ticket had been signed and addressed there was nothing on the face of it to shew how it was intended to operate; and Platt, B., held clearly that it was not a warrant for the payment of money; and as to its being

a request, said, 'I am of opinion that the document should shew on the face of it that it is a request, and that you cannot by parol make a thing a request if it does not, on the face of it, bear that construction.' Having consulted Patteson, J., Platt, B., added, 'I have discussed this case with my brother Patteson, and he entirely agrees with me that this is neither a warrant for the payment of money, nor a request for the delivery of goods.' (d)

The prisoner was indicted for forging the following order for the delivery of goods:—

'Please give the bearer two bars of solder, for Mr. Chapman, Lamb's Conduit Place.'

and it was held that this was not an order for the delivery of goods, for it did not purport to bear the signature of any one. (e) The same prisoner was also indicted for forging the following order for delivery of goods:—

'Please to give bearer two bars of solder and two brushes.

'Mr. CHAPMAN, Lamb's Conduit Place.'

and it was held that the instrument might be considered complete in itself, and that the words at the end constituted a sufficient signature. (f)

The following document was held to be merely a request for the delivery of goods:—

Sidney-street, 22 Dec. 1849.

'Mr. Bevan,

'S—Pleas to sen by bearer a quantity of basket nails a clasp for  
'E. LLOYD.' (g)

The prisoner was indicted for forging the following 'order and request for the delivery of goods:—

'I hereby authorise my servant man, Abraham Egan, to procure a watch of you.

'To Mr. Thomas Kellitt, Thorn.'

Cresswell, J., was of opinion that the instrument was not properly described, although the distinction was a very fine one; and ordered another bill to be preferred for obtaining the watch by false pretences. (h)

The prisoner was indicted for forging and uttering a certain request for the delivery of goods, which is as follows:—

'To Mr. Edwards, Southgate-street, near the Cross.

'Please to let bearer, William Gof, have spillshoul and grafting tool for me,

'EDWARD RICKETTS, of Stantway.'

The prisoner went to the shop of Mr. Edwards, an ironmonger, and presented the paper to his shopman, who, knowing Mr. Ricketts of Stantway, allowed the prisoner to select a spade and grafting tool from his master's stock. It was objected that this was not a request within the meaning of the 1 Will. 4, c. 66. In the cases of warrants and orders it had been decided that the party must have a right to dispose of, or

(d) R. v. Ellis, 4 Cox, C. C. 258.

(e) R. v. Hussey, 1 Cox, C. C. 345.

The Recorder.

(f) Ibid. The Recorder afterwards con-

sulted Patteson, J., who confirmed his opinion.

(g) R. v. Williams, 2 Den, C. C. 61.

(h) R. v. Egan, 1 Cox, C. C. 29. See 24 & 25 Vict. c. 98, s. 23.

an interest in, the property, and the requests intended to be made the subject of forgery were requests for the delivery of goods, in which the party had at least an interest; but it was held that this was a forged request for the delivery of goods within the statute. (i)

A forged letter requesting a tradesman to deliver goods to A. B. on his credit, and vouching for his ability to pay, might be described as a request within the 1 Will. 4, c. 66, s. 10, though the supposed writer had no authority over or interest in the goods, and A. B. only were looked to for payment. The indictment stated that the prisoner uttered a certain forged request for the delivery of goods, which is as follows:—

‘May 24, 1836.

‘Sir,

‘I beg to inform you that the thing is right and true. Please to let W. Thomas have such things (meaning thereby certain goods which the said W. Thomas then and there wanted) as he wants for the purpose.

‘Sir, I have got the amount of seven and twenty pounds for Maria Cole in my keeping this many years.

‘I am your servant,

‘ANN DAVIES,’

with intent, &c. A second count charged the uttering a certain forged request from one Ann Davies, for the delivery of certain goods to him the said W. Thomas, with intent, &c. The prisoner had come into the shop of the prosecutor Clare, and asked him if he knew Maria Cole, of Prendergast. Being answered in the affirmative, he said she was dead, that he was her son-in-law, that she had left £50 or £60, and that he wanted black. Clare asked him if he meant to pay for it; he said he had not the money, but it was very safe. Clare however refused, observing that he was a stranger to him; upon which the prisoner said, ‘It’s very safe. It’s in the hands of Mrs. Davies, of Prendergast.’ Clare, knowing her, and knowing her to be a respectable person, said, ‘If you will get me her order for the goods you shall have them.’ Upon this the prisoner went away, and in half-an-hour returned with the note set out in the first count; upon the production of which he was furnished with such mourning things as he required, which were put down to his credit. The note was a forgery, and Mrs. Davies had no money of Maria Cole’s in her keeping. Coleridge, J., had doubts whether the paper writing was properly a request for the delivery of goods within the meaning of the statute, and whether the charge ought not to have been for obtaining goods under false pretences; because Ann Davies had not, nor was supposed to have, any authority over, or interest in, the goods obtained, because the note did not purport in any way to charge, nor did it charge, her credit, and because the goods were supplied on the prisoner’s own credit, and he liable for them. The prisoner’s counsel also suggested that no goods were specified. But, upon a case reserved, the judges present were unanimously of opinion that the instrument was correctly set out as a request, and the conviction was affirmed. (j)

The indictment charged the prisoner with forging and uttering ‘a certain forged request for the delivery of goods,’ which was as follows:—

‘Mr. Turner, — Please to let the lad have a hat, about 9s., and I will answer for the money.

‘ED. BARRETT,’

(i) *R. v. James*, 8 C. & P. 292. Gurney, B., referring to *R. v. Carney*, *ante*, p. 950.

(j) *R. v. Thomas*, 2 Moo. C. C. R. 16. 7 C. & P. 851. Lord Abinger, C. B.,

Williams and Coleridge, JJ., were absent. *Qu.* whether the innuendo in the first count be not too large, there being no introductory averments. C. S. G.

and it was contended that this was not a request for the delivery of goods, but a guarantee for the payment of the price; and, if it were the subject of forgery at all, it should have been charged to be an undertaking for the payment of money; but Gurney, B., held that this instrument was not the less a request for the delivery of goods, because it might also be an undertaking for the payment of money. (*k*)

The 1 Will. 4, c. 66, made no provision at all for forging a request for the payment of money, and such a request could not be described as an undertaking, warrant, or order for the payment of money. Upon an indictment for forging and uttering an instrument, described in different counts as an order for the payment of money, a warrant for the payment of money, and an undertaking for the payment of money, it appeared that the prisoner sent one Walker to Messrs. Seager's, with a letter and the following memorandum:—

‘Taunton, } 20 Feb., 1841.  
Fore Street, }

‘Gentlemen,

‘I shall feel obliged by your paying Mr. Bennett the sum of £2 7s. 8d., and debiting me with the same. You will please have a receipt, and add the amount to invoice of order in hand.

‘I am,

‘Gentlemen,

‘Your most obedient servant,

‘T. D. CHAPPELL.

‘Messrs. Seager, Evans, & Co., Distillers, &c.

‘10, Millbank, Westminster.’

Messrs. Seager and Evans had a customer at Taunton, named T. D. Chappell, and Mr. Seager proved that, supposing he had believed the memorandum to be the genuine handwriting of Mr. Chappell, he should have paid the money, and that it was the practice of their house, and in the course of business, to pay on these requests to country customers. It was objected, that this was not an offence within the 1 Will. 4, c. 66, as the paper was neither an undertaking, warrant, nor order for the payment of money, but at most only amounted to a request; and forging a request for money was not provided for; and the prisoner having been convicted, the judges held, upon a case reserved, that the conviction could not be sustained. All the judges thought it was no undertaking, because none was expressed in it; that it was no order, because it did not purport to be one in form; and all agreed that, according to decided cases, it was no warrant. (*l*)

The prisoner was indicted for uttering a certain forged request for the delivery of goods, which is as follows:—

‘Per bearer,

‘2 ¼ Counterpanes.

‘T. DAVIES,

‘E. TWELL,’

‘88, Aldgate.

with intent to defraud J. Lanison and others, the prisoner well knowing the said request to be forged. The prisoner, who had been in the service of Mr. Davies as porter, went on the 19th of November, 1830, to the house of Messrs. Lanison & Co., and produced to Smith, their servant,

(*k*) R. v. White, 9 C. & P. 282. R. v. & M. 206. The prisoner was afterwards Robson, 9 C. & P. 423.

(*l*) R. v. Thorn, 2 M. C. C. 210, 1 C. ante, p. 820.

the forged instrument in question. Smith, in consequence of the prisoner producing the paper, delivered the counterpanes to him. Davies was a customer of Lanison & Co., and lived at 88, Aldgate. Smith did not then know Twell; he gave credit to the signature of Davies; Twell was in the employ of Davies, and had authority from him, in his absence, to write an order for goods in his name in this form; but Twell had no authority to employ any other person to write the same. The paper produced was not the writing of Davies or Twell, nor signed by the authority of Davies. Mr. Davies said they generally wrote their orders 'Send per bearer,' or 'per bearer,' and that such orders as these are common in their business. It was objected, that the paper produced did not purport to be a request, within the meaning of the statute: no particular person was requested, nor was it directed to any particular person. The jury found the prisoner guilty, and said that they considered the paper as a request for the delivery of the goods mentioned in it, and that such papers were in trade so considered. But upon a case reserved upon the questions, whether the instrument was upon the face of it one of those instruments, namely, a request for the delivery of goods, the knowingly uttering of which is prohibited by the 1 Will. 4, c. 66, s. 10, and particularly whether the want of any address was a valid objection, the judges present were unanimously of opinion that the words 'per bearer' did not necessarily import 'send per bearer;' they might mean 'I have sent per bearer:' and that there ought to have been an innuendo to explain them. They seemed to think the address not necessary. (*m*)

Where goods were obtained by a forged request within the 1 Will. 4, c. 66, the indictment must have been for forgery, and could not be for obtaining them by false pretences. The prisoner was indicted for obtaining goods by means of the following false and counterfeit letter:—

'Mr. Brooks, — Please let the bearer, William Turton, have for J. Roe, four yards of Irish linen and a waistcoat.

'JOHN ROE.

'Jan. 6, 1833.'

Taunton, J. — 'This is a forged request for the delivery of goods. This case comes within the 10th sec. of the 1 Will. 4, c. 66. It is clearly an uttering of a forged request for the delivery of goods. It is a felony, and not a misdemeanor.' (*n*)

(*m*) R. v. Cullen, R. & M. C. C. R. 300. This case is also reported in 5 C. & P. 116, and it is there stated that the indictment contained a count calling the instrument a forged order, and that the judges held that the instrument was neither an order nor a request within the 1 Will. 4, c. 66,

s. 10. See R. v. Pullbrook, 9 C. & P. 37. In such a case there should at all events be one count describing the request in the manner adopted in R. v. Robson, 9 C. & P. 423; 2 M. C. C. R. 182. C. S. G.

(*n*) R. v. Evans, 5 C. & P. 553.

## APPENDIX P.

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### *Decisions on Repealed Statutes relating to Forgery by Engraving Plates.*

AN indictment under 1 Will. 4, c. 66, s. 19, charged Balls, Moses, and Harris, in some of the counts, with engraving on a certain plate, in the Polish language, a certain note for the payment of money; in other counts with feloniously using the plates, on which the notes were engraved. At the close of the case for the prosecution, Littledale, J., required the counsel for the prosecution to elect, whether they would go on the counts for engraving, or the counts for using the plates, as they were quite distinct offences; and the counsel for the Crown, admitting that there was no evidence of a joint engraving, relied on the counts for using the plates. It was then objected for the prisoners that there was not any evidence of a joint using of the plates. It was answered that there was evidence to go to the jury, as it was clear that Balls had the plate at one time and Moses at another, and that Harris was active in bringing the parties together, so that Flaum might have the impression. Any act traced to one was traced to all; and the question was, whether the notes were not struck off with the joint consent of all the parties. Littledale, J., in summing up, said, 'In a case of felony you can only go upon one act committed. There is a very great difficulty in this case for you to know which act the prosecutor relies on, all these things being done at different times. The prosecutor does not fix on any particular day; if you find that at any one time all three did concur in using the plates, then you may find them guilty. There are four different times at which notes were taken. As to what has been said about these parties being general dealers, it is not sufficient; they are not indicted one for doing the act, and the others as accessories before the fact, but are all charged as principal felons. There may be cases in which acts done at different times may be evidence of a joint using, as, for instance, if one were to find the plate, and one the paper, and one to do the work, I should say it was a joint using, but there is no evidence of that sort here. There is no evidence that by common concert these parties did such things. If one struck off the impressions, and the others wished him to do it, and shared in the profits, that would not make them principal felons. As this is an indictment against all three, you must be satisfied that they were all three present at one time, or assisting in some way at that time, either by watching at the door or something of that sort. Having the notes in possession is not sufficient evidence of having used the plate; as in the case of forgery, uttering is not sufficient evidence of having forged. Balls, it seems, had the plate the year before, but that is no evidence under this indictment, as the using under it must be since August, 1835, as Harris and Moses do not come on the stage till that time. The only evidence against Harris is the negotiations he entered into with Saltzman and others respecting this note; there is no proof of his having the plate in his possession. Moses had it in his possession,

and is proved to have said before that he had the plate, and could print as many as he liked; this may be something like evidence of a using, on his part, of the plate. It does not seem to me that there is any evidence to prove a joint using at any one time, which, in my opinion, is necessary to prove this indictment; you may find two of them guilty, or one of them guilty, or all three of them guilty.' (a)

Upon an indictment against several for engraving plates, under the 1 Will. 4, c. 66, s. 19, the jury must have been satisfied that they jointly employed the engraver, but it was not necessary that they should all be present when the order was given; it was sufficient if one first communicated with the others, and all concurred in the employment of the engraver. Mazeau, Ramuz, and Rault were indicted for feloniously engraving and making upon two plates two parts of a promissory note for 25 rubles of Nicholas, Emperor of Russia, and it appeared that Ramuz and Mazeau had for some time been acquainted with an engraver, of the name of Salt, and that on the 9th of August, 1840, Mazeau went to Salt and shewed him two Russian notes, and had some conversation with him about engraving some plates, and some days after Mazeau came again, accompanied by Ramuz, and both told Salt that he was to go on with the engraving, and both gave him some money, and they both came together to him frequently during the progress of the work. The evidence against Rault was, that when Salt took the print, Mazeau told him that the man they were executing the order for was present in their house in the parlour; in consequence of this, Salt watched outside the door after he left, and saw Rault come out of the house. Salt had also seen Rault several times during the progress of the engraving; he had seen him in conversation with Mazeau and Ramuz. Mrs. Salt, who knew the three prisoners, had seen two of them a great many times, but one not so often as the other two. She only saw the three prisoners together once, and that was on the day that they were taken into custody; they were standing talking together, close to Salt's window. On Rault's apprehension, some proofs from the plate and a Russian passport were found upon him. It was submitted for Rault, that there was not any act proved to have been done by him jointly with Mazeau and Ramuz, so as to make him guilty of the charge laid in the indictment; that there must be a joint employment of Salt by all the three prisoners; and that in order to make out such joint employment, it was necessary to shew that all three were present at the time the order was given. Patteson, J., 'I quite agree that there must be a joint employment, and that all these three persons cannot be convicted on this indictment, unless the jury think that they jointly employed Mr. Salt. But I do not go along with the learned counsel, in saying that they must all three be present at the time when the order was given to Mr. Salt. (b) I am of opinion that, if it be shewn that two of them gave the order on behalf of themselves and another person, that other person being the other prisoner, he may be connected by some evidence with the employment. Whether there is such evidence in the case is a question for the

(a) *R. v. Harris*, 7 C. & P. 416, *cor.* Littledale and Gaselee, JJ. The facts proved on the trial are not stated in the report, and although there is a reference to *R. v. Balls*, 7 C. & P. 426, for the principal facts of the case, the statement there does not contain any of the most important facts alluded to by the learned judge in his summing up. For other points decided in other cases against the same prisoners,

see *R. v. Warshaner*, R. & M. C. C. R. 466; *R. v. Harris*, 7 C. & P. 429; *R. v. Balls*, R. & M. C. C. R. 470, *ante*, p. 729. In a similar case now all the prisoners who had taken such a part as to make them accessories before the fact, might be convicted with the principal under the 24 & 25 Vict. c. 94, s. 1.

(b) See *R. v. Bull*, 1 Cox, C. C. 281.



jury; I cannot withdraw the case from their consideration.' And in summing up, the learned judge said, 'You cannot find all guilty, unless you are of opinion that they jointly employed Salt to make the engraving. If you are satisfied that Rault first communicated with the other two, and then that they all concurred in employing Salt, the three prisoners may be found guilty; but you cannot find Rault guilty if you think he employed the other two to get the plate engraved by any person, and they afterwards, of their own accord, employed Salt. You may acquit all or any one of the prisoners, if you are satisfied that they did not employ Salt. It is clear, under the words of the Act of Parliament, and taking the evidence to be true, if Ramuz and Mazeau knew the nature of the instrument, that the case is brought home to them; and I am inclined to think, that if by Salt they engraved the plate, although they did not know the nature of the instrument, they are within the Act; but I am not confident of that, and shall ask you to say, whether you think they knew the nature of the instrument which they employed Salt to engrave. With respect to the guilt of Rault upon this indictment, the evidence is certainly not so cogent. He is not brought forward until a very late period, long after the order had been given by the other two prisoners, when he is seen coming out of their house, and he is subsequently seen in their company. When he is apprehended, he gives his address in Portland-street, and at that address, in the room he occupied, the first proof of the plate is found, and other proofs are also found upon him. These circumstances, however, do not clearly lead to the inference that you must arrive at, before you can pronounce him guilty on this indictment; for, to make him answerable for the offence now charged, you must be satisfied that he was a party concerned in giving the order originally to Salt. For that purpose, it seems to me, the evidence is but slight; but should you think that he did originally instruct the other prisoners, and that by his authority they went and employed Salt, they may all be convicted. If you do not think that, Rault must be acquitted. You will, therefore, say whether Ramuz and Mazeau knew what the contents of the plate were, and what the nature of the instrument was; and you will also say whether Rault was a party concerned in giving the original instructions to Salt.' (c)

(c) *R. v. Mazeau*, 9 C. & P. 676. The jury found Mazeau and Ramuz guilty, and that they knew the nature of the instrument. With the greatest deference to the very learned judge, it is submitted that it deserved consideration, whether, supposing that Rault gave the order to Mazeau and Ramuz, and they in his absence gave it to Salt, who was an innocent agent, Rault was more than an accessory before

the fact. If Rault had given the order to Ramuz and Mazeau, and they in his absence had themselves engraved the plate, it is conceived they would have been principals, and Rault an accessory before the fact; and it is submitted that this case is not varied by the act of an innocent agent, as that act is, according to all the authorities, just the same as if it was done by the party procuring it to be done. C. S. G.

## APPENDIX R.

### *Decisions on Repealed Statutes relating to Arson.*

It seems that the 9 Geo. 1, c. 22, did not alter the nature of the crime, or create any new offence, but only excluded the principal more clearly from his clergy. (a) The words 'set fire to' in that statute did not, therefore, appear to admit of a larger construction than prevails by the rule of the common law; (b) by which, as we have seen, the putting fire into or towards a house, however maliciously, does not amount to arson, if either by accident or timely prevention no part of it be burned. (c)

So that where the prisoner was indicted on that statute for setting fire to an outhouse, commonly called a paper-mill, and it appeared that she had set fire to a large quantity of paper, which was drying in a loft annexed and belonging to the mill, but no part of the mill itself was consumed, the judges thought the case not within the statute on that ground. (d) The setting fire to a parcel of unthreshed wheat was holden not to be felony within that statute. (e)

*Gaol.*—A common *gaol* was holden to be a house within the 9 Geo. 1, c. 22. One count charged the prisoner with setting fire to the house of the corporation of Liverpool; another with setting fire to the house of one Richard Rigby; and a third with setting fire to the house of one Hannah Kerby. The place where the offence was committed was a *gaol* belonging to the corporation of Liverpool, which was used as the place of confinement both for criminals and debtors; the prisoner, being confined there for debt, voluntarily set fire to his box, which was a little apartment in the prison; and the whole *gaol* would, in consequence, have been probably burnt to the ground but for timely assistance. The R. Rigby mentioned in the indictment was the keeper of the *gaol*; and it appeared that his dwelling-house adjoined to the *gaol*, and was inhabited by himself and by Hannah Kerby, who was his mother-in-law, and who lived there by his permission, and kept it as a public-house. A wall separated the prison from the house; but the entrance into the prison was from the dwelling-house, by a door through the wall. This door was locked every night, and nobody inhabited the prison itself but the prisoners, some of whom were occasionally supplied with beds in the dwelling-house. The prisoner having been convicted, the case was submitted to the consideration of the judges, who were of opinion that it was within the Act; the dwelling-house being a part of the prison, and the whole prison being the house of the corporation. (f)

(a) *Breema's case*, 1 Leach, 220. 2 East, P. C. c. 21, s. 6, p. 1020.

(b) 2 East, P. C. c. 21, s. 4, p. 1020.

(c) *Ante*, p. 896.

(d) *Taylor's case*, 1 Leach, 49. 2 East,

P. C. c. 21, s. 4, p. 1020. See sec. 7 of the new Act, *ante*, p. 903.

(e) *Judd's case*, 2 T. R. 255.

(f) *Donnivan's case*, 2 Black. Rep. 682. 1 Leach, 69. 2 East, P. C. c. 21, s. 6, p. 1020. 2 Stark. Crim. Plead. 444.

The prisoner was indicted for setting fire to the gaol of the liberty of Havering-atte-Bower. The gaol was used at present only as a lock-up house, and persons are never detained there more than a night or two. The keeper of the gaol is appointed and paid by the justices of the peace, but he does not reside at the gaol, nor is there any keeper's residence attached to it; but he has the custody of the keys and the charge of the prisoners. The court-house, where the liberty sessions are held, is under the same roof, but not otherwise connected with the gaol, which is repaired by a rate on the inhabitants, of whom the gaoler was one. Parke, B., had no doubt that at common law the word 'house,' with reference to this offence, would mean a dwelling-house; and he doubted whether this gaol was a house at all. (*g*)

**Unfinished house.**—On the trial of an action against a hundred, under the 9 Geo. 1, c. 22, s. 7, to recover satisfaction for the malicious burning of a house, outhouse, or barn, it appeared that the building which had been burnt was in an unfinished state; it contained five rooms, viz., a kitchen and parlour, two rooms on the first floor, and one room over that floor; it had a stone staircase, and all the windows were fixed in and one was glazed; the owner had deposited straw and agricultural implements in the building. It was objected, 1st, that this building was not a house; that a house intended for a dwelling-house, but not completed, and which had never been inhabited, was not a house within the meaning of the statute. 2dly, that it was not an outhouse, because it was not parcel of a dwelling-house. 3dly, that it was not a barn in the ordinary acceptation of the term. It was not intended to be used as a barn, nor was it constructed for that purpose. On the other hand it was admitted that it was not a house or outhouse within the meaning of the statute, for it must undoubtedly be a house or outhouse, in respect of which burglary might be committed: but it was contended that the use of the building for the purpose of depositing in it hay and straw, which is the purpose for which a barn is used, made this a barn. Bayley, J., in delivering the judgment of the Court, after time taken to consider, said, 'the question is whether the building which was set fire to comes within the description of a house, outhouse, or barn. It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. It was conceded in argument, that it was not a house within the meaning of the 9 Geo. 1, c. 22. It has been decided that that statute does not alter the nature of the crime, or make any new offence, but merely excludes the principal from clergy more clearly than he was before. There cannot be any doubt that the building, in this case, was not a house, in respect of which burglary or arson could be committed. It was a house intended for residence, but it was not inhabited. It was not, therefore, a dwelling-house, though it was intended to be one. It was not an outhouse, because it was not parcel of a dwelling-house. But it was contended that it was a barn, because it had been used for those purposes for which a barn is used. The building had three stories, chimneys, a staircase, and windows. The plaintiff had deposited in it a quantity of straw and agricultural implements. On consideration, we are of opinion that this

(*g*) *R. v. Connor*, 2 Cox, C. C. 65. One count laid the house as the house of the gaoler and the intent to injure him; another as the house of the inhabitants of the liberty, and the intent to injure them; another as the house of 'T. Mashiter and others,' justices of the peace; and Parke, B., doubted whether any count met the

case, as he thought the real intent must be taken to have been to injure the inhabitants, and that the house was in the possession of the gaoler. *Sed quare* whether the gaoler was not merely the servant either of the justices or the inhabitants. The prisoner was acquitted, or the case would have been reserved.

building was not a barn within the meaning of that word as it is used in this statute. It was a house applied to those purposes to which a barn might be applied. The 9 Geo. 1, c. 22, though remedial in some respects, is in others capitally penal. The hundred are liable to make satisfaction to the party injured by the burning of a house, outhouse, or barn, provided a capital offence be committed against that statute by such burning. The statute, therefore, with reference to a case like the present, must be construed strictly; and, so construing it, we are of opinion that the building consumed by fire in this case was not a house, outhouse, or barn within the meaning of this Act of Parliament; and in this opinion Lord Tenterden, with whom we have conferred upon this case, concurs.' (h)

A count charged the prisoner with setting fire to the dwelling-house of Watson and Turnbull. The house was one of a number which the prisoner had mortgaged to Watson and Turnbull, and shortly before the fire a party had taken possession of them on behalf of the mortgagees, and they had previously received the rents of some of them; but the house in question was uninhabited, and secured by a padlock. Maule, J., 'I think this is not the dwelling-house of these mortgagees, so as to enable burglary to be committed; but it is said that the allegation is not to be understood as meaning the dwelling-house in which these persons dwelt, but as meaning that it is a dwelling-house, and that it belongs to them. But suppose a man lives in No. 1, and is seised in fee of Nos. 2, 3, 4, &c., could 2, 3, 4, &c., be properly described as the dwelling-houses of the landlord? It comes entirely to the question whether the term dwelling-house means the house in which a person dwells, or only imports a relation subsisting between the person and the thing. My opinion is, that when you state it to be the dwelling-house of A. & B., that is a place in which they are in some sense dwelling. A house, as soon as built and fitted for residence, does not become a dwelling-house till some person dwells in it. Here the evidence is that no person has dwelt in it, and there is therefore no evidence to support the count.' (i)

One count charged the prisoner with setting fire to the dwelling-house of J. Whithorne; another the house of J. Whithorne; and a third the dwelling-house of J. Ball. Ball had resided in a cottage to the 10th of June as tenant to Whithorne, at a rent paid quarterly. In order that some necessary repairs might be done to the cottage by the landlord, Ball left the cottage on the 10th of June, and removed his furniture, and had not returned at the time of the trial, the repairs not having been completed. Whithorne stated that he held Ball responsible for the rent during this period. It was objected that the two first counts were not proved, as the house was let to Ball; and so Crompton, J., held. It was then objected that the cottage was not the dwelling-house of Ball at the time of the fire, as he was neither residing in, nor in possession of, it; and that 'house' in the statute meant a dwelling-house. Crompton, J., was of opinion that a house in the statute meant a dwelling-house; but in this case he thought the evidence proved it to be the dwelling-house of Ball, and therefore the third count was supported. (j)

(h) *Elsmore v. The Hundred of St. Bravela*, 8 B. & C. 461. See also *Hiles v. The Hundred of Shrewsbury*, 3 East, 457.

(i) *R. v. Allison*, 1 Cox, C. C. 24.

(j) *R. v. Kimbrey*, 6 Cox, C. C. 464. Crompton, J., ordered the second count to be amended by inserting Ball's name for Whithorne, and said he would reserve the

point whether there was any evidence to support the second or third counts; but the jury acquitted. In summing up, Crompton, J., left it to the jury to say whether at the time of the fire Ball's absence was merely temporary, he having, at the time he left, an intention to return.

**Building not used as habitation.**— Upon an indictment for setting fire to a house it appeared that the prosecutor, thirteen years before, caused a small building to be erected at his lime works for his workpeople at the kiln to eat their meals in and dry their clothes. This building was seven feet high, and had four walls of stones without mortar, the roof consisting of broom, turf, and straw, and being supported by two pieces of timber: the door had neither lock nor bolt, and there was no window in the building: which had not been erected as a habitation, and none of the prosecutor's men had ever slept there. One Williams had been sleeping in the building without the prosecutor's consent, but he was aware of his having done so for three weeks previous to the fire, he working on the roads, and having no cottage of his own. The building was called a shed, an outhouse, and cabin, and was erected for the use of the lime works. Tindal, C. J., 'This place, not having been built for the habitation of man, and the person who slept there doing so without the leave of the owner, I think that it was not a house within the statute; although a cottage, however mean and wretched, used as the habitation of man, would be protected by its enactments.' (*k*)

The first count of an indictment for arson, for setting fire to a cellar, described it as the dwelling-house of a constable; the second count described it as an outhouse parcel of a cottage. It appeared that under a cottage was a cellar, which cellar was hired by the constable of Bradford as a lock-up-house. The cellar and cottage were independent of each other in all respects. The cellar was six or seven feet below the surface of the ground. Hullock, B., was of opinion that it was neither a house nor an outhouse, and therefore improperly described in both counts. (*l*)

**Outhouse.**— In a case where the prisoner was indicted under the repealed statute, 9 Geo. 1, c. 22, for setting fire to a '*certain outhouse*,' a point was made whether the building in question answered this description. The prosecutor kept a public-house, and also carried on the business of a flax-dresser; and the building set fire to by the prisoner consisted of a stable and a chamber over it, which was used by the prosecutor as a shop for keeping and dressing his flax; and these buildings were situated in a yard at the back of the house, about four or five yards distant from it, the yard being enclosed on all sides, in one part by the house, in another part by a wall, in a third by a railing which separated it from a field, and in the remaining part by a hedge. It was objected on behalf of the prisoner that this building was not an *outhouse* within the statute. And that the statute applied only to outhouses which in contemplation of law were not part of the dwelling-house; and it was insisted that this was part of the dwelling-house, and that the indictment should have been for arson at common law. But, upon a case reserved, the judges agreed that the verdict was right. And it was observed, that though for some purposes this might be part of the dwelling-house, yet still it was in fact an outhouse. (*m*)

In a subsequent case the prisoner was convicted upon an indictment consisting of several counts, some of which charged him with burning 'a

(*k*) R. v. England, 1 C. & K. 533. The learned C. J. thought the want of a window immaterial, and said he had seen cottages which had no windows in them. R. v. Smith, 1 M. & Rob. 256, *ante*, was cited for the crown; but Tindal, C. J., said, 'there the person rented it as a house.'

(*l*) Anonymous, 1 Lew. 8.

(*m*) North's case. 2 East, P. C. c. 21,

s. 5, p. 1021. In the discussion before the judges, 3 Inst. 67 was referred to, where it was laid down that to burn a stable and the like parcel of the mansion-house is felony; but that in the indictment it is sufficient to say *domum*, viz., a barn, malt-house, or the like, without saying *mansionalem*. *Ante*, p. 900.

certain outhouse' of one Thomas Rogers; and others with burning 'a certain house' of the said Rogers; and some of the counts were at common law, others being laid against the form of the statute. The premises burnt consisted of a schoolroom, which was situated very near to the house in which Rogers lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the whole, were rented by Rogers of the parish at a yearly rent. There was a continued fence round all the premises, and nobody but Rogers and his family had a right to come within it. It was objected that the building burnt was not a house nor an outhouse within the 9 Geo. 1. c. 22. But, on a case reserved, the judges were of opinion that the building was correctly described in the indictment either as an outhouse or part of the dwelling-house within the meaning of that statute. (n)

An indictment upon the 7 & 8 Geo. 4, c. 30, s. 2, charged the prisoner in one count with setting fire to an outhouse of W. Deans, in another with setting fire to a coach-house, and in another with setting fire to a building and erection, then used by W. Deans in carrying on the trade of a poulterer. The prosecutor was a labourer and poulterer, and had between two and three acres of land, and kept three cows. The building in question was in the prosecutor's farm-yard, and was three or four poles from the prosecutor's dwelling-house, and might be seen from it. The prosecutor used it to keep a cart in, which he used in his business of poulterer, and also to keep his cows in at night. There was a barn adjoining the dwelling-house, then a gateway, and then another range of buildings which did not adjoin the dwelling-house or barn; the first of which from the dwelling-house was a pigsty, and adjoining that was another pigsty, and adjoining that was a turkey-house, and adjoining the turkey-house was the building in question. The dwelling-house and barn formed one side of the farm-yard, and the three other sides were formed by a fence enclosing these buildings. The building was formed by six upright posts, nearly seven feet high — three in the front and three at the back — one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom, and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely open between the posts; one side of the building adjoined the turkey-house, which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field, and was a rail-fence, the rails being six inches wide; these came four or five feet from the ground, within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a pale fence, but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said that he should call the building in question an outhouse. The only part burnt was some of the straw on the roof. Upon a case reserved upon the questions, first, whether the building were an outhouse within the meaning of the 7 & 8 Geo. 4, c. 30, s. 2 [for there was no ground for saying that it could be called a coach-house, or a building and erection used in carrying on the trade of a poulterer]; and second, whether, in case the building were an outhouse,

(n) Winter's case, R. & R. 295.

the straw as above described were a part of the building; all the judges, except Tindal, C. J., thought the erection an outhouse, and that the conviction was right. (o)

Upon an indictment for setting fire to an outhouse, it appeared that the building set fire to was a pigsty, thatched at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pigsty formed part of the fence between the prosecutor's and the adjoining property. The state of the premises was this: first, the prosecutor's house fronting the public road, with a back door opening into the yard; then a gate leading from the road into the yard; then a pale fence about two feet; then a cottage; then a barn attached to it; the cottage and barn were let by the prosecutor to a tenant; they opened to the road, and neither of them had any door or opening into the yard; next to the cottage and barn was a stable; then a barn; then the pigsty — all in the possession of the prosecutor, and opening into the yard; next to the pigsty was a pale fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields; and, upon a case reserved, the judges were unanimously of opinion that the pigsty was an outhouse within the 1 Vict. c. 89, s. 3. (p)

The indictment under the 7 & 8 Geo. 4, c. 30, s. 2, charged the prisoners with setting fire to an outhouse. The place in question stood in an enclosed field, a furlong from the dwelling-house, and not in sight thereof. The supposed place had originally been divided into stalls capable of holding eight beasts, and partly open and partly thatched; but of late years it was boarded all round, the stalls taken away, and an opening left for horses and cows, or other cattle which might be in the field, to go in and out of their own accord; there were no windows nor door, and the opening was sixteen feet wide, so that even a waggon might be drawn through it under cover. The back part of the roof was supported by posts, to which the side boards were nailed: part of it internally was boarded and locked up, where several boards were locked up; there was no distinction in the roof between the enclosed and unenclosed part, and the inhabitants and owners usually called it the cow-stalls: and, upon a case reserved, all the judges (except Lord Lyndhurst, C. B., and Taunton, J.) met and considered this case, and Lord Tenterden, C. J., Bayley, B., Littledale, J., Vaughan, B., and Parke, J., and Bolland, B., held this to be an outhouse within the statute. The other seven judges were of a contrary opinion, and a pardon was recommended. (q)

The prisoner was charged in one count with setting fire to an outhouse, and in another with setting fire to a stable; the place burnt had been an oven to bake bricks, and the prosecutor had made a doorway (with a door) into it, and had put boards and turf over the vent-hole at the top. Two poles had been fixed across it at about half its height, on which boards had been laid so as to make a loft floor. In this place, the prosecutor kept a cow; and adjoining to it, but not under the same roof, was a lean-to, in which a person named Cope kept a horse; but this latter building was not injured by the fire. The building was about a hundred yards from any dwelling-house, and the owner of the nearest dwelling-house had no interest in it, and no dwelling-house or farm-yard of the prosecutor was near it, and there was no wall to connect it with any dwelling-house. It was contended for the prisoner, that this building was neither a stable nor an outhouse. The term outhouse had, both at

(o) *R. v. Stallion*, R. & M. C. C. R. 398.

(p) *R. v. Jones*, 2 M. C. C. R. 308. S. C. 1 C. & K. 303, as *R. v. Jones*.

(q) *R. v. Ellison*, R. & M. C. C. R. 336.

common law and under the repealed statutes, been held to apply to those buildings only which were within the curtilage, and in which, till the 7 & 8 Geo. 4, c. 29, a burglary might be committed, and the rule being that where any term which has obtained a precise and definite meaning at common law, or in a statute, is used in a statute, it will be presumed to have the same meaning there; (r) it must be taken that the word outhouse was used in the 7 & 8 Geo. 4, c. 30, in the same sense as it had at common law and under the former statutes; and unless such a construction were put upon that word, the words 'stable, coach-house,' &c., were useless. Taunton, J., 'I am clearly of opinion that this is not a case within the Act of Parliament. It is true, that the word "outhouse" occurs in the Act of Parliament, but I apprehend that it has been settled from ancient times that an outhouse must be that which belongs to a dwelling-house, and is in some respect parcel of such dwelling-house. This building is not parcel of any dwelling-house, and does not appear to be connected in any way, either with the premises of Mr. Sparrow, or of the prosecutor. It had been a brick-kiln, and the prosecutor kept his cow there afterwards. There is no such word as cow-house in the statute. The only word likely to be applicable in this case is the word outhouse; and this building being wholly unconnected with the dwelling-house, it is not included in the legal definition of outhouse. It is also not a stable; indeed, I do not see that it could be much more properly called a stable than it could be called a coach-house.' (s)

So where the prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to an outhouse, and it appeared that the building was a kind of cart-hovel, consisting of a stubble roof, supported by uprights, and was situate by itself in a field, some distance from any other buildings, Vaughan, B., was of opinion that it was improperly described as an outhouse. (t)

**Shed.**—In an indictment for arson the building was described in different counts as 'a shed' and 'a building used for carrying on a certain trade, to wit, the trade of a builder.' The building stood on premises belonging to a gentleman possessing a considerable freehold, and he

(r) *Bac. Abr. Statute (I. 4). Moore v. Hussey*, Hob. 97. *Smith v. Harmon*, 6 Mod. 142.

(s) *R. v. Haughton*, 5 C. & P. 555, March 15, 1833. This case is entitled to the more weight, as the opinion of the learned judge was not formed with reference to this case alone, but the same question had before been raised and discussed before him in *R. v. Williams*, Gloucester Lent Ass. 1832. In that case the prisoner was indicted for setting fire to a building, which was in one count described as a barn, and in another as an outhouse, and it appeared that there was a barn, which had a sloping roof extending continuously over the barn, and a cow-house adjoining to the barn, the rafters of the roof running the whole length over both buildings; and there was a wall between them, and in this wall there was a square aperture for the purpose of admitting air to the cattle; there was no internal communication between the barn and the cow-house; a part of the roof over the cow-house was burnt, but no part of the barn. The buildings were in a field, and at a distance from any house. It was objected, first, that the build-

ing burnt was not a barn—it was merely a cow-house, and the use of it as such determined what the building was. Secondly, it was not an outhouse, because it was neither within the curtilage, nor had any connection with any dwelling-house; after hearing the points argued, Taunton, J., consulted Little-dale, J., and then said, 'It is desirable that there should be a better understanding of the term "outhouse," and therefore I will reserve the point. I have a very decided opinion myself on both points, which, however, I will not state.' The prisoner was acquitted. The case of *R. v. Ellison* came before the judges between this case and *R. v. Haughton*, and, either by that case or by some other means, the learned judge had come to so decided an opinion as to the meaning of the word 'outhouse,' that he did not reserve the point. C. S. G.

(t) *R. v. Parrott*, 6 C. & P. 402. The prisoner was acquitted, otherwise the point would have been reserved. See *R. v. Woodward*, R. & M. C. C. R. 323, and *R. v. Newill*, R. & M. C. C. R. 458, where questions arose, but were not decided, as to whether certain buildings were outhouses.



employed his capital in building houses thereon, of which from twenty to thirty were in the course of erection, himself providing the materials and superintending the work, which was performed by persons sometimes under contracts with him, and sometimes directly employed by him, but always with his own materials. His object was to let the premises, or sell and convey them as he could find purchasers. The building was erected four or five years ago for the convenience of the works. It was twenty-four or twenty-five feet square, its sides of wood, with glass windows, its roof slated, and it was commonly called the 'workshop.' It was used as a storehouse for seasoned timber, as a place of deposit for tools, and a place where timber was worked up into proper forms and prepared for use. At the time of the fire this building contained timber prepared for use. For the prisoner it was contended that this building was neither a shed nor building used for carrying on a trade. The objections were overruled, and the jury found the prisoner guilty, and that the prosecutor had been, and was at the time of the fire, in the habit of employing his capital in the building of houses on his own land, and of purchasing and working up timber and other materials in their erection for his profit and gain, and that the building was at the time of the fire employed for such purposes; and, upon a case reserved, the judges held that the building was a shed within the meaning of the 7 & 8 Vict. c. 62, s. 1. The second section of that statute related to farm produce; but the first section evidently comprised buildings other than farm buildings; and Patteson, J., said, 'I am inclined to think it is a building used in carrying on trade within the 1 Vict. c. 89, s. 3.' (u)

One count charged the prisoner with attempting to set fire to a building then and there used for the purpose of carrying on the trade of a builder; another a shed; and others a stable, outhouse, and a stack of haulm respectively. Combustibles were found partly consumed on some haulm, which had been carted from a field into the building, and there stacked under cover. The building itself was originally intended for and used as a stable, but had latterly been divided into three parts by a wall, which only reached up to the eaves; one of these divisions was still used as a stable, and that in which the combustibles were placed was at the other end of the building, and at the time in question contained, besides the haulm, a quantity of tiles, stored for the use of the prosecutor, who was a builder, and stated that he had, not long before, mixed some mortar in it for building purposes, and had been accustomed, from time to time, to keep timber and sand in it. Coleridge, J., 'This building is certainly misdescribed in those counts which lay it as an outhouse, a shed, and a stable. There is no pretence for calling it by either of the two first names; and as to the third, I think that, though the whole building was no doubt a stable, this particular portion of it lost that character when the division took place. I think, however, that the counts which charge the prisoner with an attempt to set fire to a stack of haulm, and a building used for the purpose of carrying on the trade

(u) *R. v. Amos*, 2 Den. C. C. 65. There were also counts describing the building as 'a warehouse,' 'an office,' and 'a shop;' but no opinion as to these was expressed. *Stuart v. Sloper*, 4 Exch. 700, was referred to as to the prosecutor being a builder. The word 'shed' is generally supposed to be derived from 'shade;' but it seems originally to have been a building covered with sheaves. The term is commonly applied to buildings for cattle, e. g. cowshed, sheep-

shed; and Sheepshed in the Forest of Charnwood was anciently spelled Sheepsheved. Potter's 'Charnwood Forest,' p. 174. And in a note Potter says, 'It is remarkable that the most frequent mode of spelling Swineshed (Lincoln) was Swinesheved in old writings; and there can be little doubt that "shed" is an abbreviation of sheved (sheaved), that is, thatched.' See the Rev. Dr. Yerburgh's 'History of Sleaford.'

of a builder, are sustained by this evidence. I do not think it essential necessary to the character of a stack that it should be erected out doors. It is enough if the material be collected direct in the field, and stacked in the building. With respect to the other count, I am of opinion that this is a building used by the prosecutor in carrying on his trade. It is clear that a builder must have some place in which to deposit his timber, bricks, and tiles, and it is not necessary to suppose this count, that any portions of a building should be constructed in a field, but it does appear that such has been the case, for the prosecutor said that, when engaged near this place, he mixes his mortar in it.' (v)

**Stable.**—On an indictment for setting fire to a building described in one count as a stable, in another as an outhouse, the evidence was that the building stood in a field, and originally consisted of a stable and cow-house which were under the same roof, but divided from one another by a partition that ran up to the slant of the roof. The stable had originally been provided with a rack and manger, but not with stalls. About three or four years ago the prosecutor used to keep young horses in the field and drive them into the stable at night. Since that time it had been used to put hay or straw in. Last spring two calves had been put there to fatten, and the rack had been removed. Alderson, B., held that the building clearly was not an outhouse, for an outhouse means something annexed to an inhouse, and that whether it was a stable was a question for the jury. If it ever was a stable it was a stable now. The rack was not taken away with the intention of never replacing it. The question was whether it was what the jury, as a matter of plain understanding and common sense, understood to be a stable. (w)

Upon an indictment for setting fire to a stable the evidence was that the building was built for and had been used as a stable, but for eight or ten years had been allowed to fall into decay; the manger and rack had been removed, and the roof had partly fallen in, and the building was used as a shed only. Cresswell, J., said the building in its present state could not be considered a stable. The description in the indictment must be made out by evidence of its present state, whereas now it was merely a shed. (x)

**Stack.**—Upon an indictment on the 1 Vict. c. 89, s. 10, for setting fire to a stack of grain it appeared that the stack was of the flax plant without the seed or grain in it, and the jury having found that the flax seed is not grain, it was held, on a case reserved, that the conviction was right.

Upon an indictment for setting fire to a stack of wood, it appeared that between the house of the prosecutor and the house next to it there was an archway, which carts could go under, and that over this archway a sort of loft was made by means of a temporary floor; and that in this place the prosecutor kept wood, straw, and fuel. It further appeared that, at the time of the fire, there was in this place about an armful of straw and a score of faggots, which were piled up one upon another. The straw was burnt, and also some of the faggots, but no part of the building caught fire. J. A. Park, J., was clearly of opinion that this was not a stack of wood within the meaning of the 7 & 8 Geo. 4, c. 30, s. 17.

An indictment under the 7 & 8 Geo. 4, c. 30, s. 17, for setting fire to a stack of straw, was held not to be supported by evidence of firing a stack of haulm. (a)

(v) *R. v. Munson*, 2 Cox, C. C. 186.  
(w) *R. v. Hammond*, 1 Cox, C. C. 80.  
(x) *R. v. Colley*, 2 M. & Rob. 475. Cresswell, J., offered to reserve the point, but the counsel for the prosecution not requiring it, an acquittal was directed.

(y) *R. v. Spencer*, D. & B. 131.  
(z) *R. v. Aria*, 6 C. & P. 348. See *R. v. Satchwell*, L. R. 2 C. C. R. 21.  
(a) *R. v. Tottenham*, R. & M. C. C. 461. 7 C. & P. 237. The word 'haulm' was probably introduced in sec. 10 of 1

In one case Williams, J., held that straw, in the usual and legal acceptation of the term, meant the straw of wheat, barley, oats, and rye. (b)

A stack which principally consisted of wheat straw, with stubble laid on the top of it to prevent it blowing away, was held to be a stack of straw, within the 7 & 8 Geo. 4, c. 30. (c)

**Ship.**—It was an offence within the 7 & 8 Geo. 4, c. 30, s. 9, for a part owner of a ship to set fire to it. The vendee of a share in a ship was a complete owner if an entry of a bill of sale to him, as the form 6 Geo. 4, c. 110, s. 37, required, was made in the proper book of registry, though it did not express in terms that the bill of sale was produced, because it would be against the duty of the officer to make the entry, except on such production. The giving a date which has nothing to apply to but the production of the bill of sale will imply it. Two or more persons may hold shares in a ship jointly. The prisoner was indicted for setting fire to a certain vessel, the property of the prisoner and of Grenfell and Eddy, with intent to prejudice Grenfell and Eddy, being part owners of the said vessel. There were other counts only stating Grenfell and Eddy to be part owners, and not taking notice of the interest of the prisoner. A bill of sale, dated the 7th of August, 1829, from the prisoner, who was then the sole owner, to Grenfell and Eddy, of  $\frac{3}{4}$  parts of the vessel, was put in, and the following entry in the book of registry of the vessel, pursuant to the 6 Geo. 4, c. 110, s. 37:—

*‘Custom House, Padstow, 11th August, 1829.*

*‘William Philp of Padstow in the county of Cornwall, mariner, hath sold by bill of sale, dated the 7th August, 1829,  $\frac{3}{4}$  shares to N. Grenfell, of St. Just in the county of Cornwall, mine agent, and R. Eddy, of Penzance in the same county, merchant.*

*‘EDWARD EDWARDS, Collector.*

*‘JOHN PHILLIPS, Comptroller.’*

An endorsement in the like terms was made on the certificate of registry. A subsequent entry of mortgage of the prisoner's shares, after the date of the mortgage deed, added the words ‘now produced.’ It was contended for the prisoner, that the bill of sale was not valid, as the 6 Geo. 4, c. 110, s. 37, required the entry to contain not only the date of the bill of sale, but of the production of it; Gaselee and Bosanquet, JJ., rather thought that the date of the 11th August, 1829, in the commencement of the entry, might be considered as the date of the production, particularly as it exactly complied with the form given by the Act. Upon a case reserved upon the question (among others) whether the ownership of Grenfell and Eddy had been sufficiently proved, it was contended, first, that two persons could not be owners of  $\frac{3}{4}$ ths of a ship, the shares held by each not being specified under 6 Geo. 4, c. 110, s. 32; secondly, that the transfer was not valid to pass the property, by reason

1 Vict. c. 89, in consequence of this case. In *R. v. Turner*, R. & M. C. C. R. 239, a question was raised whether a stack was a stack of straw within the 7 & 8 Geo. 4, c. 30. The stack was made partly of straw, there being two or three loads of it at the bottom, and the residue of haulm, that is the aftermath of the stubble of rye or wheat, about eighteen inches long; according to one witness the straw and haulm were mixed. This question was not decided by the judges. At

the following assizes the prisoners were again indicted, and one count charged them with setting fire to a stack of straw, called haulm; and Vaughan, B., intimated that it would be unsafe to convict them on this count, and they were convicted on counts for setting fire to a barn and a wheat stack, 4 C. & P. 246.

(b) *R. v. Baldock*, 2 Cox, C. C. 55.

(c) *R. v. Newill*, 3 Burn's Just. Doy. & Wms. 999. R. & M. 458.

of the omission of the date and the fact of production; thirdly, that it was no offence within the statute for an owner or part owner to set fire to his own ship; but the judges overruled the objections, being of opinion that two or more persons might hold shares jointly; and that the entry was sufficient, as the date had no application, unless it applied to the production of the bill of sale and entry thereof by the officer, it being against his duty to make the entry but on the production of the bill of sale; and the conviction was therefore affirmed. (d)

**Mill.** — In the course of the trial of an indictment upon the 9 Geo. 3, c. 29, s. 2, now also repealed, which related to the burning of mills, it was objected that a *cotton* mill was not within the meaning of that statute; but the objection was overruled. (e)

**Indictment.** — A count on the 14 & 15 Vict. c. 19, s. 8, alleged that the prisoner feloniously, wilfully, and maliciously set fire to certain goods in a house in his own occupation, with intent to defraud the Shropshire and North Wales Insurance Company. The goods had been insured against fire, and were in the prisoner's own house, and no part of the house was burnt. It was objected that the 14 & 15 Vict. c. 19, s. 8, which enacted that 'if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act,' &c., only applied to the case where the setting fire to a building *per se* was an offence, and that to make a person setting fire to a house in his own occupation guilty of an offence within the 1 Vict. c. 89, there must be some one in the house, or the setting on fire must be done with intent to defraud. The objection was overruled, and the jury found the prisoner guilty of maliciously setting fire to his own goods in his own house, with intent, by burning the goods, to defraud the insurance office; and, on a case reserved, it was held that under the 14 & 15 Vict. c. 19, s. 8, the offence was complete if there were a setting fire to the goods under such circumstances as, if shewn with respect to a house set on fire, would render the setting fire to the house a felony. Here the intent to defraud was alleged with respect to the goods. The setting fire to the house with the like intent would be a felony. The offence, therefore, was sufficiently stated in the count, and the case was brought within the two Acts of Parliament. (f)

In a case in which the construction of the 43 Geo. 3, c. 58, came under consideration, it was decided that the 'intent to injure' mentioned in that statute, must be inferred where injury was the necessary consequence of the setting fire to the premises, on the ground that a man must be supposed to intend the necessary consequence of his own acts. (g)

The first count alleged that the prisoners a certain barn 'feloniously, voluntarily, and maliciously' did set fire to, &c. The second count stated that the prisoners a certain stack of straw 'feloniously, voluntarily, and maliciously' did set fire to, &c. Upon reading the indictment, Parke, J., found that it did not pursue the words of the statute, as it omitted the word 'unlawfully,' and he referred to 2 *Hawk, P. C.* c. 25, s. 96, where it is laid down, 'that where a statute uses the word "unlawfully" in the description of an offence, it is certain that an indictment grounded on it must use the word *illicite*, or some other tantamount.' The indictment, therefore, seemed to the learned judge to be

(d) *R. v. Philp*, R. & M. C. C. R. 263.

(e) Anon. Lancaster Special Session, May, 1812. 2 Stark. Crim. Plead. 420.

(f) *R. v. Lyons*, Bell, C. C. 38. See *R. v. Child*, 40 L. J. M. C. 127.

(g) *R. v. Farrington*, MS. Bayley, J. and R. & R. 207. See *R. v. Newill*, R. & M. C. C. R. 458; *R. v. Allison*, 1 Cox, C. C. 24, where the parties defrauded were a corporation.

bad; but he left the case to the jury; and, upon a case reserved, the judges held that the indictment ought to have charged the act to have been done 'unlawfully,' and they thought it best to order a new indictment to be preferred at the following assizes. (*h*)

It was holden not to be necessary to allege the burning of a *dwelling-house*; and that the burning of a *house* only was a sufficient statement. (*i*) And where an indictment on the same repealed statute stated the burning to be of *outhouses* generally, without specifying their denomination, it was holden good. (*j*) And we have just seen that it was holden to be sufficient, in an indictment upon that statute, to state the burning of an *outhouse*, if it were such in fact, though in point of law it was parcel of the dwelling-house, as being within the curtilage. (*k*) Where the indictment was for setting fire to a hay-stack upon the same statute, it was decided that it was not necessary to aver that the stack was thereby burnt; that not being requisite to the completion of the offence. (*l*)

An indictment charged that the prisoner feloniously set fire to a house situate in the parish of E., and it was holden to be bad. (*m*) The facts were that the house belonged to a parish, and the parish permitted a person to live in it who was merely a servant of the parish, and it was wholly unknown who were the trustees, or in whom the legal estate was vested; and it appears to have been holden by the judges, that such house might have been laid to be the property of the overseers or of persons unknown. (*n*) In an indictment upon the 24 & 25 Vict. c. 97, it is, as we have seen, by the words of the statute, sufficient to shew the house, &c., to be in the possession of the offender, or in the possession of any other person.

The indictment described the house first as Fearne's, secondly as Dance's, and thirdly as the prisoner's. Fearne occupied part of it and let out the rest in lodgings, the room set fire to being let to the prisoner; five months before the fire Fearne was discharged as an insolvent debtor, and had previously executed an assignment, including this house to Dance; Dance never took possession. A case was reserved upon the point whether the possession of the house was rightly described, and the judges held that it was; for the whole house was properly in the possession of Fearne, the possession by his tenants being his possession; and if not, the prisoner's own room might be deemed his house. (*o*)

In a case where the indictment laid the whole of the premises consumed by the fire as in the sole occupation of one B. Silk, widow, it appeared that the premises burned, consisting of outhouses, were the property of the widow, but were only made use of by her son, who lived with her after his father's death, in the dwelling-house adjoining the outhouses, and took upon him the sole management of the farm, with which these outhouses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother, and he paid all the servants, and purchased all the stock; but the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house and the outhouses in question; and the indictment in this form was holden to be improper.

(*h*) R. v. Turner, R. & M. C. C. R. 239.  
4 C. & P. 245. 1 Lew. 9.

(*i*) 3 Inst. 67. 1 Hale, 567. Sum. 86.  
1 Hawk. P. C. c. 39, s. 1.

(*j*) Glandfield's case, 2 East, P. C. c. 21,  
s. 11, pp. 1033, 1034.

(*k*) North's case, *ante*, p. 962.

(*l*) R. v. Salmon, MS. Bayley, J., and  
R. & R. 26.

(*m*) Rickman's case, 2 East, P. C. c. 21,  
s. 11, p. 1034. MS. Bayley, J.

(*n*) 2 East, P. C. *ibid*.

(*o*) R. v. Ball, MS. Bayley, J., and R.  
& M. 30.

And Heath, J., held, that as to the stable, pond, and hog-sties, which the son alone used, the indictment must lay them to be in his occupation; and as to the brewhouse (another of the outhouses burned), the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expenses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid as in their joint occupation. The prisoner was afterwards convicted on a second indictment, drawn agreeably to this opinion, and containing two counts; the first laying the occupation in the son alone, the other laying it in the mother and son; and he was executed. (p)

The prisoner, who was the wife of James Wallis, was indicted for setting fire to a certain house in the possession of the said J. Wallis, with intent to injure M. Wright. The second count charged her with the like offence with intent to injure Lord Yarborough. The prisoner's husband was a labourer of M. Wright, who provided him with the house in question as part of his wages. The house was Lord Yarborough's property, and was let with a large farm, and other cottages for the accommodation of labourers on the farm, by his lordship to Wright. Wright, being dissatisfied with Wallis's conduct, discharged him from his service, and told him to quit his house in a month, which time he allowed him to procure another residence. Two days after the expiration of the month, Wallis and the prisoner and his family still continuing in possession, Wright and two of his servants went in the daytime, whilst the husband was out, to strip off part of the thatch, in order to force them to quit. The prisoner resisted; struck at the men with a pitchfork; knocked out the windows and doors; made a fire with the fragments on the floor of the house, and thereby set the house on fire, and burned it down. The jury found that she wilfully set the house on fire, and that the fire communicated to the house whilst Wallis continued in the actual possession of it by means of his family and furniture. The learned judge thought the indictment should have been framed differently, and should have stated the house to be in the possession of Wright, Wallis having, at the time of the fire, no lawful possession, but the legal possession being in Wright: an offence committed under similar circumstances would have been capital before the passing of the 43 Geo. 3, c. 58, (q) and would have been a felony at common law. But, upon a case reserved, the judges present held, that as Wallis was the actual occupier, the statement was proper, and the conviction right. (r)

It was considered in a case under the 7 & 8 Geo. 4, c. 30, s. 9, that an indictment for setting fire to a barge ought to contain an averment that it was done with intent to injure the owner. (s)

The prisoner was indicted in the first count for setting fire to an outhouse in the possession of Chettle, with intent thereby to injure Chettle, and to a certain stack of straw belonging to Chettle; in the second count for setting fire to an outhouse; and in the third for setting fire to a certain stack of straw belonging to Chettle, not saying with intent to injure, &c. And, upon a case reserved, the judges present were unanimously of opinion that, as the 17th clause of the Act had no words of intent, the last count was good. (t)

(p) Glandfield's case, 2 East, P. C. c. 21, s. 11, p. 1034.

(q) Gowan's case, 2 East, P. C. 1027.

(r) R. v. Wallis, R. & M. 344.

(s) R. v. Smith, 4 C. & P. 569, March 15, 1831. This case occurred before R. v.

Newill, *infra*, and it may therefore perhaps be doubted whether the opinion expressed by the learned judges in this case may not be considered as overruled by that case. C. S. G.

(t) R. v. Newill, R. & M. 458.

Where an indictment charged the prisoner with setting fire to a certain stack of beans, upon a case reserved, the judges present unanimously held that they were bound to consider beans as a species of pulse, and the conviction was affirmed. (u)

So the judges will take notice that barley is corn or grain. Where, therefore, an indictment charged the prisoner with setting fire to a stack of barley, Patteson, J., held that it was sufficient. (v)

An indictment alleged that the prisoner set fire to certain wood, to wit, to twenty yards square of wood, situate and growing, &c.; and Alderson, B., after consulting Williams, J., said it was no offence to set fire to a single detached tree; and this indictment was so framed that proof of the prisoner's having set fire to a single detached tree would sustain it in point of fact, and as he should be obliged to arrest the judgment if the prisoner was convicted, it was no use to go on with the case. (w)

An indictment which alleges that the prisoners on such a day, and at such a place, 'feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of R. P. W., then and there being,' sufficiently states the property to belong to R. P. W., and there is no necessity for such an indictment to state that the prisoner did 'then and there' set fire, &c. (v)

The indictment on the 1 Vict. c. 89, s. 2, alleged that the prisoner set fire to the dwelling-house of J. S., the said J. S. and his wife then being therein. The evidence failed distinctly to shew that either J. S. or his wife were in the house at the time of the fire; and Wightman, J., held that as there was no such proof, the case could not be sustained on the 1 Vict. c. 89, s. 2, and as there was no allegation of an intent to defraud or injure any person, the case could not be sustained on the third section. (x)

Where an indictment on the 1 Vict. c. 89, s. 2, alleged that the prisoner set fire to a dwelling-house, M. T. being therein, and it appeared that the prisoner set fire to an outhouse adjoining to and under the same roof, but not communicating with the dwelling-house, and the fire spread to the house, which was burnt. At the time the prisoner set fire to the outhouse M. T. was in the dwelling-house, but before the fire extended to the house she had left it. Patteson, J., 'Although there can be no doubt that setting fire to an outhouse, which afterwards extends to an adjoining dwelling-house, is setting fire to the dwelling-house, yet unless some person is in the dwelling-house at the moment the fire reaches it, the capital part of the charge cannot be sustained. And as there is no allegation in this indictment that the object of the prisoner was to defraud or injure any one, she cannot be found guilty of the minor offence under sec. 3.' (y) So where a prisoner was indicted for setting fire to a house, certain persons being therein, and it appeared that there was a stable immediately adjoining the house, and that the family, being alarmed by the cry of fire, rushed into the yard, and the stable was then in flames, and these flames communicated to the house, but the evidence was not precise as to the time when the house took fire. Alderson, B., directed the jury to find whether the house took fire before the family got in the yard or after. If they were of opinion that it was after the family was in the yard, he thought they

(u) *R. v. Woodward*, R. & M. 323.

(v) *R. v. Swatkins*, 4 C. & P. 548.

(w) *R. v. Davy*, 1 Cox, C. C. 60.

(x) *R. v. Paice*, 1 C. & K. 73.

(y) *R. v. Fletcher*, 2 C. & K. 215. As

the outhouse was under the same roof as the house, it would seem that for the purpose of arson it was parcel of the dwelling-house. C. S. G.

ought to acquit the prisoner of the capital part of the charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it. (z)

The first count charged the prisoner with setting fire to a shed of the S. E. R. Co.; the second another shed of one Lake; the third certain goods of the company in another shed of the company; the fourth certain goods of one Lake, in another shed of the said Lake; and the last certain goods of the company in another shed of Lake's. On arraignment it was urged that the prosecution ought to elect, as the indictment charged distinct felonies under different sections of the Act. Wightman, J., 'It does not appear that it is not all one and the same transaction, or indeed one and the same act; the prisoner may have set fire to goods in one shed, and so set fire to others; in that case it will be all one act.' (a)

**Evidence.**— In a case where the prisoners were charged with setting fire to a house, the proof adduced by the first witness of their having been present in the house, and implicated in the fact, was that a bed and blankets, which had been taken out of the house at the time it was fired, and concealed by them from that time, were afterwards found in their possession; and Buller, J., doubted at first whether such evidence of another felony could be admitted in support of this charge. But as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted this amongst other evidence. (b)

A female servant of the prosecutor was indicted for setting fire to his stable. The fire was discovered at an early hour in the morning in the stable, which was not far from the kitchen, where it was the duty of the prisoner to be; and in order to prove that it must have originated in the wilful act of some one connected with the house, it was proposed to shew that on two former recent occasions attempts had been made by some one from within the house to fire the warehouse and the shop of the prosecutor, though there was no evidence to shew that the prisoner or any other person was implicated in these attempts; and Pollock, C. B., held that this evidence was clearly admissible, and might be used at all events for the purpose of shewing that the present fire could not have been the result of accident. Surely if a man finds certain mysterious circumstances to arise day after day in his establishment, he is at liberty to refer to them, if only for the purpose of shewing that they could not have had their origin in accident, and that a repetition of them could only lead to the conclusion that they resulted from malice and design. (c)

One indictment charged the prisoner with setting fire to a rick of one Wilson, another a rick of one Applebee, and a third a rick of one Taylor. On the evening before the fires, which were all in the same night, the prisoner was at a public-house, and complained that Wilson had sent a lawyer's letter to his father for a debt of £3, which the prisoner owed him, and he said he would be even with him, and would light Badsey

(z) *R. v. Warren*, 1 Cox, C. C. 68. The jury acquitted, or the point would have been reserved.

(a) *R. v. Davis*, 3 F. & F. 19. The proof was that the prisoner set fire to some straw in a shed let by the company to Lake, and the shed and goods of Lake therein were burnt.

(b) *Rickman's case*, 2 East, P. C. c. 21, s. 11, p. 1035.

(c) *R. v. Bailey*, 2 Cox, C. C. 311. Pollock, C. B., cited Captain Donellan's case, where it was proved that a tree had been sawn nearly in two near a spot where Sir T. Boughton used to fish, on a trial for poisoning him, though there was no proof who had sawn it.



from end to end, and burn the whole lot. He left the public-house about half-past six, saying he was going to Evesham, to do which he would have to pass near both Applebee's and Wilson's rickyards. At seven a rick in Applebee's yard was on fire, but soon put out. At half-past seven a rick in Wilson's yard, about half a mile distant, was on fire, and the prisoner was seen to come out of an orchard into the rickyard, and he said he had heard the cry of fire, and in running to the place had jumped into the millpond, and was wet through; but his dress appeared quite dry. He assisted in putting out the fire, and afterwards went into the house, and was there as late as eleven; but in the mean time had been home and changed his clothes, and his frock was then very wet. At half-past twelve a rick of the prisoner's uncle was set on fire, and the people at Wilson's immediately proceeded towards it, and met the prisoner running towards Wilson's. He was told his father's or his uncle's ricks were on fire, and replied, 'Not it,' and proceeded towards Wilson's; but afterwards was assisting at putting out the fire at his uncle's. Patten, J., was of opinion that, on the part of the prosecution, evidence might be given, on the indictment for setting fire to Wilson's rick, of the movements of the prisoner during the whole of that night, including the facts of his presence and demeanor at the other fires, the subject of the two other indictments; but that evidence ought not to be given of threats, statements, and particular acts pointing alone to those other charges, and not tending to implicate or explain the conduct of the prisoner in reference to the fire at Wilson's. (d)

On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having fired a gun very near it; and on the part of the Crown it was proposed to prove that the rick had been on fire on the previous day, and that the prisoner was then close to it with a gun in his hand. The defence was that the firing of the rick was accidental. It was contended that the evidence was not admissible. The firing of the rick on the previous day, if wilfully done, was a distinct felony. Maule, J., 'Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully.' 'I shall receive the evidence.' (e)

On an indictment for setting fire to a building, Erle, J., held that the mere fact of the prisoner's having given notice of other fires, and claiming the reward usually paid on such occasions at the engine station, was not evidence which could be adduced to found a presumption that he caused the fires in question. (f)

The prisoners were jointly charged with attempting to set fire to a malthouse. One of the prisoners had gone to bed an hour and a half before the fire was discovered, and the evidence tended to shew that the other prisoner had lighted the fire very shortly before it was discovered. It was objected that there was no case against the former prisoner. It was answered that whatever would make a person an accessory before the fact in a felony would make him a principal in a misdemeanor; and

(d) *R. v. Taylor*, 5 Cox, C. C. 138. Evidence was accordingly given of which that stated in the text is a summary, but threats against Applebee and Taylor were not tendered in evidence. See *R. v. Long*, 6 C. & P. 179.

(e) *R. v. Dossett*, 2 C. & K. 306. Maule, J., also said, 'If a person were charged with having wilfully poisoned an-

other, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to shew that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of another distinct felony.'

(f) *R. v. Regan*, 4 Cox, C. C. 335.

Williams, J., overruled the objection, and told the jury that in treason and misdemeanor all who take part in the crime are principals, and that it was not necessary in this case to prove that the one prisoner was present when the other prisoner attempted to set fire to the malthouse, and if they were satisfied that the one counselled and encouraged the other to set fire to the malthouse, they might both be convicted on this indictment. (g)

The prisoner was indicted, on the 9 & 10 Vict. c. 25, s. 7, for attempting to set fire to a stack of corn with a lucifer match. The prisoner applied to the prosecutor for work, and being refused, threatened to burn him up: he was then seen to go to a neighbouring stack, and, kneeling down close to it, to strike a lucifer match, but, discovering that he was watched, he blew out the match, and went away. Pollock, C. B., told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, this was in law a sufficient attempt to set fire to the stack within the meaning of the statute. It was clear that every act done by a person with a view of committing the felonies therein mentioned was not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime [and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution]. (h) The facts proved in this case were sufficient to warrant the jury in finding the prisoner guilty, if they thought that he intended to set fire to the stack. (i)

(g) R. v. Clayton, 1 C. & K. 128.

(h) The dictum between brackets seems to be erroneous; for there is no doubt that a man may be guilty of an attempt to com-

mit a crime, though he be prevented by superior force from doing so. C. S. G.

(i) R. v. Taylor, 1 F. & F. 511.

## APPENDIX S.

### *Decisions on Repealed Statutes relating to Killing and Maiming Cattle.*

**What are cattle.**—Where the prisoner had been convicted on an indictment framed on the 9 Geo. 1, c. 22, for killing a mare and a colt, it was moved in arrest of judgment, first, that the mare and colt were not averred in the indictment to be cattle within the meaning of the Act; and, secondly, that the word *cattle* did not necessarily include *horses*, *mares*, and *colts*. In support of these objections, several statutes were cited, in which different sorts of animals were particularly specified, (a) and several others, in which 'horses' and 'horses and mares' seemed to be contradistinguished from and not included in the word 'cattle.' (b) But the judges agreed unanimously that as the 22 & 23 Car. 2, c. 7, had made the offence of killing horses by night a single felony, the 9 Geo. 1, c. 22, was only to be considered as an extension of that Act; and some precedents of capital convictions were cited upon this branch of the statute, though none of executions. It was, therefore, agreed that judgment of death should be given against the prisoner at the next assizes. (c) *Pigs* were cattle within the 9 Geo. 1. (d) So were *asses*. (e)

**What is a maiming.**—Upon an indictment under the 9 Geo. 1, c. 22, which charged the prisoner, in one count, with maiming, and in another with wounding a gelding, and upon proof that he had maliciously, and with an intent to injure the prosecutor, driven a nail into the frog of the horse's foot, whereby the horse was rendered useless to the owner, and continued so at the time of the trial, but was stated to be likely to do well, and to be perfectly sound again in a short time, a case was reserved upon a doubt whether, as the horse was likely to recover, and as the wound was not a permanent injury, the offence was within the statute; but the judges held the conviction right, and considered the word 'wound' in the 9 Geo. 1, to be used as contradistinguished from a permanent injury, such as maiming. (f) The clause in the present Act appears to admit of a similar construction.

Upon an indictment for maiming a horse, it was proved that the prisoner was thrown by the horse, and dragged some distance along the ground, and that the prisoner got up and laid hold of the tongue of the horse, a part of which was left in his hand, and which he threw away.

(a) 3 & 4 Ed. 6, c. 19. 5 & 6 Ed. 6, c. 14, and 31 Geo. 2, c. 40, for regulating the sale of cattle.

(b) 12 Car. 2, c. 4 (book of rates). 22 Car. 2, c. 13. 14 Geo. 2, c. 6. 15 Geo. 2, c. 34. But see the observation in 2 East, P. C. c. 22, s. 18, p. 1075, that the argument from the statutes 14 & 15 Geo. 2 will lose much of its force from adverting to the preamble of the first of those statutes.

(c) Paty's case, 2 Black. Rep. 721. 1

Leach, 72. 2 East, P. C. c. 22, s. 18, p. 1074. Mott's case, 1 Leach, 73, note (a). Moyle's case, *cor.* Buller, J. 2 East, P. C. c. 22, s. 18, p. 1076.

(d) *R. v. Chapple*, MS. Bayley, J., and R. & R. 77.

(e) *R. v. Whitney*, MS. Bayley, J., and R. & M. C. C. R. 8.

(f) Haywood's case, 2 East, P. C. c. 22, s. 20, p. 1076, R. & R. 16.

There was no evidence to shew that the prisoner used any instrument, nor was it at all shewn in what way this portion of the tongue had been separated from the residue, but it might possibly have been done by the tongue being drawn against a sharp tooth, which the horse had. The wound had healed, and the horse was able to work as well as before, the only injury resulting from the loss of the point of the tongue being, that it could not eat its corn quite so fast as before. Wightman, J., having consulted Patteson, J., held that there was no such permanent injury inflicted on the horse as would support the charge of maiming. (g)

The two first counts charged the prisoner with having unlawfully, feloniously, and maliciously killed the mare, against the form of the statute. The first, stating the means used by the prisoner for that purpose, namely, the pouring nitrous acid into the left ear of the mare, and also stating as a fact that the prisoner thereby killed the mare, and the second count, merely stating as a fact that the prisoner killed the mare; the third count charged the prisoner with having unlawfully, feloniously, and maliciously, maimed the mare, against the form of the statute; and the fourth count charged the prisoner with having unlawfully, feloniously, and maliciously wounded the mare, against the form of the statute. It was proved, that the prisoner did pour a quantity of nitrous acid, which he had shortly before purchased, into the mare's left ear; and that he had either also poured some of it into the left eye, or, what was more probable, that some of the acid, which he had poured into the ear, had run along a furrow which it had made from her left ear upon her left temple, and so into her left eye, and that he had thereby occasioned the immediate blindness of that eye. The mare continued to live, in extreme pain, about ten days, when, in order to put her out of her misery, she was stuck with a knife, and bled to death. Two surgeons stated, that the injuries done to the ear (which was produced) were not wounds but ulcers, though such ulcers would have turned to wounds. Upon this state of facts, the nitrous acid not having been the proximate and immediate cause of the death of the mare, and the surgeons having deposed that the nitrous acid had not produced what they could technically call wounds, the Court recommended the jury, if they were satisfied of the guilt of the prisoner, to find their verdict against him on the third count of the indictment, and to acquit him on the other counts; the jury having found a verdict accordingly, a case was reserved upon the question whether the injury done to the eye of the mare in the manner and by the means above stated was a maiming within the meaning of the 7 & 8 Geo. 4, c. 30, s. 16; and the conviction was affirmed. (h)

The prisoner was indicted under the 4 Geo. 4, c. 54, s. 2, for feloniously wounding a sheep, and it appeared that he had set a dog at the sheep, and that the dog, by biting it, inflicted several severe wounds. J. A. Park, J., 'This is not an offence at common law, and is only made so by statute; and I am of opinion that injuring a sheep by setting a dog to worry it, is not a maiming or wounding within the meaning of the statute.' (i)

If a person maliciously set fire to a building in which a cow was, and the cow was burnt to death by the fire, this was a killing within the 7 & 8 Geo. 4, c. 30, s. 16. (j)

(g) *R. v. Jeans*, 1 C. & K. 539. There was also a count for wounding, but it was admitted that this was not proved, as no instrument was used.

(h) *R. v. Owens*, R. & M. C. C. R. 205. See *R. v. Murrow*, R. & M. C. C. R. 456, vol. i.

(i) *R. v. Hughes*, 2 C. & P. 420. But see *Elmsley's case*, 2 Lew. 126, where Alderson, J., thought a wound inflicted by the bite of a dog was a wound within the 9 Geo. 4, c. 31, but intended to reserve the point if it became necessary. C. S. G.

(j) *R. v. Haughton*, 5 C. & P. 559.

**Malice.** — On the trial of an indictment under the 7 & 8 Geo. 4, c. 30, s. 16, for unlawfully and maliciously wounding cattle, it was not necessary to shew personal malice against the owner of the property. It was enough that there was a mischievous motive, though not particular malice towards the owner. (*k*)

**Indictment.** — In an indictment upon the 9 Geo. 1, c. 22, the prisoner was charged with maliciously killing certain cattle, viz., a mare, and he was convicted, but upon referring to the evidence, it did not appear that there was any evidence of the sex of the animal killed. A case being reserved, the first question considered was, whether the allegation that the prisoner killed certain cattle, without specifying what, would have been sufficient, because then what was stated under the videlicet might be rejected, and the judges thought that it would not have been sufficient, and they were clear that it was essential that some evidence should have been given that the animal was a mare. (*l*)

**Intent to kill.** — The prisoner was indicted for a misdemeanor in administering sulphuric acid to six horses, with intent maliciously to kill them, and it appeared that the prisoner mixed sulphuric acid with a quantity of corn, and that, having done so, he gave each horse his feed, all the horses being in the same stable. Sulphuric acid is sometimes given to horses by grooms, under an idea that it will make their coats shine. J. A. Park, J., held that several acts of administering sulphuric acid were admissible, as they might go to shew whether it was done with the intent charged in the indictment; and he left it to the jury to say, whether the prisoner had administered the poison with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of the horses; for that in the latter case they ought to acquit him. (*m*)

(*k*) Wilson's case, 1 Lew. 226. R. v. Tivey, 1 Den 63. 1 C. & K. 704, decided under the above statute and 1 Vict. c. 90, s. 2.

(*l*) R. v. Chalkley, R. & R. 258.

(*m*) R. v. Mogg, 4 C. & P. 364. The learned judge also held that the evidence proved a joint administering of the sulphuric acid to all the horses.

## ADDENDA

TO

### THE SECOND VOLUME.

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Add to p. 96, note (xx). — *R. v. Tomlinson* is reported (1895) 1 Q. B. 707. The prisoner was indicted under sec. 44 (see *ante*, p. 78), and it was contended on his behalf at the trial that the 'menaces' must be either of an injury to person or property, or of an accusation of an infamous crime. The menace contained in the letter, in fact, was a threat to tell the prosecutor's wife of 'your doings' with a certain woman. It would seem that wherever the threat of an accusation is of a nature to reasonably operate on the intelligence of a man of sound mind, it is a 'menace' within the meaning of sec. 44, although it is not a threat of an accusation of any crime. Wills, J., indeed, would go further, and would hold that the threat need not be one which would affect a man of even average firmness of mind, so long only as it was not a threat which could influence nobody.

P. 209. — The question whether goods are taken *animo furandi* is a question for the jury. Therefore, where, at the conclusion of a trial for larceny, the jury were asked whether they believed the evidence for the prosecution, and, on their replying that they did, a verdict of guilty was entered, the Court for Crown Cases Reserved quashed the conviction on the ground that there had been no finding by the jury that the prisoner had acted *animo furandi*. *R. v. Farnborough* (1895), 2 Q. B. 484.

P. 344. — The fact that a person employed to collect moneys on behalf of a company, in which he is a shareholder, is also a director of the company, does not prevent him from being convicted of embezzling such moneys, under sec. 68. *R. v. Steward*, 17 Cox C. C. 723.

P. 437. — *Taylor v. R.* (1895), 1 Q. B. 25, overrules a recent case before the Common Serjeant, *R. v. Mackay*, 17 Cox C. C. 713.

P. 786. — A prisoner may be indicted under 24 & 25 Vict. c. 97, s. 2, although he himself is the only person in the house at the time he set fire to it. *R. v. Pardoe*, 17 Cox C. C. 715.





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